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John Anthony Palombi

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THE INEFFECTIVENESS OF TITLE VII IN TENURE DENIAL DECISIONS

I. INTRODUCTION

Sex discrimination is manifested in many aspects of higher education. One aspect of particular concern is the discrimination existent in tenure decisions at colleges and universities. Tenure decisions are important to faculty members, both as a group and individually. At a group level, the character of an academic department can be largely determined by the degree of diversity in its tenured faculty. Tenured faculty members can control the philosophical and educational focus of a department by selecting junior faculty members for tenure. On an individual basis, a tenure decision is important because it is typically made on an "up and out" basis. If a faculty member is not granted tenure, she is given a terminal contract and asked to leave the university.


2. The reason for this concern becomes evident after examining the statistics concerning the percentage of women employed on the faculties of colleges and universities. Women are usually in lower level positions where there is no hope for advancement, and when they are in positions where advancement is possible, they do not advance to the same level as their male counterparts.

The position of women academics in four-year colleges and universities has not changed significantly since the passage of the 1972 amendments to Title VII: women continue to constitute only 24 percent of the full-time faculty, and they remain clustered in the lower levels of the academic hierarchy. Furthermore, women are concentrated in nonladder appointments. Women represent 37 percent of the lecturers and 49 percent of the instructors, as opposed to 18 percent of professors in the tenure track. The proportion of women at each level within the tenure track also is inversely related to the status of that position: women constitute 28 percent of the assistant professors, 16 percent of the associate professors and 8 percent of the full professors.


3. Because tenure decisions typically begin at the department level, a department can seemingly deny tenure to faculty members who hold different political or educational views. Another problem is that women's studies and concentration in women's issues are not considered serious academic topics, and many female professors specialize in these areas. See Lynn v. Regents of the Univ. of Cal., 656 F.2d 1377, 1343 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

4. Universities that are member institutions of the American Association of University Professors must grant their faculty members one year's notice before permanent termination. E.K. Abel, supra note 2, at 65.
Colleges and universities are normally regarded as havens of idealism. Unfortunately, discrimination against women in tenure decisions is not an isolated phenomenon and can have far-reaching effects on academia.\(^5\) As a consequence, courts became involved where women felt they were denied tenure on the basis of their sex. The United States Supreme Court has developed an analysis which can be used in tenure denial cases under Title VII of the Civil Rights Act of 1964.\(^6\) This analysis, however, allows too much latitude in reviewing tenure denial cases by permitting lower courts to defer to the faculty's decision. This deference effectively removes any Title VII rights of female faculty members by requiring women seeking tenure to prove that they are far more qualified than previously tenured males.

This Comment examines tenure denial cases and the methods courts use in analyzing these cases. A review of tenure denial cases displays the lower courts' improper application of the analysis set forth by the Supreme Court. The lower courts' divergence from the original Supreme Court analysis indicates a weakness in the original analysis that has drastically reduced the Title VII rights of female faculty members. The analysis must be altered in order to effectuate the congressional intent behind Title VII. This Comment suggests that the defendant's burden of proof be increased in a tenure denial action, or, alternatively, that Title VII be reaffirmed through legislation. Either alternative will ensure that female faculty members enjoy the protections they are entitled to under Title VII.

I. BACKGROUND

A. The Institution of Tenure

Academic tenure is an old and often misunderstood institution.\(^7\) Tenure is the system by which colleges and universities provide academic freedom

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Denials have also involved various fields of study. See, e.g., Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1340 (9th Cir. 1981) (professor of French literature denied tenure); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (physical education professor denied tenure); Johnson v. Michigan State Univ., 547 F. Supp. 429 (W.D. Mich. 1982) (medical school professor denied tenure).


7. Scholars have been given preferential treatment and granted a certain modicum of job security for hundreds of years. R.D. Mandell, THE PROFESSOR GAME (1977). As for tenure being misunderstood by judges, see infra notes 111-44 and accompanying text.
and economic security to their faculty members. Tenure may be granted after a probationary period and, after it is granted, a faculty member may not be terminated except for adequate cause, retirement, or financial exigency. While some view tenure as the granting of a permanent position, in reality a professor may be asked to leave because of poor performance.

