NOTE

Employment Discrimination and the Evidentiary Standard for Establishing Pretext: *Weinstock v. Columbia University*

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INTRODUCTION

An Ivy League university hired Pam Watson for a non-tenured teaching position.[1] Watson accepted the position because of the promising prospect of one day gaining tenure at the prestigious university. Tenure is the coveted status universities grant to professors who demonstrate exceptional scholarship and teaching ability.[2] A university may terminate a professor with tenure status for just cause only.[3] After seven years, Watson becomes eligible for tenure.

A university committee comprised of Watson's peers and colleagues review her candidacy. Although she receives favorable reviews from a majority of her peers, the university decides to deny her tenure. The

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[1] This hypothetical is based on the case of Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000). *See also* JOAN ABRAMSON, THE INVISIBLE WOMAN 1-50 (1975) (describing author's experience when university denied her tenure); ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 11-19 (Louis Joughin ed., 1967) (describing model case procedure of tenure denial case).

[2] *See* AAUP BULL. 40 (1941), *reprinted in* FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 250-52 (1973) (outlining American Association of University Professors Statement of Principles regarding tenure); *see also* Clisby Louise Hall Barrow, *Academic Freedom and the University Title VII Suit After* University of Pennsylvania v. EEOC *and* Brown v. Trustees of Boston University, 43 VAND. L. REV. 1571, 1572 (1990) (describing tenure as crowning laurel of academia); Elizabeth Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J.L. & EDUC. 319, 319 (1986) (defining tenure and outlining tenure process); Kathryn R. Swedlow, *Suing for Tenure: Legal and Institutional Barriers*, 13 REV. LITIG. 557, 562-63 (1994) (defining tenure and outlining tenure requirements). The definition of tenure varies from person to person. *Id.* at 562. Professors may interpret tenure to mean lifetime employment, guaranteeing that the university cannot dismiss them without cause. *Id.* However, students may view tenure as a guarantee that their professor has reached some level of achievement and status in their field. *Id.* After a probationary period of typically six years, a professor earns or the university awards tenure based on the system in place. *Id.*

[3] *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND ASSOCIATION OF AMERICAN COLLEGES, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, *reprinted in* ACADEME, Jan.-Feb. 1986, at 52-53 (stating that goals of tenure are to protect academic freedom and provide economic security); Richard J. Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U. L. REV. 473, 478 (1980) (stating that few instances exist where university fired tenured professor for reasons other than financial exigency, gross incompetence, or grievous misconduct). Academics defend permanent tenure as a means of fostering academic freedom and generating new knowledge through the assurance of job security. *Id.* at 478.

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decision surprises and disappoints Watson. Watson inquires into the reasons behind the decision. The university avoids her question for two months. Eventually the Provost informs her that he denied tenure because her scholastic ability was inadequate.

The university's proffered reason shocks Watson. In her past evaluations, her colleagues and students gave her favorable reviews. She had published numerous articles in prestigious academic journals and many scholars in her field admired and respected her.

The committee members who supported Watson for tenure are also shocked by the Provost's decision. They come forward with information that numerous deviations from regular procedure occurred. For example, the committee chair was very vocal in his negative feelings towards Watson's candidacy. In direct violation of committee rules, the committee chair voiced his negative sentiments outside of committee meetings. In addition, one colleague tells Watson that some committee members stereotyped her as being too feminine and passive. Watson brings this evidence to the head of her department. The allegations shock the department head. He investigates the situation and finds peculiar and improper circumstances surrounded the tenure decision.

Watson is furious. She believes that the Ivy League university denied her tenure because she is a woman. Based on this belief, Watson decides to sue the university for sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII").[4] Title VII prohibits an employer from discriminating against employees because of their sex.[5] The university denies the allegation that it denied Watson tenure on account of her sex. It argues that it denied tenure because of Watson's weak scholastic contributions.

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[4] 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination against employees based on sex). Title VII reads, in pertinent part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any ways which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id.

[5] 42 U.S.C. § 2000e-2 (stating that it is unlawful to discriminate against individual because of sex); *Weinstock*, 224 F.3d at 38.

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The university immediately moves for summary judgment.[6] The university argues that Watson presented no evidence to dispute the university's legitimate reason for denying tenure. Therefore, the university asserts that the court should find in their favor because a reasonable jury would not have a legal basis to find for Watson.[7] Despite Watson's evidence of gender discrimination and procedural irregularities, the court grants the motion for summary judgment. As a result, Watson's proverbial "day in court" is gone, and the university goes unpunished for its discriminatory behavior.

This is the exact scenario in *Weinstock v. Columbia University*.[8] In *Weinstock*, Columbia University ("Columbia") denied tenure to Shelly Weinstock ("Weinstock"), a female assistant professor.[9] Weinstock brought suit against Columbia in federal court, alleging sex discrimination under Title VII.[10] Columbia moved for summary judgment, arguing that Weinstock failed to present any evidence that Columbia's legitimate, nondiscriminatory reason for denying tenure was pretextual.[11] The district court granted the motion and the Second Circuit affirmed.[12] The Second Circuit held that Weinstock failed to establish a genuine issue of material fact illustrating that Columbia's legitimate reason for denying tenure was pretextual.[13]

This Note examines *Weinstock*'s effect on the evidentiary standard for a motion for summary judgment in an employment discrimination case. Part I discusses the historical foundation of Title VII and the role that summary judgment has played in employment discrimination cases. Part II presents the facts, procedure, and rationale of *Weinstock v. Columbia University*.[14] Part III argues that the *Weinstock* court established

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[6] *See* FED. R. CIV. P. 56 (stating that court may grant judgment if no genuine issue of material fact exists for jury to find for non-movant); *Weinstock*, 224 F.3d at 40 (stating that defendant filed motion for summary judgment).

[7] *See* FED. R. CIV. P. 50(a)(1) (stating that court may grant motion for summary judgment if no legally sufficient evidentiary basis exists for reasonable jury to find for non-moving party).

[8] *Weinstock*, 224 F.3d at 37 (dealing with summary judgment in employment discrimination case under Title VII).

[9] *Id.*

[10] *Id.* at 40.

[11] *Weinstock*, 224 F.3d at 41.

[12] *Id.* at 40, 50 (noting district court's grant of summary judgment to Columbia); Weinstock v. Columbia Univ., No. 95-C0569, 1999 U.S. Dist. LEXIS 11429, at *37 (S.D.N.Y. July 28, 1999) (granting Columbia's motion for summary judgment).

[13] *Weinstock*, 224 F.3d. at 50 (stating that Weinstock failed to meet burden of proof to show Columbia's proffered reason was pretextual).

[14] *Id.* at 37-50.

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an evidentiary standard that makes it too difficult for a plaintiff to survive a motion for summary judgment. Part III also argues that the *Weinstock* decision frustrates the intent of Title VII by insulating universities from judicial scrutiny.

I. BACKGROUND

In employment discrimination actions, it is important to understand the relationship between the summary judgment standard and Title VII. This section will discuss the historical background of Title VII and the summary judgment standard codified in Rule 56 of the Federal Rules of Civil Procedure ("Rule 56").[15] In addition, this section will outline the requirements for a plaintiff to establish a prima facie case of employment discrimination. Finally, this section will outline how a plaintiff may prove discrimination.

A. Title VII

The implementation of Title VII as part of the 1964 Civil Rights Act was a key step toward eliminating discrimination in the workplace. Title VII prohibits an employer from discriminating against an individual with respect to hiring, terms of employment, or opportunities on the basis of race, color, religion, sex, or national origin.[16] The historical background of Title VII illustrates Congress' intent to apply Title VII broadly in order to end employment discrimination.[17] Congress' intent to apply Title VII broadly is evident in the fact that Congress has

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[15] *See* 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on sex); FED. R. CIV. P. 56 (codifying motion for summary judgment and outlining standards); H.R. REP. NO. 92-238, at 19-20 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154-55 (discussing Congress' purpose in enacting Title VII and removing exemption for educational institutions); H.R. REP. NO. 88-914, at 787-95 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2390, 2400-10 (discussing Congress' intent behind 1964 Civil Rights Act and Title VII).

[16] 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on race, color, religion, sex, or national origin).

[17] *See* H.R. REP. NO. 92-238, at 19-20 (illustrating Congress' intent to end employment discrimination once and for all); H.R. REP. NO. 88-914, at 788 (stating that purpose of Title VII is to eliminate employment discrimination). Because Title VII serves a remedial purpose, courts have construed it liberally. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) (stating that primary objective of Title VII is prophylactic); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (stating that Congress intended that courts fashion most complete relief possible under Title VII); Hart v. J.T. Baker Chem. Co., 598 F.2d 829, 831 (3d Cir. 1979) (stating that courts should give remedial statutes such as Title VII broad construction); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (noting that court should construe Title VII liberally to effectuate Congress' intent to eliminate inconvenience, unfairness, and humiliation of discrimination).

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amended Title VII twice since 1964, each time broadening Title VII's scope and remedy.[18]

The primary purpose of the 1964 Civil Rights Act was to provide effective means to enforce the civil rights of all persons in the United States.[19] The specific purpose of Title VII was to address the problem of employment discrimination.[20] Congress enacted Title VII to give all persons, regardless of their sex, creed, or color, equal access to employment opportunities.[21] Title VII had a particular impact on women, as they were now able to obtain employment from employers who had traditionally excluded them from the workforce.[22]

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[18] *See* 42 U.S.C. § 1981(a) (1994) (amending scope of remedy under Title VII by providing plaintiffs right to demand jury trial); 42 U.S.C. § 2000e-1 (1976) (amending and broadening reach of Title VII by eliminating exemption for educational institutions).

[19] *See* 42 U.S.C. § 2000e-2 (prohibiting discrimination by employers based on race, color, religion, sex, or national origin); H.R. REP. NO. 88-914, at 787 (stating that Civil Rights Act is designed to protect and provide effective means to enforce civil rights).

[20] *See* 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on race, color, religion, sex, or national origin); H.R. REP. NO. 88-914, at 788 (stating that Civil Rights Act would prohibit discrimination in employment).

[21] *See* 42 U.S.C. § 2000e-2 (prohibiting employment decisions based on race, color, religion, sex, or national origin); H.R. REP. NO. 88-914, at 788 (stating that purpose of Act is to prohibit employment discrimination). Congress recognized the incompatibility of discrimination with the ideals and principles upon which the founding fathers originally established America. H.R. REP. NO. 88-914, at 788. Congress also stated that provisions in the Constitution clearly supply the means to secure the rights, privileges, and opportunities of U.S. citizens. *Id.* To that end, Congress designed the Civil Rights Act as a step toward eradicating discrimination on a nationwide basis. *Id.* However, Congress did not intend to bind the hands of employers by requiring special treatment of persons protected by Title VII. *Id.* at 789. Congress' general goal was to balance the ideal of eliminating discrimination in the private workplace against the employers' legitimate interests in running their businesses. *Id.*

[22] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (invalidating height and weight requirements not sufficiently related to job requirements of prison guard); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 437 (D.C. Cir. 1976) (prohibiting exclusion of women applicants from positions as "pursers"). Although the improvement in the number of tenured female professors at universities has increased in the past twenty years, statistics evidence slow progress. *See* Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 86 (1994) (citing studies that show that it will take more than fifty years before percentage of female faculty equals percentage of female student body). Of the increase in women in tenured faculty positions, almost half are concentrated in the Humanities and Social Sciences. *See* ANGELA SIMEONE, ACADEMIC WOMEN: WORKING TOWARDS EQUALITY 2-3 (1987). However in the sciences, women continue to be underrepresented. *Id.* at 12. Generally, academics have considered the sciences as the most masculine of disciplines. *Id.* This view is a result of how academics perceive the sciences and in the overwhelming predominance of male students and professors. *Id.* Generally, the science academy has stereotyped women as lacking the dedication, drive, rational objectivity, or creative intellectuality necessary to be successful scientists. *Id.* Even today, this false stereotype is pervasive. *Id.* In 1984, women earned ten percent of the Ph.D.s in chemistry, but constituted only four percent of new faculty hires.