Tenure policies differ from institution to institution and even from department to department, so confusion often ensues regarding the precise requirements for granting tenure. Even where the requirements for granting tenure are written down and known to the faculty, they are usually vague and provide little guidance for faculty members. There are, however, normally three components to the tenure decision: teaching skills, research abilities, and service to the college community. Because tenure decisions are so important to an academic career, it is not unexpected that faculty members who felt they were treated unfairly would seek relief in the judicial system.

B. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 is concerned with discrimination in the terms and conditions of employment. The Act forbids employers from discriminating on the basis of race, color, creed, national

9. Id.
10. EDWARDS & NORDIN, supra note 8, at 251.
11. The following is a typical statement of the requirements for obtaining a tenured position taken from the University of Michigan College of Literature, Science and the Arts.

Appointment or promotion to the assistant professorship in the College carries no presumption of promotion to tenure. Tenure is earned by excellent teaching, outstanding research and writing, and substantial additional service, each of which must be relevant to the goals and needs of the University, College and the Department. It is based upon the achievement of distinction in an area of learning, and the prediction of continued eminence throughout the individual's professional career. Less than outstanding performance in these areas should not be construed as an adequate basis for promotion.

EDWARDS & NORDIN, supra note 8, at 227.
12. Id.
13. The Civil Rights Act of 1964 also includes provisions covering various other aspects of civil rights, such as voting rights (Title I) and public accommodations (Title II). 42 U.S.C. §§ 1973, 2000a-1 (1982).
origin, or sex. Courts have read into Title VII a rather broad legislative intent to equalize employment opportunities.

Initially, Title VII did not apply to the educational staff of colleges and universities. Congress, however, amended Title VII by enacting the Equal Employment Opportunity Act of 1972. This Act rendered Title VII applicable to all employees of colleges and universities. While Title VII did not originally apply to colleges, there has been no indication that Title VII was not meant to apply to "high-level" jobs.

Where there are facially neutral rules, litigants alleging violations of Title VII typically use one of two different methods of showing employer

   [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 of 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 way 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.

Title VII originally did not protect gender as a class. A representative seeking to sabotage the entire bill added gender to the list of protected classes on the floor of the House of Representatives. His maneuvering backfired, and the bill passed with the amendment. C. Whalen & B. Whalen, The Longest Debate 218 (1985) [hereinafter Whalen & Whalen]. Contra Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duq. L. Rev. 453 (1981) (the addition of "sex" to Title VII was not a maneuver to sabotage the bill).

15. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court stated:
   Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
   Id. at 430-31.


16. Educational institutions were exempt "with respect to the employment of individuals to perform work connected with the educational activities of such institution[s]." 42 U.S.C. § 2000e-1 (1972).


18. Id.

19. From its inception, Title VII was designed to eliminate discrimination in all levels of employment. See supra note 14. In reality, it is more important that courts apply Title VII rigorously to "high-level" positions because minorities and women have historically been kept out of high-level, high-paying positions and kept in entry-level positions. While women do not encounter difficulties obtaining entry-level positions, positions with stature, especially in education, are more difficult to procure. See supra note 2.
discrimination: disparate impact and disparate treatment. Disparate impact is used when facially neutral rules affect a protected class to the exclusion or near exclusion of others. Disparate treatment is used when facially neutral rules are applied in a discriminatory fashion to a protected class. Female faculty members usually allege disparate treatment in tenure denial cases. This Comment, therefore, will focus on disparate treatment claims.

C. The Disparate Treatment Analysis

The United States Supreme Court developed an analysis for disparate treatment cases under Title VII in *McDonnell Douglas Corp. v. Green.* In this case, the McDonnell Douglas Corporation laid off a black male employee as part of a general reduction of its workforce. The plaintiff subsequently participated in a "stall-in" at the defendant's factory to protest the company's hiring practices. The stall-in consisted of a group of workers blocking plant entrances by parking and locking their cars in front of them. When the company later advertised for mechanics, the plaintiff applied for a position but was turned down because of his participation in the stall-in. The plaintiff alleged that he was not rehired because of his race and civil rights activities. The plaintiff's complaint was dis-

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21. The seminal disparate impact case is *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (Title VII requires elimination of artificial or arbitrary barriers to employment and if employment practice which operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited).


23. One commentator has suggested that plaintiffs in Title VII cases involving tenure denial should use a disparate impact theory instead of a disparate treatment theory because the employer has a heavier burden to explain any statistical anomalies in disparate impact cases. See Bartholet, *Application of Title VII to Jobs in High Places,* 95 HARV. L. REV. 945 (1982) [hereinafter Bartholet]. For an overview of the tactics used in employment discrimination cases and other aspects of women's rights under the law, see D. SCHLING, REDRESS FOR SUCCESS (1985).


25. Id. at 794.

26. The plaintiff participated in the "stall-in" along with other members of the Congress on Racial Equality. Id.

27. Id.

28. Id. at 796. There was also some question as to whether the plaintiff participated in a "lock-in," when a chain and lock were placed on a door to prevent the departure of some of McDonnell Douglas's employees. Id. at 795. Although the extent of the plaintiff's participation in the lock-in was not clear, the lock-in was another factor which culminated in the plaintiff's rejection. Id. at 795-96.

missed at the district court level, but the dismissal was reversed by the Eighth Circuit Court of Appeals.\(^3\) The Supreme Court remanded the case for further consideration and outlined three phases of a disparate treatment case.\(^3\)

The first phase (Phase I) of a disparate treatment case is the plaintiff's prima facie case. The Court set out four points, which if met, would satisfy the plaintiff's prima facie burden. The plaintiff must first show that he is a member of a protected class.\(^3\) Second, the plaintiff must show that he is qualified for a job for which the employer has sought out applicants.\(^3\) Third, the plaintiff must demonstrate that the employer rejected him for the position.\(^3\) Finally, the plaintiff must prove that the employer continued to seek applications from those with qualifications similar to the plaintiff's.\(^3\)

Satisfying Phase I of the analysis creates an inference of discrimination.\(^3\) While the McDonnell Douglas Court suggested specific guidelines for Phase I, it also stated that these requirements are not applicable in all Title VII cases.\(^3\) Because the basic purpose of Phase I is to create an inference of discrimination, the plaintiff may create that inference without technically satisfying all four prongs of the Phase I analysis.\(^3\) Plaintiffs, however, normally use the four points set forth by the Supreme Court as the basis for their prima facie case.\(^3\)

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30. 411 U.S. at 797.
31. *Id.* at 802-04. The Eighth Circuit Court of Appeals attempted to set standards for disparate treatment cases and would have allowed the plaintiff to demonstrate that the employer's reasons for refusing to rehire him were a pretext. *Id.* at 798.
32. *Id.* at 802.
33. *Id.*
34. *Id.*
35. *Id.*
37. "The facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.
38. Timper v. Board of Regents of Univ. of Wis. Sys., 512 F. Supp. 384 (W.D. Wis. 1981). In *Timper*, the district court stated that the *McDonnell Douglas* analysis could not be applied "literally in every respect" where tenure decisions were concerned. *Timper*, 512 F. Supp. at 393. However, after making this and other statements concerning the inapplicability of the *McDonnell Douglas* analysis, the court proceeded to effectively apply that analysis. *Id.* at 395.
39. "The courts of appeals have consistently approved the application of the *McDonnell*
Once the plaintiff satisfies Phase I, the second phase (Phase II) of the case shifts the burden of production to the defendant. The defendant must articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff's application.\textsuperscript{40} By using the word "articulate" in its formulation of Phase II, the Court kept the defendant's burden as one of production,\textsuperscript{41} while leaving the ultimate burden of proof to the plaintiff.\textsuperscript{42} The Court has reaffirmed this definition of the defendant's burden in more recent cases, and has continually rejected any increase in this burden.\textsuperscript{43} The third and final phase (Phase III) of the analysis is the plaintiff's rebuttal.\textsuperscript{44} To meet the burden of proof at this stage, the plaintiff must prove that the defendant's reason for rejecting the plaintiff was a pretext.\textsuperscript{45} The Court offered examples of evidence relevant to proving that the employer's reason was a pretext such as statistical evidence, evidence of past discrimination, and comparative evidence.\textsuperscript{46} The Court stated that comparative evidence, the comparison of the plaintiff's qualifications or actions to those of people who are in the position desired by the plaintiff,\textsuperscript{47} is particularly relevant in disparate treatment cases.\textsuperscript{48}