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Although Congress designed Title VII to stop employment discrimination in America, it originally exempted educational institution employees from equal employment requirements.[23] However, in 1972, Congress realized there was little justification for such an exemption.[24] Therefore, it amended Title VII to remove the exemption and extended statutory coverage to academic institutions.[25]

The legislative history of the 1972 amendment shows Congress' express desire to apply Title VII to discriminatory hiring practices in universities.[26] Congress noted that discrimination against women and minorities was as prevalent in the field of education as in other areas of employment.[27] It specifically discussed the difficulties that women faced in educational institutions.[28] Congress observed that women enjoy the

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Id. In addition, one study found the suicide rate for women chemists five times that of white American women as a whole. *Id.* This study suggests that the extraordinary suicide rate may be due, in part, to the male dominated workplace. *Id.; see also* Alison Schneider, *Support for a Rare Breed: Tenured Women Chemists*, CHRON. HIGHER EDUC., Nov. 10, 2000, at A12 (citing recent survey of top fifty universities finding six percent of full professors of chemistry are women).

[23] The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)) (exempting instructional employees of educational institutions from scope of Title VII). Section 702 states that Title VII does not apply to educational institutions. *Id.* Specifically, the statute does not apply to individuals employed to perform work connected with the educational activities of the academic institution. *Id.; see* H.R. REP. NO. 92-238, at 27 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154-55 (stating that 1972 amendment removes section 702 exemption for educational institutions).

[24] *See* H.R. REP. NO. 92-238, at 26 (noting danger of allowing discrimination in educational institutions).

[25] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 85 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-1 (1976)) (removing exemption under Title VII for educational institutions); H.R. REP. NO. 92-238, at 26 (stating that 1972 amendment removed exemption).

[26] H.R. REP. NO. 92-238, at 26 (stating that 1972 amendment removed special exemption for educational institution employees under Title VII). Congress noted that an exemption for universities from Title VII had no support in the legislative history of the Civil Rights Court or Title VII. *Id.* In addition, no national policy supported an exemption for teachers from Title VII coverage. *Id.*

[27] *See id.* (discussing problem of employment discrimination against women). Congress acknowledged that in the area of sex discrimination, institutions of higher education have invited women to participate as students in the academic process, but without the prospect of gaining employment as serious scholars. *Id.* at 19-20. Congress also noted that when institutions of higher learning hire women, the institutions tend to relegate women to positions of lesser standing than their male counterparts. *Id.*

[28] *See id.* (discussing difficulties women face in gaining acceptance as legitimate scholars when hired into educational institutions). Congress cited a study by Theodore Caplow and Reece J. McGee, which found that the primary factors for hiring male faculty were prestige and compatibility. *See id.* (citing study stating that women are judged differently than men); *see also* THEODORE CAPLOW & REECE J. MCGEE, THE ACADEMIC

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opportunity to become serious students but lack equal opportunity to become serious scholars.[29]

Congress recognized that discrimination in academic institutions could lead to future discrimination.[30] It noted that permitting discrimination in institutions that strongly influence the thoughts and ideas of the nation's youth would only perpetuate future discrimination.[31] Therefore, Congress amended Title VII and mandated that educational institutions end all discriminatory practices in hiring.[32] Their activities are subject to the provisions of Title VII.[33]

In 1991, Congress once again amended Title VII through the Civil Rights Act of 1991.[34] Significantly, it amended Title VII to provide a right to a jury trial.[35] Thus, Congress took the role of fact finder out of the hands of federal judges, and placed it into the hands of juries.[36]

MARKETPLACE 109-37 (1965) (discussing hiring practices of universities). The study also found that universities generally perceive women to be outside of the prestige system. *Id.*

[29] H.R. REP. NO. 92-238, at 25 (discussing barriers that confront minorities and women in academia, restricting such groups to lesser academic positions).

[30] *Id.* (stating that committee feels that discrimination in educational institutions is especially critical). Congress acknowledged the sensitive nature of discrimination in American universities. *Id.* Universities expose America's youth to important and influential thoughts and ideas and have the unique power of shaping the minds of the youth of America. *Id.* Therefore, Congress noted that to allow discrimination to continue in these institutions would only promote future discrimination. *Id.*

[31] *Id.*

[32] *Id.* (summarizing committee's finding that law should subject educational institutions to provisions of Title VII).

[33] *Id.* (noting that Congress should subject educational institutions, like other employers, to provisions of Title VII); *see* George R. Kramer, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206, 1208 (1982) (summarizing legislative history of Title VII).

[34] *See* 42 U.S.C. § 1981a (1994) (providing that if plaintiff seeks compensatory or punitive damages under Title VII, either party may demand jury trial). *See generally* West, *supra* note 23, at 123-24 (discussing 1991 amendment and its impact on Title VII litigation).

[35] 42 U.S.C. § 1981a (providing that plaintiff may demand jury trial under Title VII).

[36] *See* West, *supra* note 23, at 123-24 (discussing significance of 1991 amendment providing right to jury trial). There are two significant consequences of a right to jury trial. *Id.* First, a right to jury trial may increase a plaintiff's chance for success. *Id.* Judges may lack empathy for discrimination victims. *Id.* Jurors tend to be more sympathetic to the idea of losing a job than federal judges who are appointed for life. *Id.* at 124. Second, the standard of review is more deferential to a jury than a judge. *Id.* Practically speaking, this means that an appellate court will sustain a jury verdict for a plaintiff as long as a plaintiff presents sufficient evidence for a jury to reasonably find for the plaintiff. *Id.* This standard insulates jury verdicts from judicial review. *Id.* If juries are in fact more sympathetic than judges, the right to jury trial will favor Title VII plaintiffs. *Id.*

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B. Rule 56: Motion for Summary Judgment

After the passage of Title VII in 1964, employment discrimination cases flooded the courts.[37] As the courts' dockets increased in size, federal judges looked for an efficient way to decrease the size of their dockets by weeding out frivolous cases.[38] As a result, judges began to grant motions for summary judgment under Rule 56 in increasing numbers in order to meet their goals of efficiency.[39]

Rule 56 codifies the summary judgment standard for federal courts.[40] A court may grant a motion for summary judgment if the pleadings, depositions, interrogatories, and affidavits show that there is no genuine issue of material fact.[41] A dispute over a material fact is genuine if the

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[37] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS 131-33 tbl.C2-A (1997) (stating that excluding criminal and prisoner-related cases, employment discrimination cases were most common type of case filed in federal court in 1997); Lynda E. Frost, *Shifting Meanings of Academic Freedom: An Analysis of* University of Pennsylvania v. EEOC, 17 J.C. & U.L. 329, 336 (1991) (noting that court challenges to racial and sex discrimination in tenure process are recent phenomena); Yurko, *supra* note 3, at 522 (estimating that faculty lawsuits regarding hiring, promotion, and tenure increased five hundred percent from 1946 to 1976). In 1997, employment discrimination filings made up twelve percent of non-criminal filings of the federal courts. JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *supra*.

[38] *See* Bourne v. Tahoe Reg'l Planning Agency, 829 F. Supp. 1203, 1205 (D. Nev. 1993) (noting that summary judgment allows courts to avoid unnecessary trials when there is no dispute over material fact before court); *In re* Southeast Banking Corp., 827 F. Supp. 742, 752 (S.D. Fla. 1993) (stating that purpose of summary judgment is to eliminate needless delay and expense to parties and court as result of unnecessary trials).

[39] *See* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1996) (stating that expanding federal caseload contributed to trend in federal litigation to substitute summary judgment for trial); R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: The Deepening Disagreement on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL. 207, 209-10 (1998) (stating that summary judgment prevents frivolous suits, saves litigants and judicial system substantial cost, and focuses issues); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 97 (1999) (noting drift of federal courts toward increased use of summary judgment in employment cases). *But see* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100-03 (1990) (explaining that increased use of summary judgment actually discourages settlement). Settlement is the most efficient and common method of unclogging federal courts' dockets. *Id.* Advocates of summary judgment as an efficiency tool should also consider the increased expense of preparing summary judgment motions. *Id.* at 103.

[40] *See* FED. R. CIV. P. 56 (codifying summary judgment standard and procedure). The purpose of summary judgment is to reduce the delay and expense of frivolous lawsuits. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929) (discussing merits of summary judgment as judicial efficiency); *see* William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 446-52 (1992) (detailing history and intent behind summary judgment).

[41] *See* FED. R. CIV. P. 56 (codifying motion for summary judgment). Rule 56(c) states, in pertinent part:

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evidence would not support a jury verdict for either party.[42] If the court finds no genuine issue of material fact, the court may enter judgment as a matter of law for the party filing the motion.[43] A judge may enter a judgment as a matter of law if there is no sufficient legal basis for a jury to find for the party opposing the motion.[44] In evaluating the evidence, the court must assess the evidence in the light most favorable to the party opposing the motion.[45] If any ambiguities exist, the court is to

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> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

[42] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (defining genuine issue of fact as dispute over evidence that would support finding for party opposing motion); Lang v. Ret. Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991) (stating that summary judgment is only appropriate if evidence is such that reasonable jury could not find for non-moving party); Martin v. United States, 779 F. Supp. 1242, 1244 (N.D. Cal. 1991) (defining genuine issue of fact as one in which evidence is such that reasonable jury could return verdict for non-moving party).

[43] *See* FED. R. CIV. P. 56(e) (stating that summary judgment is appropriate when no genuine issue of material fact exists); Poller v. CBS, Inc., 368 U.S. 464, 467 (1962) (stating that court should enter summary judgment only when pleadings, depositions, affidavits, and admissions show no genuine issue of material fact); Lang v. N.Y. Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983) (stating that upon reviewing evidence in light most favorable to non-moving party, court may grant summary judgment if no genuine issue of material fact for trial exists).

[44] *See* FED. R. CIV. P. 50(a)(1) (stating that court may enter judgment as matter of law if no legally sufficient evidentiary basis exists for reasonable jury to find for non-moving party); *see also* Hutton v. Gen. Motors Corp., 775 F. Supp. 1373, 1376 (D. Nev. 1991) (stating that where no proof of essential element exists, all other facts are rendered immaterial and court must grant summary judgment as matter of law); Ridgeway v. Union County Comm'rs, 775 F. Supp. 1105, 1108-09 (S.D. Ohio 1991) (describing standard as whether evidence presented sufficient disagreement to require submission to jury, or whether evidence is so one-sided that party must prevail as matter of law); Spell v. McDaniel, 604 F. Supp. 641, 646 (E.D.N.C. 1985) (stating that after court draws inferences in favor of opposing party, and finds no evidence to show necessary element, court may grant judgment as matter of law). However, some courts have articulated policy of granting summary judgment even when a reasonable jury could find for the non-movant. *See* Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) (acknowledging growing docket pressure makes court extremely reluctant to overrule grants of summary judgment even if rational factfinder could return verdict for non-moving party); Canitia v. Yellow Freight Sys., 903 F.2d 1064, 1068 (6th Cir. 1990) (Nelson, J., dissenting) (acknowledging demands on time of district courts and noting that full-scale trial in close case would result in misallocation of resources); EEOC v. Luckmarr Plastics, Inc., 884 F.2d 579, No. 88-2192, 1989 WL 102320, at *3 (6th Cir. Sept. 7, 1989) (affirming summary judgment even though district court resolved many disputed facts and case was close because plaintiff's evidence was not strong).

[45] *See Poller*, 368 U.S. at 473 (stating that on summary judgment motion, court should

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draw all reasonable inferences in favor of the opposing party.[46]

Even after Congress adopted Rule 56, judges remained hesitant to grant summary judgment.[47] This hesitancy stemmed from the judiciary's concern with preserving parties' rights.[48] The judiciary feared that the drastic nature of summary judgment cut off a plaintiff's right to present their case to a jury.[49] Therefore, courts used summary judgment

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view record in light most favorable to non-moving party); Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990) (stating that court must view evidence in light most favorable to plaintiff); *Lang*, 721 F.2d at 119 (stating that evidence should be considered in light most favorable to non-moving party).