While \textit{McDonnell Douglas} involved racial discrimination, the Court intended its analysis to be used in all cases involving disparate treatment claims.\textsuperscript{49} The Court specifically heard this case to clarify the disparate treatment analysis for the lower courts.\textsuperscript{50} Consequently, the \textit{McDonnell Douglas} analysis is applied routinely, albeit incorrectly, in tenure denial cases.\textsuperscript{51}

III. USING \textit{McDONNELL DOUGLAS} IN TENURE DENIAL CASES

A. Phase I: The Plaintiff's Prima Facie Case

Under the \textit{McDonnell Douglas} analysis, the plaintiff must first prove her\textsuperscript{42} prima facie case. Proving the prima facie case creates an inference

\textit{Douglas} test to charges of discrimination in the academic context." \textit{Lynn}, 656 F.2d at 1341 (footnote omitted).

\textsuperscript{40} \textit{McDonnell Douglas}, 411 U.S. at 802.
\textsuperscript{41} Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978).
\textsuperscript{42} "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." \textit{Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248, 253 (1981). There is no question that the burden of proving discrimination is always on the plaintiff. The only burden on defendants is to produce an explanation for their actions.
\textsuperscript{44} \textit{McDonnell Douglas}, 411 U.S. at 804.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 804-05.
\textsuperscript{47} Id. at 804.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 800. "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination." \textit{Id}.
\textsuperscript{50} Id. at 798.
\textsuperscript{51} See infra notes 52-96 and accompanying text.
\textsuperscript{52} Because this Comment deals entirely with female plaintiffs and tenure denial, the feminine rather than the masculine pronoun will be used whenever appropriate.
of discrimination with respect to the defendant's actions. The burden on the plaintiff in Phase I is slight; she need only produce evidence sufficient to take the case to the trier of fact. Although this burden is slight, it can cause some difficulties. Typically, the most difficult part of Phase I for the plaintiff is proving that she is qualified for tenure.

Because tenure decisions are subjective, it is often difficult for a plaintiff to prove that she has the requisite minimum qualifications for tenure. The plaintiff must show that she is qualified to hold a tenured faculty position, not just a nontenured one. There are various ways a plaintiff can prove that she is qualified for tenure. One way is through affirmative votes from faculty tenure committees. Realistically, however, this type of evidence is

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53. See supra note 36. The standards as to what the plaintiff must show in her prima facie case in tenure denial cases have been articulated as follows:
1) that plaintiff belongs to a class protected by the statute;
2) that she was a candidate for tenure and was qualified under the institution's standards, practices or customs;
3) that despite her qualifications plaintiff was denied tenure; and
4) that tenure positions were open in plaintiff's department at the time she was denied tenure, in the sense that others in the department were granted tenure during a period relatively near to the time of plaintiff's denial.


54. McDonnell Douglas describes the plaintiff's burden at this stage as establishing a prima facie case. 411 U.S. at 802.

55. Proof of qualification for tenure is the most challenging aspect of Phase I because: 1) women are automatically a protected class under Title VII; 2) the demonstration of rejection by the employer for the position is obviously shown through the initiation of the lawsuit; and 3) the university continues to grant tenure to those who come up for tenure review after the plaintiff.

56. Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (university's decision to deny tenure to female associate professor did not violate Title VII because plaintiff could not satisfy her burden of proof by demonstrating that the claimed neutral basis for the denial was pretextual). Contra Timper, 512 F. Supp. 384, 394 (W.D. Wis. 1981).

[T]o apply the McDonnell Douglas formula to a prima facie case challenging the denial of tenure would require a decision whether 'qualified for a job' means 'qualified for the non-tenured teaching job,' held by plaintiff at the time tenure was denied, or 'qualified for the tenured teaching job' being sought.

Id.