[46] *See* Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975) (stating that in motion for summary judgment, court must resolve all ambiguities in favor of non-moving party); Westhemeco Ltd. v. N.H. Ins. Co., 484 F. Supp. 1158, 1162 (S.D.N.Y. 1980) (stating that court should resolve all factual ambiguities against moving party); Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310, 314 (W.D.N.Y. 1977) (noting that court should resolve ambiguities in favor of non-moving party).

[47] *See, e.g., Poller*, 368 U.S. at 473 (discouraging use of summary judgment and stating that trial by affidavit is no substitute for jury trial); Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970) (noting that courts should deny summary judgment whenever slightest doubt exists regarding whether jury could find for non-movant); Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949) (stating that if triable issue of fact exists, court should deny summary judgment); Arnstein v. Porter, 154 F.2d 464, 469-70 (2d Cir. 1946) (noting that where credibility of witness is at issue, court should deny motion for summary judgment); Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1261 (W.D. La. 1982) (stating that courts should use summary judgment sparingly and should only grant motion with great caution and much soul-searching).

[48] *See Heyman*, 524 F.2d at 1320 (stating that summary judgment is drastic remedy because it cuts off party's right to present case to jury); Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940) (cautioning against use of summary judgment as way to deprive litigants from trial); Croxen v. United States Chem. Corp., 558 F. Supp. 6, 7 (N.D. Iowa 1982) (describing summary judgment as extreme and treacherous remedy); Lawrence W. Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOK. L. REV. 279, 280 (1987) (noting that when improperly used, summary judgment can retard litigation, increase expense, and unjustly cut off party's right to present case to jury). *But see* Schwarzer, *supra* note 41, at 445 (noting that some commentators interpret summary judgment as essential docket-clearing device for overworked courts).

[49] *See Heyman*, 524 F.2d at 1320 (noting drastic nature of summary judgment because it cuts off party's right to try case before jury). There is a strong tension between the summary judgment procedure and an employment discrimination case. Summary judgment is justified by an efficiency argument. *See* Issacharoff & Loewenstein, *supra* note 39, at 74-75. Summary judgment looks to clear the calendar of frivolous lawsuits and defenses if there are no disputed issues of fact. *Id.* However, employment discrimination cases are inherently factual inquiries that result in fact-based disputes. *See* Cherkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996) (noting that direct evidence of employment discrimination is rare and court should use circumstantial evidence to support inference of discrimination); Johnson v. Minn. Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991) (noting that summary judgment is inappropriate in discrimination cases, which often depend on inferences rather than direct evidence). Critics have questioned the drastic nature of summary judgment in the context of employment discrimination litigation. *See* Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987) (explaining

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conservatively.

Over time, judges have begun to utilize summary judgment as an efficient tool to weed out frivolous cases.[50] In 1986, via a trilogy of cases, the United States Supreme Court clarified the standards for summary judgment.[51] In clarifying the standards, the Court encouraged the more liberal use of summary judgment to facilitate judicial efficiency.[52] Today, the motion for summary judgment is a commonly used tool in civil litigation.[53]

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that not only must there be no genuine issue of material fact, but also no controversy regarding inferences drawn from them); Beiner, *supra* note 39, at 96-98 (illustrating circuit split regarding whether courts may properly apply summary judgment to employment discrimination cases). Given the drastic nature of summary judgment, the Second Circuit has articulated a policy of caution when faced with a summary judgment motion in the employment context. *See* Belfi v. Predergast, 191 F.3d 129, 135 (2d Cir. 1999) (stating that because of its drastic effect, trial court must be especially cautious in granting summary judgment in discrimination case); *Cherkova*, 92 F.3d at 87 (stating that because direct evidence of employment discrimination is rare, court should scrutinize record for circumstantial evidence to support inference of discrimination); Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1224 (2d Cir. 1994) (explaining that courts must exercise caution when granting summary judgment where intent is at issue).

[50] *See* Sheldon Co. Profit Sharing Plan & Trust v. Smith, 828 F. Supp. 1262, 1269 (W.D. Mich. 1993) (noting that Supreme Court has encouraged use of summary judgment to ensure just, speedy, and efficient determination of cases); Pierce, *supra* note 48, at 280 (stating that Second Circuit has encouraged use of summary judgment as means of terminating suits prior to trial where no genuine issue of fact exists).

[51] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (clarifying summary judgment standard by defining genuine issue of material fact). The same year the Supreme Court decided *Anderson*, the Court also decided *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The trilogy set off a new era for summary judgment. *See* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 & n.5 (6th Cir. 1989) (stating that *Anderson*, *Celotex*, and *Matsushita* brought in new era for summary judgment); TRW Fin. Servs., Inc. v. Unisys Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) (stating that trilogy marked change in summary judgment); Sec. Sys. v. Ed Swierkos Enters., 829 F. Supp. 911, 913 (S.D. Ohio 1993) (describing trilogy as giving new life to Rule 56 as mechanism for weeding out claims at summary judgment). However, commentators have also described the trilogy as having a negative effect on discrimination cases. *See* Ann G. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (noting that summary judgment trilogy makes it easier for defendants to obtain summary judgment in cases of arguable discrimination).

[52] *See Celotex*, 477 U.S. at 327 (regarding summary judgment as integral tool to ensure just and quick resolution); Lawrence W. Pierce, *The Second Circuit Review – 1985 –1986 Term: Foreword: Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOKLYN L. REV. 279, 286 (1987) (stating that trilogy cases indicate to bar and bench that summary judgment is viable tool to avoid excess litigation); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) (observing that Court's tone in *Anderson*, *Celotex*, and *Matsushita* created more conducive environment for summary judgment).

[53] *See* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141,

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C. *The McDonnell Douglas Framework to Establish a Prima Facie Case of Employment Discrimination*

In the years after Congress enacted Title VII, the judiciary struggled with how to handle summary judgment in Title VII cases.[54] Given the inherent factual nature of Title VII inquiries, courts were unsure how to administer summary judgment motions.[55] In 1973, the Supreme Court intervened to establish the analytical framework for the proper nature of proof in employment discrimination cases under Title VII.[56] In *McDonnell Douglas Corporation v. Green*, the Supreme Court articulated a three-part burden shifting analysis.[57] Courts use the framework to determine whether a plaintiff has met their burden of proof in a Title VII case.[58]

In *McDonnell Douglas*, the defendant, McDonnell Douglas, employed the plaintiff, Percy Green, an African-American, as a technician.[59] After

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142-44 (2000) (noting decline in number of trials in federal court). Statistics show that in 1973, there were 8,297 bench and jury civil trials. *Id.* at 141. In 1999, with a judicial branch double the size, as well as an increased number of magistrates and clerks, only 6,228 civil trials took place. *Id.* The percentage of civil trials in federal courts dropped from 8.5 percent of all pending civil cases in 1973, to 2.3 percent in 1999. *Id.* The decline in the number of trials occurred when the number of matters pending before the district court doubled. *Id.* at 143. In 1973, there were 144,126 cases before the district court. *Id.* In 1999, this number grew to 345,543. *Id.* Commentators attribute the decline in the number of trials to the emergence of summary judgment as "the new fulcrum of federal civil dispute resolution." *Id.* at 141.

[54] *See* Namenwirth v. Bd. of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1243 (7th Cir. 1985) (stating that courts have struggled with employment discrimination cases since Congress extended Title VII to universities); Beiner, *supra* note 40, at 98-102 (discussing dissent between courts on whether to apply summary judgment liberally or conservatively in Title VII cases). Part of the pressure to liberally apply summary judgment has come from the growing dockets of federal judges. *See* Schwarzer, *supra* note 40, at 451 (stating that courts recognized summary judgment as procedure for avoiding unnecessary trials and as an effective case management device). Concern over the cost and delay of litigation increased the reliance upon Rule 56 as a vehicle to achieve the goals of the Federal Rules of Civil Procedure. *Id.* at 445. These goals included the just, speedy, and inexpensive resolution of litigation. *Id.* Summary judgment can eliminate cases that have little or no factual support. Thus, when the number of sex discrimination and harassment cases drastically increased, some judges looked to apply summary judgment to these cases. This proved to be difficult. *See Johnson*, 931 F.2d at 1244 (noting that summary judgment is inappropriate in discrimination cases, which often depend on inferences rather than direct evidence).

[55] *See Johnson*, 931 F.2d at 1244 (noting that summary judgment is inappropriate in discrimination cases, which depend on inferences rather than direct evidence).

[56] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793-94 (1973) (stating that case raised significant questions of proper order and nature of proof in Title VII actions).

[57] *Id.* at 802.

[58] *Id.*

[59] *Id.* at 794.

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nine years of employment, McDonnell Douglas fired Green.[60] Green protested his discharge, claiming that race motivated McDonnell Douglas' actions.[61] As part of his protest, Green participated in a "stall in."[62] He illegally stalled his car on the main roads leading to McDonnell Douglas to block access to the plant.[63] In addition, there was evidence that Green participated in a "lock-in."[64] As a part of the lock-in, protesters placed a chain and padlock on the front door of a McDonnell Douglas building to prevent employees from leaving.[65]

Three weeks after the protests, McDonnell Douglas publicly recruited qualified mechanics.[66] Green promptly reapplied for a position as a technician.[67] McDonnell Douglas rejected Green's application because he had allegedly engaged in disruptive and illegal behavior against McDonnell Douglas.[68] Green brought a Title VII discrimination suit against McDonnell Douglas.[69] Green claimed that McDonnell Douglas violated Title VII by basing its rejection on his race and persistent involvement in the civil rights movement.[70] Green claimed this was in direct violation of the Civil Rights Act.[71]

The district court dismissed Green's claim.[72] The district court found that McDonnell Douglas legitimately based its refusal to rehire Green solely on his participation in an illegal demonstration.[73] The court held that McDonnell Douglas' decision was not based on Green's legitimate civil rights activities.[74] On appeal, the Eighth Circuit reversed and remanded the case to the trial court.[75] The Eight Circuit found that

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[60] *Id.*

[61] *Id.* at 796.

[62] *Id.* at 794 (describing Green's participation in "stall in").

[63] *Id.*

[64] *Id.* at 795 & n.3.

[65] *Id.*

[66] *Id.* at 796.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 797.

[70] *Id.* at 796.

[71] *Id.* Green based his claim on section 703(a)(1) and 704(a). *See* 42 U.S.C. §§ 2000e-2(a)(1)-3(a) (1994). Section 703(a)(1) prohibits an employer from refusing to hire an applicant because of the applicant's race. *Id.* Section 704(a) prohibits an employer from discriminating against an applicant for employment because the applicant protested against discriminatory conditions of employment. *Id.*

[72] *McDonnell Douglas*, 411 U.S. at 797.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 797-98.

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Green successfully alleged a prima facie case of discrimination.[76] McDonnell Douglas appealed and the Supreme Court granted certiorari. The Court sought to clarify the standard for determining when an employer discriminates against an employee or applicant for employment in violation of Title VII.[77]

The Supreme Court held that a plaintiff must establish four elements to state a Title VII claim for employment discrimination.[78] First, the plaintiff must be a member of a protected class.[79] The protected classes under Title VII are race, sex, religion, and national origin.[80] Second, the plaintiff must be qualified for the position they are seeking.[81] Third, the plaintiff must suffer adverse employment action.[82] Lastly, the circumstances must give rise to an inference of discrimination.[83]

If a Title VII plaintiff can successfully allege these four elements, the plaintiff establishes a prima facie Title VII discrimination claim.[84] The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting the employee.[85] If the employer articulates a legitimate reason, the burden shifts back to the employee.[86] The employee must show that the employer's proffered reason for rejection was pretextual.[87] In other words, the employee must show that the presumptively valid reasons for the employer's denial of tenure were actually a cover-up for discrimination.[88]

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[76] *Id.* at 798.

[77] *Id.*

[78] *Id.* at 802.

[79] *See id.* (holding that complainant must belong to racial minority).

[80] 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination against employees based on race, color, religion, sex, or national origin).

[81] *McDonnell Douglas*, 411 U.S. at 802.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See id.* at 804 (stating that petitioner must be given opportunity to rebut on remand).

[87] *Id.* (listing examples of evidence plaintiff could use to show pretext); *see also* Trs. of Keene State Coll. v. Sweeney, 569 F.2d 169, 177 (1st Cir. 1977) (noting that colleges need only produce some evidence to rebut plaintiff's contention that sex played impermissible role in decision); Kluger, *supra* note 2, at 324 (defining "pretext" as mask for unlawful discrimination).

[88] *See McDonnell Douglas*, 411 U.S. at 805. The *McDonnell Douglas* Court recognized evidence that the company rehired white employees who engaged in the same activities as the plaintiff was sufficient to prove pretext. *See id.* at 804. The Court also noted that evidence of how the company treated Green while he was an employee could show pretext. *Id.* In addition, the Court recognized statistical evidence of the company's hiring patterns was sufficient evidence of pretext. *Id.* at 805.

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D. Plaintiff's Evidence of Discrimination

While *McDonnell Douglas* established the analytical framework for Title VII claims, courts began to recognize different types of evidence a plaintiff may use to prove sex discrimination.[89] Courts recognized two types of evidence sufficient to prove sex discrimination. The first is evidence of gender stereotyping.[90] This includes the use of gendered words to describe an employee, or general assumptions based on the individual's gender.[91] The second is evidence of procedural irregularities.[92] Procedural irregularities include any change or bypass in the hiring or promotion procedure based on the individual's gender.[93]

1. Gender Stereotyping

The first type of evidence sufficient to prove sex discrimination is gender stereotyping.[94] Stereotypes result from generalizations of social

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[89] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989) (recognizing gender stereotyping as sufficient evidence to show sex discrimination); Stern v. Trs. of Columbia Univ., 131 F.3d 305, 313 (2d Cir. 1997) (recognizing procedural irregularities in decision-making process can create inference of discrimination).

[90] *See Price Waterhouse*, 490 U.S. at 231; City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (recognizing that employers cannot predicate employment decisions on stereotyped impressions about characteristics of men and women); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (stating that courts may characterize subtle and benign attitudes as discriminatory).

[91] *See* Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model, in* ORGANIZATIONAL BEHAVIOR 269, 271 (L. L. Cummings & Barry M. Staw eds., 1983) (stating that stereotypes represent attributes ascribed to one group and imputed to individual members simply because they belong to that group).

[92] *See Stern*, 131 F.3d at 313 (recognizing evidence of procedural irregularities in decision-making process can create inference of discrimination).

[93] *See id.* (defining procedural irregularities as any departure from normal procedure from which jury could infer discrimination).

[94] *See Price Waterhouse*, 490 U.S. at 231 (stating that society has progressed beyond time when employer could evaluate employee by assuming they matched group stereotype); *Manhart*, 435 U.S. at 707 (noting that employers cannot predicate employment decisions on stereotyped traits of males and females and that such stereotypes are not acceptable reasons for denying employment); Barbano v. Madison County, 922 F.2d 139, 142-43 (2d Cir. 1990) (finding employer discriminated against employee under Title VII by asking stereotyped interview questions); Tracy L. Bach, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1254 n.11 (1993) (noting that gender stereotyping defeats ideal of equality because it undermines individual by promoting unreasonable or untrue generalizations). Sociological and psychological studies confirm the prevalence of gender stereotyping in the workplace and its disproportionately adverse effect on women in the professional setting. *See* Benson Rosen & Thomas H. Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOL. 511, 512 (1973) (finding that women's overall job performance ratings were significantly lower than men).

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group behavior, and the use of those generalizations to make judgments about individual group members.[95] In the case of women, gender stereotyping occurs when employers apply broad generalizations of women to individual female employees while evaluating them for employment.[96]

Gender stereotyping of women creates problems because evaluators, a majority of which are male, attach different meanings to the performance of men and women.[97] For example, in evaluating an employee's ambition, a male evaluator may rate a male employee as "up and coming."[98] However the same evaluator may rate a female employee

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The most common stereotype facing women today is the notion that women are primarily caregivers and family oriented. *See* Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 35 (1990) (stating that women are typically said to be passive, dependent, warm, and sensitive, while men are described as aggressive, active, independent, analytic, and confident). Gender stereotyping has had a long tradition in the law, dating back to Justice Bradley's infamous statement: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 3 U.S. (1 Wall.) 130, 141 (1872).

[95] *See* Bach, *supra* note 94, at 1253-55 (discussing gender stereotyping and its effect on individuals). Journalist Walter Lippmann first used the term "stereotype" to describe generalizations about individuals who share common characteristics. WALTER LIPPMANN, PUBLIC OPINION 96 (1922), *noted in* Cava, *supra* note 94, at 29. According to Lippmann, people order their complex world by generalizing. Cava, *supra* note 94, at 115. They do so by picking out a sample, which supports or denies their prejudices, and apply the characteristic to the group as a whole. *Id.* Empirically, stereotypes are an efficient way to resolve many complicated decisions about individuals. *Id.* at 30. Stereotyping streamlines decision making. *Id.* It allows individuals to analyze the situation in accordance with commonly accepted cultural truths. *Id.* However, social scientists soon found that individuals who use stereotypes in their interactions with people do so with bias. *Id.*

[96] *See* Cava, *supra* note 94, at 34 (defining sex stereotypes as generalized beliefs about nature of men and women). Sex stereotypes do not describe how men and women actually differ. *Id.* Rather, sex stereotypes describe how society *thinks* men and women differ. *Id.*

[97] *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 602 (1997) (noting that when evaluators rate candidates on their ambition, they rate male candidates as "up and coming," but female candidates as "pushy" or "abrasive"); Cava, *supra* note 95, at 34-35 (noting social science research showing perception of quality of performance is tied to sex). One study found that evaluators believe men are successful because of their talent, whereas women are successful because of luck or timing. *See* Thomas Deaux & Jarrod Emswiller, *Explanations of Successful Performance on Sex-Linked Tasks*, 29 J. PERS. & SOC. PSYCHOL. 80 (1974), *cited in* Cava, *supra* note 94, at 34. Other studies have found that in blind evaluations, evaluators judge work attributed to a man better than the same work attributed to a woman. *See* Ronald Lipton & Michael Herschaft, *"Girl," "Woman," "Guy," "Man,": The Effects of Sexist Labeling*, 10 SEX ROLES 183 (1984), *cited in* Cava, *supra* note 94, at 35. In yet another study, researchers found that evaluators were more likely to give a higher rating to a resume under a male name than the same resume under a female name. *See* Leslie Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 353 (1980), *cited in* Cava, *supra* note 94, at 35.

[98] *See* Bridge, *supra* note 97, at 602.

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with the same qualities as pushy or abrasive.[99]

In 1989, the Supreme Court held that evidence of gender stereotyping in Title VII employment discrimination cases is sufficient to show sex discrimination.[100] In *Price Waterhouse v. Hopkins*, Ann Hopkins, the plaintiff, sued Price Waterhouse, the defendant, for sex discrimination in denying her partnership.[101] Hopkins was a strong candidate for partnership.[102] She played a key role in a successful multi-million dollar contract and received praise from her colleagues for her professionalism, integrity, intelligence, creativity, and assertiveness.[103] However, Hopkins' superiors noted that her assertiveness occasionally spilled over into abrasiveness.[104]

Evidence suggested that some male partners reacted negatively to Hopkins' personality because she was a woman.[105] One partner described Hopkins as "macho" and another stated that she overcompensated for being a woman.[106] Another male partner suggested that she take a course in charm school.[107] Several other partners criticized Hopkins' use of profanity and voiced their objection to a woman using foul language.[108]

The district court held that Price Waterhouse unlawfully discriminated against Hopkins on the basis of sex by using gender stereotypes in

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[99] *Id.*

[100] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (stating that if employer acts on belief that woman cannot or should not be aggressive, employer has acted on basis of gender); Bach, *supra* note 96, at 1264 (stating that *Price Waterhouse* changed landscape of employment discrimination cases involving gender stereotyping). *Price Waterhouse* represented the first time the Supreme Court discussed gender stereotyping. *Id.* A plurality of the Court recognized gender stereotyping as evidence of sex discrimination. *Id.*

[101] *Price Waterhouse*, 490 U.S. at 231-32.

[102] *Id.* at 233-34.

[103] *Id.* Hopkins played a key role in a two-year effort to secure a twenty-five million dollar contract with the Department of State. *Id.* at 233. The partners labeled the performance as "outstanding" and rated her performance as "partner level." *Id.* at 234. The district court judge noted that no other partnership candidate at Price Waterhouse had a comparable record with respect to securing major contracts that year. *Id.* The partners also praised Hopkins' character, using such phrases as "an outstanding professional," "strong character, independence and integrity," and "extremely competent, intelligent." *Id.* Other partners described her as "strong and forthright, very productive, energetic and creative," and "a stimulating conversationalist." *Id.*

[104] *Id.* Partners had counseled Hopkins to improve her relations with her staff. *Id.* The court noted that both supporters and opponents of Hopkins' candidacy noted that she was aggressive, harsh, difficult to work with, and impatient with staff. *Id.* at 235.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

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evaluating her partnership candidacy.[109] The court of appeals affirmed the district court's conclusion.[110] However, the court of appeals also held that if a plaintiff establishes a prima facie case of discrimination, the employer could avoid liability.[111] The employer can avoid liability by showing that it would have made the same decision absent discrimination.[112]

The Supreme Court affirmed the court of appeals' decision and explicitly discussed gender stereotyping with respect to sex discrimination for the first time.[113] The Court acknowledged the difficult situation that women find themselves in when their employers demand aggressive job performance yet object to women who meet this requirement.[114] The Court held that gender must be completely irrelevant to employment decisions.[115] Hence, Price Waterhouse violated Title VII because it used the partners' inappropriate statements to make the decision to deny Hopkins' partnership.[116]

2. Procedural Irregularities

In addition to evidence of gender stereotyping, a plaintiff may establish discrimination by showing that the decision-making process contained procedural irregularities.[117] From these irregularities, a court can infer discriminatory behavior. An employer is liable for discrimination if the procedural irregularities would allow a trier of fact to infer discrimination.[118] The Second Circuit addressed procedural irregularities in the case of *Stern v. Trustees of Columbia University*.[119]

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[109] *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1121 (D.D.C. 1985) (holding that Hopkins had proven her claim and was entitled to remedy); *see also* Price *Waterhouse*, 490 U.S. at 237 (noting district court's finding for Hopkins).

[110] *Price Waterhouse*, 490 U.S. at 237 (affirming district court's decision in favor of Hopkins).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 231 (noting plurality of Court decided *Price Waterhouse*). The plurality consisted of Justices Brennan, Marshall, Blackmun, and Stevens. *Id.*

[114] *Id.* at 251.

[115] *Id.* at 240.

[116] *Id.*

[117] *See* Stern v. Trs. of Columbia Univ., 131 F.3d 305, 314 (2d Cir. 1997) (recognizing evidence of procedural irregularities in tenure process which could cause fact-finder to infer discrimination).

[118] *Id.*

[119] *Id.* (recognizing that procedural irregularities that affect employment decision are discriminatory).

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In *Stern*, Columbia University, the defendant, denied Irwin Stern, the plaintiff, a position as head of the Spanish Language Program.[120] Stern filed a Title VII claim against Columbia for allegedly denying him the position because of his national origin.[121] Stern was a white American male of Eastern European descent.[122] Columbia, adhering to an affirmative action plan designed to seek out women and minority candidates, appointed another candidate of Hispanic descent.[123]

Stern argued that despite his extremely strong credentials and recommendations, Columbia did not give him a genuine opportunity to compete with other minority candidates.[124] Stern argued that Columbia had deviated from normal procedure. First, standard procedure dictated that for a single-department position, such as the position Stern sought, members from the affected department should comprise the search committee.[125] Columbia deviated from procedure by appointing an unprecedented special interdepartmental committee to search for candidates.[126] After reviewing the candidates, the special committee rapidly appointed another candidate.[127] Second, Columbia's affirmative action plan placed the responsibility of applying judgmental criteria with the faculty of the affected department.[128] In Stern's case, the Spanish Department emphasized the need to hire someone proficient in Portuguese.[129] However the search committee ignored this requirement and hired a candidate who was not proficient in Portuguese.[130] Of the three candidates, Stern was the only candidate proficient in Portuguese.[131]

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[120] *Id.* at 306-07.