57. At the beginning of the process, a committee of faculty members from the plaintiff's department consider and then vote whether tenure should be granted. Edwards & Nordin, supra note 8, at 227. The fact that these meetings are closed provides an interesting conflict between the rules of discovery and claims of academic freedom. Faculty members claim that a chilling effect on academic freedom will result if their votes and the reasons for them can be introduced in court. See generally Lee, Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation, 9 J.C. & U.L. 279 (1982-1983) (new balancing test proposed to address conflict between confidentiality of peer review and disclosure of peer review materials to plaintiff) [hereinafter Lee].
rare because a positive recommendation shows some support for a grant of tenure. Even if she can obtain this type of evidence, it does not guarantee success.\textsuperscript{58}

The Ninth Circuit decision in \textit{Lynn v. Regents of the University of California}\textsuperscript{59} provides an example of a different type of evidence which a plaintiff may use. The plaintiff in this case proved her minimum qualifications by showing that she had similar experience, education, and publications as her tenured male colleagues.\textsuperscript{60} She also claimed that she was denied tenure and promotion even though a majority of extramural scholars commented favorably on her work.\textsuperscript{61} Another method to establish the plaintiff’s qualifications was used in \textit{Johnson v. Michigan State University}.\textsuperscript{62} In \textit{Johnson}, a Michigan district court found that a recommendation for a second three-year teaching term and a favorable student petition were also enough to satisfy the plaintiff’s Phase I burden.\textsuperscript{63}

In \textit{Hooker v. Tufts University},\textsuperscript{64} however, a Massachusetts district court set forth more rigorous standards. Here, the plaintiff was denied a tenured position in the Physical Education Department at Tufts University.\textsuperscript{65} The district court held that because the plaintiff did not satisfy the criteria set forth in the Tufts Faculty Handbook, she did not meet her Phase I burden.\textsuperscript{66} The court found that the plaintiff was qualified in some aspects, but did not meet the standards of scholarship at Tufts.\textsuperscript{67} There was also evidence that Tufts customarily waived the scholarship requirement in the physical education department.\textsuperscript{68} This requirement was not waived in the plaintiff’s case and the court found that Tufts could cease granting such waivers at any time.\textsuperscript{69} Therefore, denying the waiver to the plaintiff was not considered

\textsuperscript{58. See Zahorik, 729 F.2d 85 (2d Cir. 1984) (women’s claims alleging discriminatory treatment in tenure denial case denied). An interesting point, however, in Zahorik, is that the Second Circuit Court of Appeals chose to ignore the recommendation of a majority of the department where one of the women was concerned. This decision followed shortly after the court stated: “[W]here the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion.” Id. at 93.}

\textsuperscript{59. 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982).}

\textsuperscript{60. Id. at 1340.}

\textsuperscript{61. Id. at 1342. The court in Lynn remanded the case to the district court because that court erred in finding that the plaintiff did not meet her prima facie burden. Id. at 1344.}

\textsuperscript{62. 547 F. Supp. 429 (W.D. Mich. 1982).}

\textsuperscript{63. Id. at 439.}

\textsuperscript{64. 581 F. Supp. 104 (D. Mass. 1983).}

\textsuperscript{65. Id. at 106.}

\textsuperscript{66. Id.}

\textsuperscript{67. Id. at 112.}

\textsuperscript{68. Id. at 113.}

\textsuperscript{69. “Assuming that any acknowledged waiver policy existed, the University clearly retained the discretion to cease granting such waivers and to hold a physical education faculty member to the criteria posted in the Faculty Handbook.” Id. at 116 (footnote omitted).}
evidence of discrimination. While there are some exceptions, it is not difficult for a plaintiff to meet her prima facie burden. A plaintiff confronts major difficulties, however, in the following phases of a disparate treatment case.

B. Phase II: The Defendant's Reason for Denying Tenure

Once a plaintiff meets her Phase I burden, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for denying tenure. Comparable to the plaintiff's Phase I burden, the defendant's burden is slight at this stage of the case. Even though there is a shift in the burden of production, the plaintiff has the ultimate burden of proof at all times.

Although defendants offer various reasons for denying tenure, the reason most offered is that the plaintiff did not meet the standards for granting tenure. This reason is not only legitimate and nondiscriminatory, it is sufficiently vague to cause rebuttal difficulties. The college's burden at this phase is satisfied when any nondiscriminatory reason is set forth. The defendant need only show the neutrality, not the soundness, of the basis for its decision.

In recognition of the slight burden defendants have in the McDonnell Douglas analysis, some lower courts have unsuccessfully attempted to increase the defendant's burden in Phase II.