[121] *Id.* at 310.

[122] *Id.* at 306.

[123] *Id.* at 307.

[124] *Id.* Stern's qualifications were exceptionally strong. *See id.* He received his Ph.D. from the City University of New York and Columbia hired him for a part-time position in the Department. *Id.* He also received high praise for his teaching and administrative abilities. *Id.*

[125] *Id.* at 310 (noting unprecedented appointment of interdepartmental committee for single-department position). In addition, a letter from the Spanish Department stated that Columbia created the special committee because it feared that the Spanish Department would have appointed Stern. *Id.* at 309.

[126] *Id.* at 310.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

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The district court concluded that Stern established a prima facie case of discrimination.[132] However, the court held that Columbia had a legitimate reason for hiring another candidate. It merely hired the best candidate for the position.[133] Columbia argued that it determined Stern was not the best candidate.[134] Thus, the district court granted Columbia's motion for summary judgment.[135]

The Second Circuit reversed.[136] It held that Stern presented enough evidence to show a genuine issue of material fact with respect to Columbia's proffered reason.[137] The Second Circuit held that the procedural irregularities could raise a question regarding the good faith of the decision-making process.[138] Therefore, the court denied Columbia's motion for summary judgment and allowed Stern's case to go to the jury.[139]

E. Courts' Deference to Academic Institution's Tenure Decision

Despite the ways to establish discrimination and Congress' directive to treat academic institutions the same as other employers, courts often defer to a university's tenure decision.[140] Generally, courts defer to

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[132] Stern v. Trs. of Columbia Univ., 903 F. Supp. 601, 604 (S.D.N.Y. 1995) (stating that Stern successfully established prima facie case of discrimination).

[133] *Id.* at 604 (stating that Columbia stated nondiscriminatory, legitimate reason for denying Stern position as head of Spanish Department).

[134] *Id.* (discussing Columbia's legitimate, nondiscriminatory reason for denying position to Stern).

[135] *Id.* at 605 (granting Columbia's motion for summary judgment).

[136] *Stern*, 131 F.3d at 311 (reversing district court's grant of summary judgment to Columbia).

[137] *Id.*

[138] *Id.* at 305 (stating that procedural irregularities can raise question of good faith in tenure process); *see also* Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) (holding that procedural irregularities that can affect employment decision can also raise question of good faith).

[139] *Stern*, 131 F.3d at 311 (denying Columbia's motion for summary judgment).

[140] *See* Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980) (noting subjective nature of tenure decisions is beyond competence of judges and should be left for professionals to evaluate); Smith v. Univ. of N.C., 632 F.2d 316, 345 (4th Cir. 1980) (stating that courts typically do not impose their judgment on whether aggrieved faculty member should receive appointment); Faro v. N.Y. Univ., 502 F.2d 1229, 1232 (2d Cir. 1974) (stating that university faculty hiring decision is too complex for federal courts). Legal historians trace the doctrine of judicial deference to academic institutions as far back as the eighteenth century. *See* Bracken v. Visitors of Wm. & Mary Coll., 7 Va. (3 Call) 573, 578-79 (1790) (holding that college had unreviewable discretion to exercise power over school faculty decisions). In 1957, the Supreme Court explicitly recognized four essential freedoms of a university: the right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Sweezy v. New

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academic institutions in tenure disputes for two reasons.[141] First, courts often conclude that they lack the expertise to second-guess tenure decisions.[142] Many courts reason that only experts have the knowledge to evaluate the subjective and complex factors necessary to select competing tenure candidates.[143] Second, the economic burden that results from a university's grant of tenure causes some courts to provide academic institutions more flexibility in decision making.[144] A grant of tenure means that a university must commit financial resources to employing a professor for the rest of her academic career.[145] Therefore, courts choose to give universities more freedom in making tenure decisions that inherently have significant financial repercussions.[146]

However, the Second Circuit has clearly stated that Title VII does not exempt tenure decisions.[147] In *Zahorik v. Cornell University*, four women,

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Hampshire, 354 U.S. 234, 263 (1957).

[141] *See* Kramer, *supra* note 33, at 1220 (stating that lack of judicial expertise and economic burden of granting tenure justify judicial deference). Kramer also cites institutional academic autonomy as a third justification for judicial deference. *Id.* at 1222-27. Institutional academic autonomy centers on the idea that a university's freedom to make decisions about its academic mission is entitled to First Amendment protection. *Id.* at 1223.

[142] *See id.* at 1220 (stating that courts are reluctant to intervene in university employment decisions because of complexity of such decisions). Based on this rationale, only experts have the authority and knowledge to evaluate the credentials of competing candidates. *Id.* Courts are not experts and therefore cannot second guess these decisions. *Id.*; *see Smith*, 632 F.2d at 345-46 (noting court's hesitancy to interfere in tenure decisions); Johnson v. Univ. of Pitt., 435 F. Supp. 1328, 1353 (W.D. Pa. 1977) (noting that court must not act as super tenure committee); Peters v. Middlebury Coll., 409 F. Supp. 857, 868 (D. Vt. 1976) (noting reluctance of court to overrule well considered judgment of university in faculty employment decisions).

[143] *See Kunda*, 621 F.2d at 548 (noting that courts should not intrude into university employment decisions because such decisions involve subjective judgments beyond competence of individual judges); *Smith*, 632 F.2d at 344-45 (stating that tenure decisions are difficult because problems arise when comparing reasons for promoting one faculty member with reasons for not promoting another); *Faro*, 502 F.2d at 1232 (stating that university faculty appointments are not suited for federal court review). Still, the *Zahorik* court noted that tenure decisions in academic situations involve complex factors that differentiate them from general employment decisions. *See* Zahorik v. Cornell Univ., 729 F.2d 85, 92 (2d Cir. 1984) (noting difference between tenure decisions and general employment decisions (citing Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1984)).

[144] *See Johnson*, 435 F. Supp. at 1354 (noting that tenure is life contract which discourages judicial intervention); Labat v. Bd. of Higher Educ., 401 F. Supp. 753, 756 (S.D.N.Y. 1975) (noting that because tenure is equivalent to lifetime employment, court should leave decision to university).

[145] *See* Kramer, *supra* note 33, at 1222 (noting that grant of tenure entails committing financial resources to employing professor for life).

[146] *See id.* (discussing tenure's economic burden on universities).

[147] *Zahorik*, 729 F.2d at 93 (stating that tenure decisions are not exempt from Title VII).

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formerly employed as assistant professors at Cornell University, brought a Title VII action claiming the denial of tenure because of their gender.[148] The women presented statistical evidence that a significantly lower percentage of women succeeded in receiving tenure as compared to men.[149] The women also presented evidence that their colleagues used gendered language to describe their work during department reviews.[150] The district court rejected their claims and granted Cornell's motion for summary judgment and the Second Circuit affirmed.[151]

The Second Circuit stated that tenure decisions in the academic setting involve four factors that set them apart from regular employment decisions.[152] First, the court noted that tenure contracts are rare lifetime personal service contracts.[153] Second, tenure decisions are noncompetitive.[154] The court stated that a tenure committee's decision to grant one candidate tenure does not necessarily mean that the committee must deny another candidate tenure.[155] Third, the court noted that tenure decisions are highly decentralized.[156] The tenure process begins with the candidate's immediate department and proceeds up the hierarchy to the university president.[157] At each step, great deference is given to the decision below.[158] Fourth, the court stated that the university must consider extensive and numerous factors in making tenure decisions.[159] The university must consider the particular needs of the department, number of positions available, and the desired mix of scholars.[160]

Courts are reluctant to review tenure decisions because of their highly subjective nature.[161] Therefore, the Second Circuit held that a plaintiff

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[148] *Id.* at 88.

[149] *Id.* at 91, 96 (alleging forty-two percent women successfully sought tenure at Cornell, compared to sixty-five percent of men).

[150] *Id.* at 89-90.

[151] *Id.* at 94-96.

[152] *Id.* at 92.

[153] *Id.* (noting special nature of tenure contracts, which entail commitments both as to duration and collegial relationships).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 93-94; *see also* Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (citing precedent and stating that courts should not disregard university's freedom to make decisions).

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challenging a denial of tenure must show more than disagreement about the plaintiff's candidacy.[162] The court held that a plaintiff must also present evidence establishing that forbidden considerations such as sex or race influenced the decision.[163] Absent such evidence, universities are free to establish departmental priorities, set standards for scholastic achievement, and act upon the good faith judgments of their tenure committees.[164] The plaintiffs in *Zahorik* failed to present evidence that sex influenced the decision to deny tenure.[165] Therefore, the Second Circuit granted Cornell's motion for summary judgment.[166]

II. *WEINSTOCK V. COLUMBIA UNIVERSITY*

The Second Circuit confronted the issue of summary judgment in Title VII actions in *Weinstock v. Columbia University*.[167] The issue in *Weinstock* was whether the plaintiff's evidence of gender stereotyping and procedural irregularities was enough to overcome a motion for summary judgment.[168] The Second Circuit held that the plaintiff did not satisfy her burden and affirmed the district court's grant of summary judgment for the defendant.[169] This decision has tremendous implications for future Title VII plaintiffs.

From July 1985 to June 1994, Sally Weinstock worked as an Assistant Professor in the Chemistry Department of Barnard College, an undergraduate college and affiliate of Columbia University.[170] In 1992-93, Weinstock became eligible for tenure.[171] The tenure process for Barnard College faculty consisted of the votes of the candidate's academic department at Barnard, the Barnard Tenure Committee, and

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[162] *Zahorik*, 729 F.2d. at 94 (stating that proof of disagreement about candidacy is not enough to show discrimination).

[163] *Id.* (noting that plaintiff must show that forbidden considerations motivated adverse employment decision).

[164] *Id.* (stating that universities are free to establish departmental priorities). The court stated that universities may set required standards of academic potential and achievement for reviewing candidates. *Id.* The court also stated that universities may act upon good faith judgments of their departmental faculties and reviewing authorities. *Id.*

[165] *Id.*

[166] *Id.*

[167] Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000) (applying Title VII to tenure decision).

[168] *Id.* at 41.

[169] *Id.* at 50.

[170] *Id.* at 38.

[171] *Id.*

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the counterpart departments at Columbia.[172] If the candidate received the necessary votes from each department, the President of Barnard College could forward the nomination to the Provost of Columbia.[173] The Provost could then convene an ad hoc committee to review the nomination.[174] The tenure appointment would be made if the committee's review was favorable and the Provost, President, and Trustees of Columbia agreed to grant tenure.[175]

Once the tenure review process began, Weinstock received the support of all four departments at Barnard and Columbia.[176] After the President of Barnard College forwarded her nomination to the Provost of Columbia, the Provost convened an ad hoc committee.[177] The committee procedures permitted the committee chair to contact committee members to determine if they needed more information to complete a candidate's file.[178] The Chair contacted two committee members.[179] However, instead of asking whether the members needed more information, the Chair expressed concerns over Weinstock's candidacy.[180] The committee members reported the incident.[181] However, when questioned about the conversation, the committee members claimed that the discussion with the Chair did not influence their evaluations.[182] Therefore, the incident was dismissed.[183]

Next, the committee convened to evaluate Weinstock's case for tenure.[184] During the discussion of her candidacy, a number of committee members referred to Weinstock, whom they had never met, by her first name of "Shelley."[185] In addition, Weinstock alleged that committee members used the words "nice" and "nurturing" when describing her.[186]

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[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 39.
[186] *Id.*

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Still, the committee eventually voted 3-2 to grant Weinstock tenure.[187] Yet, when the decision moved to the Provost of Columbia, he decided to deny tenure to Weinstock because he felt that her scholarship was "not up to snuff."[188] The President of Columbia agreed with the Provost and denied tenure.[189]

In 1995, Weinstock brought suit in district court.[190] She alleged that Columbia violated Title VII by denying her tenure on the basis of her gender.[191] After discovery, Columbia filed a motion for summary judgment.[192] Columbia argued that it denied Weinstock tenure because her scholastic ability was sub-par.[193] Columbia further argued that this was a legitimate, nondiscriminatory reason for denying tenure.[194] Therefore, Columbia argued that Weinstock failed to establish a genuine issue of fact to dispute Columbia's proffered reason.[195] The district court agreed and granted Columbia's motion for summary judgment.[196] The court of appeals affirmed the decision.[197]

The *Weinstock* court held that Columbia articulated a legitimate, nondiscriminatory reason for denying Weinstock tenure.[198] The court applied the *McDonnell Douglas* framework and found that the plaintiff had the burden of producing evidence that the defendant's legitimate reason was false.[199] Accordingly, Weinstock had to establish that discrimination was the motivating factor for the denial of tenure to withstand a motion for summary judgment.[200] The court held that Weinstock failed to produce sufficient evidence to show that Columbia's

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[187] *Id.*

[188] *Id.*

[189] *Id.* at 39-40 (stating that Provost considered 3-2 favorable vote as underwhelming support).

[190] *Id.* at 40.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* (granting motion for summary judgment in favor of Columbia).

[197] *Id.* at 50.

[198] *Id.* at 43 (noting that Columbia's proffered reason for denying tenure because of Weinstock's weak scholastic ability was legitimate).

[199] *Id.* at 42 (stating that because Columbia offered legitimate reason for denying tenure, burden shifted to Weinstock to prove reason was pretextual); *see also* McDonnell Douglas v. Green, 411 U.S. 792, 802-03 (1973) (outlining three-part burden shifting analysis applied in Title VII cases).

[200] *Weinstock*, 224 F.3d at 50; *see McDonnell Douglas*, 411 U.S. at 802 (stating that after defendant articulates legitimate reason, burden shifts to plaintiff to prove defendant used illegal criteria to make that decision).

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legitimate reason was false.[201] Therefore, the court granted summary judgment for Columbia.[202]

The *Weinstock* court concluded that Columbia's legitimate, nondiscriminatory reason for denying Weinstock tenure was that she failed to meet Columbia's scholarship standard.[203] Columbia presented evidence that other faculty members expressed concern that Weinstock was inferior to other tenured professors at Barnard College.[204] Columbia also presented evidence that the Columbia department did not consider Weinstock worthy of tenure.[205] Columbia contended that the department recommended Weinstock for tenure as a courtesy to Barnard and not based on her own merits.[206]

Finally, the *Weinstock* court evaluated Columbia's evidence and deferred to the university's judgment.[207] The court accepted Columbia's assertion without question.[208] The court articulated the general policy of the judiciary to defer to an academic institution's reasons for denying tenure.[209]

The *Weinstock* court rejected Weinstock's allegations of gender stereotyping.[210] Weinstock alleged that the committee acted improperly during her tenure review meeting.[211] Weinstock asserted that the committee's patronizing and stereotypical statements demonstrated gender bias.[212] Specifically, she alleged that two committee members

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[201] *Weinstock*, 224 F.3d at 50.

[202] *Id.*

[203] *Id.* at 42-43.

[204] *Id.* at 43. After numerous inquiries, the Provost learned that the general sentiment in the Columbia Chemistry Department was that Weinstock's work was weak and unimaginative. *Id.*

[205] *Id.* at 39.

[206] *See id.*

[207] *Id.* at 43. The court stated that when a university denies tenure for a valid, nondiscriminatory reason, and there is no evidence of discriminatory intent, the court will not second guess the university's decision. *Id.*

[208] *Id.*

[209] *See* Bickerstaff v. Vassar Coll., 196 F.3d 435, 455-56 (2d Cir. 1999) (stating that when university denies tenure for valid reasons, court will not second guess that decision); Smith v. Univ. of N.C., 632 F.2d 316, 345 (4th Cir. 1980) (noting that courts do not impose their judgment on whether aggrieved faculty member should receive appointment); Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980) (noting that judges lack competence to review tenure decisions and therefore, courts should leave decisions for evaluation by professionals).

[210] *Weinstock*, 224 F.3d at 43-44.

[211] *Id.*

[212] *Id.* at 44.

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referred to her as "nice" and "nurturing."[213] Weinstock argued that these statements are code words for gender bias because they reflect feminine stereotypes.[214] Hence, she claimed that these stereotypical statements constitute evidence of discrimination.[215]

The *Weinstock* court disagreed and dismissed Weinstock's argument for two reasons.[216] First, the court found that there was no admissible evidence to support her allegations of gender stereotyping.[217] The court held that Weinstock failed to present any direct evidence that the committee used the word "nurturing" during the tenure process.[218] Second, the *Weinstock* court held that even if the committee used the words "nice" and "nurturing," such terms do not connote gender bias.[219] The court noted that unlike *Price Waterhouse*, the language used in *Weinstock* was not explicitly discriminatory.[220] In *Price Waterhouse*, the plaintiff's superiors told her to act more femininely.[221] However in this case, the *Weinstock* court noted that the word "nice" could be used to describe both men and women.[222] Thus, the use of such a word is not evidence of gender discrimination.[223]

In addition to gender stereotyping, Weinstock offered evidence to establish procedural irregularities in the committee's tenure review process.[224] Weinstock alleged two specific procedural irregularities.

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[213] *Id.*

[214] *See id.*

[215] *Id.* at 43.

[216] *Id.* at 44-45.

[217] *Id.* at 44.

[218] *Id.*

[219] *Id.* The court incongruously stated that "nice" and "nurturing" are not stereotypically female qualities. *Id.* The court looked to Webster's Dictionary for its definition of "nurturing" and found two meanings. *Id.* The first definition was "to supply with food, nourishment, and protection." *Id.* The second definition was "to train by or as if by instruction." *Id.* The court concluded that these definitions are in no way stereotypical. *Id.* at 44-45.

[220] *Id.* at 44.

[221] *Id.* (distinguishing *Price Waterhouse* from present case); *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (stating that Hopkins' superiors advised her to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry).

[222] *Weinstock*, 224 F.3d at 44.

[223] *Id.* The court found that "nice" and "nurturing" are not stereotypically female qualities because a person of either sex would like to be considered nice. *Id.* The court explained that if the word "nice" translated into gender discrimination, then a cause of action would arise in ridiculous situations. *Id.* The court reasoned that every time an employer told an employee that they were a nice person, but chose to fire them, the employee would have a Title VII claim. *Id.*

[224] *Id.* at 45.

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First, Weinstock alleged that the phone calls to the committee members before the committee convened violated the tenure procedure.[225] Second, Weinstock alleged that the Provost's delay in explaining why he rejected the committee's favorable vote violated procedure.[226] The *Weinstock* court dismissed these irregularities.[227] The court held that there was no evidence that sex played a role in the alleged irregularities and, therefore, no sign of pretext.[228]

In holding that the procedural irregularities were immaterial, the *Weinstock* court distinguished its decision in *Stern v. Columbia University*.[229] The court noted that in *Stern*, the procedural irregularities affected the final decision not to hire Stern.[230] However, the *Weinstock* court held that unlike *Stern*, the departure from procedure did not affect the final decision to deny Weinstock tenure.[231] The deposition testimony of the committee members acknowledged that the phone calls did not alter their decision.[232] Therefore, the *Weinstock* court held that any procedural irregularities in this case did not influence the denial of tenure.[233]

III. ANALYSIS

The *Weinstock* court erred in its application of the summary judgment standard to the *McDonnell Douglas* framework. The *Weinstock* decision makes it extremely difficult for a plaintiff who does not have direct evidence of intentional discrimination to survive a motion for summary judgment. This decision also weakens the force of Title VII.[234] The decision creates a legal environment in which a university can win on summary judgment by merely presenting evidence of an alternate,

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[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* The *Weinstock* court relied on *Stern*. *Id.* The court stated that departures from regular procedure could raise questions of bad faith in the decision-making process, if the departure affects the decision. *Id.*

[229] *Id.*

[230] *See id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *See* H.R. REP. NO. 92-238, at 26 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2151 (broadening Title VII to apply to educational institutions to effectuate goal of eliminating all forms of employment discrimination); H.R. REP. NO. 88-914, at 788 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401-02 (stating purpose of Title VII is to eliminate employment discrimination).

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nondiscriminatory justification for denying tenure. The court failed to recognize evidence of gender stereotyping and procedural irregularities as evidence of discrimination. As a result, the *Weinstock* decision makes it more difficult for a Title VII plaintiff to rebut an employer's nondiscriminatory reason for denying tenure.

The *Weinstock* court erred with respect to three issues. First, the court misapplied the standard for granting summary judgment when it resolved the factual disputes regarding use of gendered language in favor of the defendant. The court must resolve all ambiguities in favor of the plaintiff regarding questions of material fact.[235] Second, the *Weinstock* court improperly distinguished relevant case law and ignored significant questions of fact regarding Weinstock's allegations of procedural irregularities during the tenure process. Lastly, the *Weinstock* court improperly deferred to academia. Such deference promotes and sustains gender discrimination against female professors.[236]

A. The Court Misapplied the Evidentiary Standard for Summary Judgment in Evaluating Evidence of Gender Stereotyping

The *Weinstock* court erred in applying the summary judgment standard under Rule 56. The court should have resolved all factual issues and ambiguities in the plaintiff's favor.[237] However, the *Weinstock* court improperly dismissed Weinstock's evidence of gender stereotyping during the tenure process.[238]

The *Weinstock* court should have adopted the Supreme Court's interpretation of *Price Waterhouse*. *Weinstock* reflects the same issues decided in the *Price Waterhouse* decision.[239] Like *Price Waterhouse*, Weinstock's perceived characteristic of being stereotypically feminine in

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[235] *See* FED. R. CIV. P. 56(c) (outlining summary judgment standard).

[236] *See* Ramona L. Paetzold & Rafael Gelu, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1534-35 (1995) (stating that subtle stereotypes that affect employer's decision-making process are as dangerous as overt discrimination). If courts fail to identify the stereotypes, it is tantamount to reinforcing and legitimizing the employer's stereotypes. *Id.* at 1535.

[237] *See* Lang v. N.Y. Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983) (stating that court must review evidence in light most favorable to non-moving party); Spell v. McDaniel, 604 F. Supp. 641, 646 (E.D.N.C. 1985) (stating that court may grant summary judgment after all evidence and inferences are drawn in favor of non-moving party).

[238] *See, e.g.*, *Weinstock*, 224 F.3d at 44-45 (holding that "nice" and "nurturing" were not discriminatory).

[239] *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989) (discussing gender stereotyping in workplace and finding that gender stereotyping can create inference of discrimination under Title VII), *with Weinstock*, 224 F.3d at 43-44 (discussing Weinstock's contention of existence of evidence of gender stereotyping).

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her work was an inappropriate factor the committee used in the decision-making process.[240] However, the *Weinstock* court ignored these factual similarities and disregarded Weinstock's evidence of gender stereotyping.[241] Specifically, the court was not persuaded by Weinstock's evidence that committee members described her as being "nice" and "nurturing."[242]

The court erred in distinguishing *Price Waterhouse* because the language used in *Weinstock* was just as discriminatory as the language used in *Price Waterhouse*.[243] The *Weinstock* court failed to consider the language in context. Although "nice" and "nurturing" may be appropriate terms to describe a woman who is a mother, they are inappropriate when describing a woman in academia.[244] It is inappropriate to use social descriptions, designed to flatter and protect women, to describe women in professional situations.[245]

The *Price Waterhouse* court specifically addressed this issue.[246] The court held that employers who use inappropriate gender stereotypes to assess employees, are guilty of sex discrimination.[247] In *Price Waterhouse*,

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[240] *See Weinstock*, 224 F.3d at 43-44 (noting patronizing tone and gendered statements made about Weinstock at tenure committee meeting).