70. *Id.*
71. One reason that plaintiffs may have an easier time at this phase is because courts are being less strict in their handling of the prima facie part than the rebuttal part of the case. *See Lynn*, 656 F.2d at 1344; *Lieberman*, 630 F.2d at 65; *Kunda*, 621 F.2d at 542; *Johnson*, 547 F. Supp. at 439. *But see Zahorik*, 729 F.2d at 94 (plaintiff failed to establish prima facie case of discrimination because it was not clear that plaintiff possessed required qualifications for tenure).
73. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). The Court's use of the word "articulate" in its formulation of Phase II has kept the defendant's burden to a minimum. The Court's unfortunate choice of words is the major weakness in the *McDonnell Douglas* line of cases.
74. *See Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). "There was overwhelming evidence that, whatever might be said of Dr. Lieberman's teaching, the participants in the tenure decision had ample basis for honest belief that her scholarship did not measure up to the properly stringent requirements for tenure." *Id.* at 66. *See also Lynn*, 656 F.2d at 1344 (female assistant professor who was denied tenure established prima facie case by showing evidence of academic sex discrimination and disdain for women's studies at the university); *Johnson*, 547 F. Supp. at 440 (female in medical school denied tenure because university articulated nondiscriminatory reasons for failure to promote and grant her tenure).
75. *Burdine*, 450 U.S. at 258.
76. *See Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir.), *vacated*, 439 U.S. 24 (1978). In *Sweeney*, the First Circuit Court of Appeals stated that "in requiring the defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." 569 F.2d at 177. The Supreme Court rejected this phraseology as impermissibly increasing the burden on the
In Sweeney v. Board of Trustees of Keene State College, the First Circuit Court of Appeals required the defendant to prove absence of discriminatory motive in Phase II rather than the existence of a nondiscriminatory reason. In Sweeney, the plaintiff's promotion was delayed for a year due to actions taken by the university. Both the district court and the court of appeals found that the reasons offered by the university were not the true reasons for the delay, and ruled that Ms. Sweeney was entitled to the position and back pay. The United States Supreme Court rejected the increased burden on defendants, reiterating that the Phase II burden on the defendant is slight. The lower court, on remand, again found that the university discriminated against Ms. Sweeney and she received back pay for the period when she should have had the higher level position.

C. Phase III: The Plaintiff's Rebuttal

After the defendant's case, the focus of the analysis shifts back to the plaintiff to prove that the defendant's stated reason for denying tenure was a pretext. This is the most difficult phase of the analysis for a plaintiff because at this point, she must come forth with statistical and comparative evidence. Lower courts can seemingly exercise the most discretion during this phase of the case. The plaintiff usually attempts to show that the proffered reason for denial was a pretext by presenting comparative evidence, that is, evidence that the university granted tenure to males with similar or lesser qualifications. Courts are skeptical of comparative evidence and profess a lack of qualifications to make this kind of comparison. A plaintiff may also use evidence of past discrimination.

defendants. 439 U.S. 24, 25 (1978). The dissent in Sweeney argued that there was no difference between articulating a nondiscriminatory reason and proving lack of discriminatory motive. Id. at 27-28. This analysis has never been used in other cases. See also Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563 (5th Cir. 1979), vacated, 450 U.S. 248 (1981). In Burdine, the Fifth Circuit Court of Appeals required the defendant to prove by a preponderance of the evidence that there were nondiscriminatory reasons for the plaintiff's termination, but this was also rejected by the Supreme Court. 450 U.S. at 258. The Court also stated in Burdine that the allocation of the burdens in Title VII cases "permits the plaintiff meriting relief to demonstrate intentional discrimination." Id. (emphasis added).

77. 569 F.2d 169 (1st Cir.), vacated, 439 U.S. 24 (1978).
78. Id. at 177.
79. Id.
80. Sweeney, 439 U.S. at 25.
83. See supra notes 47-49 and accompanying text.
84. Lieberman, 630 F.2d at 67-68.