[241] *Id.*

[242] *Id.*

[243] *Compare Price Waterhouse*, 490 U.S. at 234 (noting Hopkins' superiors stated that she was too masculine and advising her to wear more jewelry and make-up), *with Weinstock*, 224 F.3d at 43-44 (noting Weinstock's colleagues referred to her as "nice" and "nurturing" in patronizing tone). In *Price Waterhouse*, Hopkins' superiors criticized her for being "too masculine," whereas in *Weinstock*, the committee members' statements described Weinstock as "too feminine." *Compare Price Waterhouse*, 490 U.S. at 234 (noting partner's gendered critiques of Hopkins), *with Weinstock*, 224 F.3d at 43-44 (noting gendered statements by Weinstock's colleagues).

[244] *See* BERNICE RESNICK SANDLER, THE CAMPUS CLIMATE REVISITED: CHILLY FOR WOMEN FACULTY, ADMINISTRATORS, AND GRADUATE STUDENTS 5 (1986) (stating that expectation of women to behave in typically feminine ways, subjects women to "double-bind" situation); Bridge, *supra* note 97, at 607-08 (stating that gender stereotypes place women in "double-bind" situation). A "double-bind" situation occurs when a woman's colleagues underestimate her competence and intelligence because she behaves in a stereotypically feminine manner. *Id.* However, colleagues who view women who deviate from gender stereotypes as inappropriately masculine label them abrasive or maladjusted. *Id.* This creates a no-win situation for female professors, whose colleagues force them to walk a thin line between being too masculine and too feminine. *Id.* One false step on either side may have tremendous professional consequences. *Id.* This is especially true for women working in traditionally male dominated fields. *Id.* at 608.

[245] *See* SANDLER, *supra* note 244, at 4-5 (noting inappropriateness of interjecting social descriptions into professional situations).

[246] See *Price Waterhouse*, 490 U.S. at 250-52 (discussing use of gender stereotyping to make decision to deny Hopkins partnership).

[247] *See id.* at 251 (stating that employer who acts on basis of stereotype effectively acts

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Hopkins' superiors told her to act more femininely, dress more femininely, and wear jewelry.[248] Hopkins' superiors used language that is normally used to describe women in social situations, to describe Hopkins in a professional situation.[249] The Supreme Court held that the use of such language violated Title VII.[250]

The *Weinstock* court should have recognized that Weinstock's allegations were extremely similar to those of Hopkins. Therefore, the court should have concluded that Weinstock's evidence of gender stereotyping was enough to raise an issue of material fact that Columbia's tenure decision was sex discrimination. In both cases, the defendants used language to describe women in a social context, to describe women in professional situations.[251] When a woman's colleagues use language to confuse social and professional roles, her legitimacy as a professional and intellectual equal is undercut.[252] It sends a message to women that they are not equals in the professional arena, and that they do not belong.[253]

The *Weinstock* court held that words like "nice" and "nurturing" are not gendered words.[254] The court noted that the terms were not

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on basis of gender in violation of Title VII).

[248] *Id.* at 235 (noting statements that Hopkins should walk, talk, and dress more femininely to improve her chances for partnership).

[249] *See id.* at 235-36 (noting testimony of social psychologist that Price Waterhouse used overtly sex-based comments when reviewing Hopkins' file).

[250] *See id.* at 258 (holding that Hopkins proved her gender played motivating part in adverse employment decision).

[251] *Compare Price Waterhouse*, 490 U.S. at 234 (discussing partners' use of negative social stereotypes in evaluating Hopkins' partnership candidacy), *with* Weinstock. v. Columbia Univ., 224 F.3d 33, 43-45 (2d Cir. 2000) (discussing colleagues' use of social language such as "nice" and "nurturing" to describe Weinstock professionally).

[252] *See* SANDLER, *supra* note 244, at 4 (stating that social etiquette designed to flatter and protect women is inappropriately interjected into professional situations). By using language to confuse social and professional roles, a woman's colleagues can easily undercut her legitimacy as an intellectual equal. *Id.* For example, a common practice is to focus on a woman's appearance, personal qualities, and relationships, rather than her professional accomplishments. *Id.* This is evidenced in comments such as, "I'd like you to meet the lovely new addition to our department." *Id.* at 5. Such comments emphasize the "feminine" and "sexual" over professional attributes, thus downplaying a woman's competence. *Id.* at 4. Another common occurrence is addressing young women by social terms such as "sweetie," "dear," or "young lady." *Id.* at 5. These words undercut a woman's professional identity, especially if her peers address male colleagues as "Dr." *Id.* A final example is when a woman's colleagues uses stereotypes to describe accomplishments or behavior, especially words that are not applied to men. *Id.* "She is charming with her students," rather than "she is an excellent teacher." *Id.*

[253] *See* SANDLER, *supra* note 244, at 1 (stating that differential treatment sends message to professional women that they are not "first-class citizens" in academic community).

[254] *Weinstock*, 224 F.3d at 8.

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gendered because the definitions were not stereotypically female.[255] The Weinstock court noted that employers could use such language to describe men as well.[256] The court's examination of Weinstock's evidence of gender stereotyping is superficial. Merely because an employer could use a word such as "nice" to describe a male, does not strip "nice" of its gendered meaning.[257] Although "nice" can be used to describe men, the term is condescending when it is used to describe women in a professional setting.[258] Such language illegitimates a woman's academic prowess and intellect.[259] It sends a message to women that they are not "first-class citizens" in academia.[260]

Columbia may argue that gender stereotyping is not discriminatory. Columbia might argue that often times, statements that a woman is "nice" or "nurturing" are part of the normal way men and women relate to each other.[261] In fact, such language is so normal that most women do not notice or perceive any discriminatory intent or behavior.[262]

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[255] *Id.*

[256] *Id.*

[257] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1988) (discussing testimony of social psychologist). Dr. Susan Fiske, a social psychologist and Associate Professor at Carnegie-Mellon University, testified that the overtly sex-based comments of partners were evidence of gender stereotyping. *Id.* In addition, she testified that gender-neutral remarks that were intensely critical of Hopkins, were also evidence of gender stereotyping. *Id.* According to Fiske, Hopkins' uniqueness as the only female candidate, and the subjectivity of the evaluations, made it likely that the sharply critical remarks were the product of gender stereotyping. *Id.* at 236.

[258] *See* SANDLER, *supra* note 244, at 5 (listing examples of inappropriate use of language to undercut women's legitimacy as scholars). This includes comments made by colleagues that emphasize the "feminine" and sexual over professional attributes. *Id.* Another example is when colleagues use stereotyped words to describe a woman's accomplishments or behavior. *Id.* This is especially true when colleagues would not use these same words to describe a male counterpart. *Id.* The described behavior undermines a woman's intellectual competence and legitimacy. *Id.*

[259] *See id.* at 4 (noting that when women's colleagues use language to confuse social and professional roles, women lose professional credibility and legitimacy). In addition, students and colleagues do not respect the keen intellectual mind of a woman they perceive as acting too feminine. *Id.* at 5.

[260] *See id.* at 1 (noting that differential treatment communicates to women that they are not respected in academic community). Differential treatment sends a powerful message to women. *Id.* at 2. The message is that women are not serious professionals and they are not expected to achieve the same success as men. *Id.*

[261] *See id.* at 2. Although the formal barriers to high-level academic positions have fallen, many subtle social barriers remain. *Id.* However, the law cannot remedy social and personal barriers. *Id.* Such barriers are a part of "normal" human behavior and society deems it acceptable behavior. *Id.* Most of the time, such behavior goes unnoticed. *Id.*

[262] *See id.* In fact, the court noted that because such language is considered "normal," the discriminatory behavior goes unnoticed, and the discrimination therefore remains insidious. *Id.*

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However, the consequences of gender stereotyping have serious ramifications in the academic context.[263] Gender stereotyping adversely affects a woman's education.[264] It also limits women faculty and administrators' advancement and productivity.[265] In most circumstances, women are forced to walk a fine line between acting too feminine and too masculine.[266] Women who behave in typically feminine ways to both students and colleagues are perceived as less intellectually vigorous.[267] However, if a woman is not "motherly" or "nurturing," or acts in less feminine ways, students and colleagues may respond negatively.[268] This creates a no-win situation for female professors.[269] If courts continue to view a Title VII plaintiff's evidence with such skepticism and naiveté, many plaintiffs with legitimate discrimination claims will be unable to recover.[270]

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[263] *See id.* (discussing problems of social barriers such as gender stereotyping on academic institutions). Most faculty and administrators do not intend to treat women colleagues differently from men. *Id.* Nevertheless, even those most concerned about equity and fairness may inadvertently treat women differently. *Id.*

[264] *See id.* at 2-3 (noting adverse affect of social barriers upon women students' education). For example, many professors are more likely to call on male students than female students. *Id.* Consequently, they create a learning environment where men receive more classroom attention, which interferes with the development of women's self-confidence, academic participation, and career goals. *Id.* at 3.

[265] *See id.* at 2 (stating that social barriers to academe limit women faculty and administrators' productivity and advancement). This "chilly climate" subverts women's self-esteem and injures their professional morale. *Id.* at 3. It isolates women professionally and socially, and causes women to participate in fewer academic activities. *Id.* Such behavior prevents academic institutions from "being the best that they can be." *Id.* at 2.

[266] *See id.* at 5 (describing "double bind" situation in which women must walk fine line between being too masculine and being too feminine).

[267] *See id.* (noting that students and colleagues do not respect intellectual prowess of women who they perceive to be too feminine).

[268] *Id.* (stating that students and colleagues may not react positively to woman who does not exhibit feminine attributes). Students and colleagues may respond by seeing the woman as "hard" or "castrating." *Id.* They may also perceive a more "masculine" woman as an "iron maiden," "unfeminine," or "simply strange." *Id.*

[269] *See id.* (describing this situation as "double bind" problem for women). One professor stated, "As I see it, I'm damned if I do and damned if I don't. If I talk like a man when I'm at work, I [still] don't come across as assertive and 'task-oriented.' But if I talk like a lady . . . I'm just a displaced mother hen." *Id.* at 11. Women experience a conflict between their colleagues' expectations of their behavior as women and expectations of their behavior as professionals. *Id.* at 5.

[270] *See id.* at 3 (noting that repeated instances of "trivial" discriminatory behavior can have large cumulative impact on women). In *Price Waterhouse*, Justice Brennan sharply rebuked the defendant's attempts to trivialize gender stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989). Justice Brennan stated:

> [T]he placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was

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B. The Court Misapplied the Evidentiary Standard for Summary Judgment in Evaluating Evidence of Procedural Irregularities

The *Weinstock* court's naiveté extended to its interpretation of Columbia's reasons for denying Weinstock tenure.[271] The *Weinstock* court acknowledged the long-standing precedent that departures from procedure can raise questions as to the good faith of the tenure process.[272] Weinstock presented ample evidence of procedural irregularities in the tenure decision to defeat summary judgment.[273] However, the *Weinstock* court did not question the good faith of Columbia's decision-making process.[274] For example, Weinstock presented evidence of the committee chairman's unusual phone calls to committee members asking them if they had any reservations about Weinstock's candidacy.[275] Such phone calls clearly violated Columbia's tenure procedures.[276] Columbia's tenure procedures prohibited phone calls to committee members to discuss a professor's candidacy.[277] Weinstock also presented evidence that the tenure committee applied a higher standard to her scholarship level as compared to previous tenure candidates.[278] Thus, Weinstock

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> not present in this case or that it lacks legal relevance. We reject both possibilities. . . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.

Id.

[271] *See* Weinstock v. Columbia Univ., 224 F.3d 33, 45 (2d Cir. 2000) (stating court's reasons for dismissing Weinstock's evidence of procedural irregularities in tenure process).

[272] *Id.* (quoting Stern v. Trs. of Columbia Univ., 131 F.3d 305, 313 (2d Cir. 1997) (stating that procedural irregularities can raise questions of bad faith in decision-making process)).

[273] *Id.* at 52-56 (Cardamone, J., dissenting). In contrast, the majority found that Weinstock failed to produce sufficient evidence to survive summary judgment. *Id.* at 45-46, 49-50.

[274] *See id.* at 45 (stating that procedural irregularities did not affect final decision to deny tenure).

[275] *See id.* at 38.