Chief Judge Clarie thus did not err in declining plaintiff's invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess the numerous scholars at the University of Connecticut who had scrutinized Dr. Lieberman's qualifications and found them wanting, in
at the university to bolster her claim of present discrimination.\textsuperscript{55}

Comparative evidence, statistical evidence, and evidence of past discrimination were used in Namenwirth v. Board of Regents of the University of Wisconsin.\textsuperscript{66} In Namenwirth, the Seventh Circuit Court of Appeals admitted that the plaintiff was qualified, but the court stated that not all qualified faculty members deserve tenure and consequently ignored the comparative and statistical evidence put forth by the plaintiff.\textsuperscript{87} The plaintiff in Namenwirth was denied tenure in the Zoology Department at the University of Wisconsin because of a purported lack of qualifications.\textsuperscript{88} She was only the second female ever placed in a tenure-track position in the Zoology Department and was the first person in the department to be denied tenure after being placed in a tenure-track position.\textsuperscript{89} The plaintiff presented comparative evidence that she had similar qualifications to tenured male faculty members, along with evidence of past discrimination in the science departments as well as other departments at the university.\textsuperscript{90} The Namenwirth court held, however, that the plaintiff was not granted tenure because she did not show promise as a faculty member.\textsuperscript{91}

The Namenwirth court recognized that a major problem in tenure denial cases is that the decision-maker is also the arbiter of the plaintiff's qualifications.\textsuperscript{92} The faculty members who vote on tenure are the same people

\begin{itemize}
\item the absence of independent evidence of discriminatory intent or a claim that plaintiff's qualifications were clearly and demonstrably superior to those of the successful males, a claim which was not made by Dr. Lieberman because it could not have been substantiated.
\end{itemize}

\textit{Id.}

\textsuperscript{55} See supra note 44.

\textsuperscript{66} 769 F.2d 1235 (7th Cir. 1985), cert. denied, 106 S. Ct. 807 (1986).  

\textsuperscript{87} "The magistrate found in fact that she was qualified but it does not follow that she ought to have been awarded tenure." \textit{Id.} at 1242.

\textsuperscript{88} \textit{Id.} at 1237.

\textsuperscript{89} \textit{Id.} at 1245 (Swygert, J., dissenting). The first woman in a tenure-track position in the Zoology Department was Dr. Nellie Bilstad. Dr. Bilstad was hired in 1931 and was granted tenure in 1942. While others around her were promoted, Dr. Bilstad remained an associate professor until 1969 when she was promoted to full professor shortly before her retirement. \textit{Id.} at 1237.

\textsuperscript{90} \textit{Id.} at 1237. The university also claimed that tenure was granted less liberally during the 1970s; however, males who were considered for tenure in the Zoology Department both before and after the consideration of Ms. Namenwirth received tenure. \textit{Id.} at 1245 (Swygert, J., dissenting). The track record of the University of Wisconsin in granting tenure to female professors was also brought into question in Timper, 512 F. Supp. at 395.

\textsuperscript{91} 769 F.2d at 1242.

The magistrate compared her record with the record of men who were awarded tenure and determined that the claim that the Department—and the University—found insufficient promise in Namenwirth's work was not pretextual. We have examined the records of Namenwirth and the various male candidates, and we cannot say that the magistrate's conclusion is in clear conflict with the evidence. \textit{Id.}

\textsuperscript{92} The court stated:
that courts rely on for determinations of the plaintiff's qualifications. Thus, biases affecting tenure decisions can also affect evaluation of the plaintiff's qualifications and present a distorted view to the court.\textsuperscript{93} Even after this realization, however, the court professed that it could do nothing about the problem.\textsuperscript{94}

The dissent in \textit{Namenwirth} agreed with the majority's characterization of the inherent problem in tenure decisions.\textsuperscript{95} The dissent, however, did not consider the problem unsolvable, and would have held instead that the university discriminated against Ms. Namenwirth because there was sufficient evidence to meet the plaintiff's burden of proof.\textsuperscript{96}

\section*{IV. The Results of Using \textit{McDonnell Douglas} in Tenure Cases}

After examining the application of the \textit{McDonnell Douglas} analysis in tenure denial cases, certain matters become evident. First, judges are reluctant to scrutinize decisions made by faculty tenure committees, professing that the judiciary is unqualified to assess a candidate's academic qualifications. Consequently, judges defer to the college to settle the issue.\textsuperscript{97}

\footnotesize

To allow the decision-maker also to act as the source of judgments of qualifications would ordinarily defeat the purpose of the discrimination laws. But in the case of tenure decisions, we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments.

\textit{Id.} at 1243.

\textsuperscript{93} A court would not normally allow this kind of situation. \textit{Id.} at 1242.

\textsuperscript{94} \textit{See supra note} 87.