[276] *See id.* (noting tenure procedures permitted committee chair to call other committee members regarding lack of information on candidate, but that here chair called to discuss candidate's file); *see also id.* at 53 (Cardamone, J., dissenting) (noting Columbia and Barnard administrators agreement that phone calls discussing candidate's qualifications would be inappropriate). Judge Cardamone, in his dissent, argued that the procedural irregularities and shifting standards that characterized the tenure review process suggest pretext. *Id.* at 58 (Cardamone, J., dissenting); *see* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993) (finding that implausibility of employer's nondiscriminatory reason showed pretext); Schmitz v. St. Regis Paper Co., 811 F.2d 131, 132-33 (2d Cir. 1987) (noting that employer's shifting explanations provided evidence of pretext).

[277] *See Weinstock*, 224 F.3d at 38.

[278] *See id.* at 46.

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presented enough evidence to withstand a motion for summary judgment.

The *Weinstock* court erred in granting summary judgment to Columbia. Under the standard for summary judgment, which resolves all factual disputes in the plaintiff's favor, Weinstock produced sufficient evidence to raise a question of pretext. Hence, the *Weinstock* court should have denied the motion for summary judgment.

C. The Court Erred in Its Deference to Academia

The final problem with the *Weinstock* decision is the deference the court gave to Columbia's decision.[279] The practice of judicial deference to university employment decisions creates another obstacle for a plaintiff to prevail in an action against a university for denial of tenure.[280] Such deference infringes on the intent behind Title VII.[281]

In 1991, Congress amended Title VII to guarantee a plaintiff's right to a jury trial in an employment discrimination action.[282] However, the right to a jury trial is moot if a plaintiff is unable to defeat a motion for summary judgment. Even though Congress put the role of fact finder into the hands of the jury, judges still have tremendous control over a plaintiff's chance of success. As long as judges continue to grant summary judgment in favor of defendant universities, the 1991 amendment granting a right to jury trial will be irrelevant.

Some courts and commentators argue that the judiciary should not second guess the tenure committee's decision-making process because of the subjectivity of such decisions.[283] Tenure decisions are unique because

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[279] *Id.* at 47. *See generally* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 959-78 (1982) (documenting differential standards courts apply to professional jobs in contrast to blue-collar jobs). Bartholet notes that federal courts are willing to strike down barriers to working class jobs, but are reluctant to apply discrimination theories to professional jobs. *Id.* at 979. She argues that these current differential standard are elitist. *Id.* at 978. She also notes that judges tend to defer to the employers with whom they identify, and uphold selection systems similar to those from which they have benefited. *Id.* at 979.

[280] *See* Swedlow, *supra* note 2, at 582 (discussing possibility that judges leave out relevant information in published decisions).

[281] *See* H.R. REP. NO. 92-238, at 20 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 (implying intent of Title VII to implement, in meaningful way, national policy of equal employment for employees without discrimination).

[282] *See* 42 U.S.C. § 1981(a) (Supp. III 1991) (providing that if plaintiff seeks compensatory or punitive damages under Title VII, either party may demand jury trial).

[283] *See* Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (discussing need for ability of academic institutions to make decisions without intervention); Sweeney v. Bd. of Trs. of Keene State Coll., 569 F.2d 169, 176 (1st Cir. 1978) (noting that courts' reluctance to

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they involve very subjective criteria.[284] Therefore, courts and commentators argue that courts should leave such subjective decisions in the capable hands of academics.[285] However, this argument fails for two reasons. First, the policy of judicial deference violates Congress' directive to treat educational institutions the same as other employment situations.[286] In amending Title VII in 1972 to apply to educational employees, Congress mandated a departure from judicial deference.[287]

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examine tenure decisions arises from recognition that such decisions require experienced people in academia to make subjective evaluations), *vacated & remanded on other grounds*, Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24 (1978); Cussler v. Univ. of Md., 430 F. Supp. 602, 605-06 (D. Md. 1977) (noting that tenure decisions involved matters of professional judgment and that courts are reluctant to substitute their judgment for judgment of experienced academics). Chief Justice Warren eloquently stated:

> No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy, 354 U.S. at 250. *But see Sweeney*, 569 F.2d at 176 (cautioning against "hands off" approach when reviewing employment decisions by academic institutions). The court warns against allowing judicial deference to abdicate the court's duties and responsibilities Congress entrusted to the court. *Id.*

[284] *See* Swedlow, *supra* note 2, at 563 (discussing subjective components to decision to grant or deny tenure). It is difficult to quantify the subjective requirements for tenure. *See id.* It includes the quality of research, how colleagues judge the candidate's published work, the prestige of the journal that published the work, and an evaluation of the candidate's personality. *Id.*

[285] *See* Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980) (stating that subjective nature of tenure decisions is beyond competence of judges and courts should leave decision for evaluation by professionals); Faro v. N.Y. Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) (finding that university hiring decision is too complex for federal courts).

[286] *See* Jepsen v. Fla. Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir. 1980) (stating that courts cannot allow caution against intervention in university affairs to undercut Congress' express intent behind Title VII); H.R. REP. NO. 92-238, at 19-20 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2136, 2155 (stating that nothing in legislative history supports exemption of educational institution employees from Title VII coverage); Susan L. Pacholski, Comment, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1330 (1992) (stating that when Congress extended Title VII to academic institutions, it did not indicate that courts should treat employment discrimination in such institutions differently).

[287] Pacholski, *supra* note 286, at 1318 (noting that by granting university employees right to sue employers, Title VII appears to mandate departure from judicial deference); *see* Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979) (noting that Congress did not intend courts to take deferential approach because deference would make universities immune from Title VII requirements); Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978) (stating that Congress instructed courts to intervene in university affairs when they found

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Congress recognized that the policy of judicial deference to a university's decision threatens Congress' goal of providing complete relief under Title VII.[288]

Second, judges are more than qualified to review subjective tenure decisions because they are familiar with the academic world.[289] Judges undoubtedly have knowledge of the academic setting and are thus qualified to evaluate the subjective and complex components of the tenure decision.[290] In addition, in modern litigation, courts must resolve difficult factual issues by exercising their judgment in fields where they possess little or no expertise.[291] The process of reviewing decisions

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any evidence of discrimination). Judicial deference makes it more difficult for a Title VII plaintiff to recover because the plaintiff is stuck in a catch-22. *See* Yurko, *supra* note 3, at 496 (noting circularity of courts' justification for judicial deference). Courts will defer to academic institutions unless the plaintiff can prove discrimination. *Id.* However, few plaintiffs can prove discrimination because courts continually defer to academic institutions. *Id.*

[288] *See* Franks v. Bowman Trans. Co., 424 U.S. 747, 764 (1976) (noting that Congress intended for Title VII to fashion complete relief for victims of discrimination); Pacholski, *supra* note 287, at 1318 (stating that judicial deference threatens to subvert Title VII's policy of complete relief).

[289] *See* Mary Gray, *Academic Freedom and Nondiscrimination: Enemies of Allies?*, 66 TEX. L. REV. 1591, 1596 (1988) (noting that judges strongly identify with decision makers in academic institutions); Kluger, *supra* note 2, at 332 (stating that judges are no less competent than college president or board of trustees to make qualitative judgments); Kramer, *supra* note 34, at 1222 n.97 (noting that trustees, presidents, and deans are often unfamiliar with individual departments' needs). Often times, trustees, presidents, and deans have weaker credentials for weighing candidates than those on the peer committee. *Id.* Yet, trustees and presidents have the power to overrule the committee's decision. *See id.* They are also more susceptible to outside pressure than tenured faculty or federal judges. *Id.* Therefore, a court may be as equally capable of reviewing university employment decisions as are high-level university officials and administrators. *Id.*

[290] *See* Swedlow, *supra* note 2, at 582. Courts are more qualified to intervene in academic decisions because judges tend to be more familiar with the ivory tower of academia. *Id.*; *see also* Namenwirth v. Bd. of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1244 (7th Cir. 1985) (Swygert, J., dissenting) (stating that courts have not hesitated to review with great suspicion subjective judgments in blue-collar context that adversely affect minorities); Bartholet, *supra* note 279, at 961-62 (arguing that courts have subjected employers of blue-collar workers to strong Title VII scrutiny, but have deferred to academic employers).

[291] Yurko, *supra* note 3, at 497 (noting that in modern litigation, courts must analyze facts ranging from cause of complex industrial accidents, to sophisticated economic analyses of antitrust cases). The subjective nature of academic tenure decisions cannot distinguish faculty litigation from other Title VII cases. *Id.* at 498. Subjective judgments dominate all professional employment decisions. *Id.* Therefore, unless courts create an exception for all Title VII cases, subjectivity *per se* does not provide a sufficient reason for courts to defer to universities. *Id.* In fact, courts should closely scrutinize subjective decisions because such decisions provide a greater opportunity for subtle discrimination. *Id.*

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outside of the court's expertise is not a foreign practice for modern courts.[292]

In fact, judges use the same process and weigh the same factors when hiring law clerks.[293] The subjective process of selecting law clerks from a pool of well qualified applicants mirrors the tenure selection process.[294] Because judges make these determinations on a yearly basis, it cannot be said that they are not qualified to intervene in subjective academic decisions.[295]

The policy of judicial deference violates the policy behind Title VII.[296] Congress found that employment discrimination in academic institutions produces extremely harmful consequences.[297] Therefore, university employment decisions should receive the same level of scrutiny as regular employment decisions.[298] However, as long as courts defer to university decisions, courts will continue to apply Title VII unequally to employers. Consequently, if universities continue such hidden, subconscious, and discriminatory behavior in the tenure process, they will continue to deny women important positions in higher education.[299]

CONCLUSION

By granting summary judgment, the *Weinstock* court erred in its determination of the facts. The court should have allowed a jury to

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[292] *See id.* at 497 (noting that courts must review complex fact issues in areas of unfamiliarity on daily basis).

[293] *See* Faro v. N.Y. Univ., 502 F.2d 1229, 1232 (2d Cir. 1974) (sympathizing with difficulty of academic decision, court noted that difficulty of selecting law clerks out of many equally qualified candidates plagues judges as well); Bartholet, *supra* note 280, at 980 (noting that courts sympathize with academic decision makers and understand their concerns and use of selection methods); Kluger, *supra* note 2, at 333 (noting that annual selection of judicial clerks shows that judges are familiar with applying subjective criteria to reach conclusions regarding candidates' merit).

[294] *See Faro*, 502 F.2d at 1232 (equating process of hiring law clerks to subjective process of hiring for high level employment positions); *see also* Bartholet, *supra* note 279, at 980 (noting court's sympathetic tone in *Faro*).

[295] *See* Bartholet, *supra* note 279, at 979.

[296] *See* H.R. REP NO. 92-238, at 19 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155 (noting Congress' intent to end employment discrimination).

[297] *See id.* at 25 (finding that discrimination in academic institutions results in future discrimination)

[298] *See id.* at 19-20 (noting that no national policy justifies exemption of education institutions from scope of Title VII).

[299] *See* Paetzold & Gelu, *supra* note 236, at 1534-35 (arguing that subtle stereotypes that affect employer's decision-making process are as dangerous as overt discrimination). If courts fail to identify the stereotypes, courts reinforce and legitimate employer's stereotypes. *Id.*

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decide the case because Weinstock and Columbia presented conflicting evidence of sex discrimination. The *Weinstock* court ignored the congressional intent behind Title VII and the strong public policy of allowing discrimination cases to go forward. In essence, *Weinstock* creates an iron-clad defense for defendant universities in employment discrimination actions. As long as a university can articulate a legitimate, nondiscriminatory reason for denying tenure, the court will defer to the university's judgment. This decision allows universities to continue their discriminatory activity, below the radar of the judicial system.

The *Weinstock* decision is a prime example of the difficulties women face in attempting to break into the elite ranks of academia. Even though a woman may have evidence of subtle sex discrimination by a university, a court may choose to ignore that evidence. To add insult to injury, the court may invoke the doctrine of judicial deference, in essence, sanctioning the university's discriminatory practices. Such discrimination in academic institutions harms both the individual and society. Individuals are left without remedy or justice, while society loses the potential contributions the individual could have made to the nation's vast intellectual commons.

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