\textsuperscript{95} "The majority wrestles with the problem of how to effectively review tenure decisions given that the dispositive factor in such decisions is the ability of the candidate to win the esteem of the very people whose sexual biases are in question." 769 F.2d at 1244 (Swygert, J., dissenting). The dissent goes on to state that while there is a problem, it is not so insurmountable that there should be a total abdication of judicial responsibility. \textit{Id.} at 1245.

\textsuperscript{96} In any event, it is difficult to believe that any factor other than sex explains the double standard applied by the University in its reviews of Moermond and Namenwirth. Although many of the faculty members were clearly appalled by Namenwirth's allegations of sex bias, sex bias need not be conscious to be actionable. The most likely explanation for the events at bar is that Namenwirth was scrutinized by the department because she was a woman breaking new ground . . . . Accordingly, when Namenwirth turned out to be a marginal performer, many members of the Department refused to give Namenwirth the benefit of the doubt. But when a similarly-situated male turned out to be a marginal performer, i.e., Moermond, the entire department was willing to give him the benefit of the doubt. In short, given Namenwirth's unhappy role as a pathbreaker, she had to perform better than a male to succeed. Such unequal treatment—however unconscious or subtle—violated Title VII.

\textit{Id.} at 1250-51 (footnotes omitted) (Swygert, J., dissenting).

\textsuperscript{97} "Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited." \textit{Zahorik}, 729 F.2d at 93. "It is first important to address the court's standard for reviewing plaintiff's qualifications for tenure. In this regard, I am clearly bound to accord the university decision makers certain deference." \textit{Hooker}, 581 F. Supp. at 112.
Second, judges consider tenure decisions to be unique in the employment area and accord them special treatment. While judges insist that educational institutions follow the precepts of Title VII, the manner of applying the statute in tenure denial cases renders it worthless. Judicial deference transforms the *McDonnell Douglas* analysis into one which gives extreme latitude to employer decisions concerning tenure. This latitude then acts as a screen to disguise all but the most blatant discriminatory acts. The following section will examine the practical effect of the judge's function in tenure denial cases and the professed rationale for this function.

A. Implications of Judicial Deference

Nowhere is judicial deference to defendants more evident than in the plaintiff's Phase III case. In *McDonnell Douglas*, the Supreme Court gave examples of the types of evidence relevant to rebutting the defendant's Phase II case. While the Court considers comparative evidence especially relevant in the racial discrimination situation, lower courts in tenure denial cases view comparative evidence with a skepticism that borders on hostility. In some cases, judges are reluctant to examine closely evidence of past discrimination. This reluctance again narrows the types of rebuttal evidence that the plaintiff can use. This narrowing of acceptable rebuttal evidence increases an already large plaintiff's burden. By examining only certain types of evidence, judges have effectively changed Phase III of the *McDonnell Douglas* analysis in tenure denial cases. The resulting standard becomes: if a plaintiff is given the same information as her male colleagues concerning tenure requirements and cannot show that there were procedural irregularities or blatant discriminatory statements concerning her tenure decision, judges will not find that a tenure decision violated Title VII.

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98. None of the cases concerning tenure decisions deny that Title VII applies to educational employment, yet, as will be developed, only one woman has been granted tenure after a lawsuit. *See infra* note 106 and accompanying text.

99. An extreme version of deference was attempted by the lower court in *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). The district court imposed a requirement of a procedural irregularity to make a prima facie case in tenure denial cases. This extra burden was rejected by the Third Circuit Court of Appeals. *Id.* at 545. This increased burden was also rejected in *Hooker*, 581 F. Supp. at 112.

100. *See supra* notes 46-48 and accompanying text.

101. *See Lieberman*, 630 F.2d at 67. "The comparative evidence offered in this case is a far cry from the comparative evidence to which the court referred in *McDonnell Douglas*."

102. "More particularized evidence relating to the individual plaintiffs is necessary to show discriminatory treatment." *Zahorik*, 729 F.2d at 95. "Whatever probative value those figures might have had, the court was not bound to admit the entire haystack because it contained a single needle." *Lieberman*, 630 F.2d at 64. "In this case, there was some evidence of past discrimination on the part of both the University and the Department. That evidence could not offset the rather substantial evidence of the close department vote." *Namenwirth*, 769 F.2d at 1243.

103. *See supra* notes 43, 101-02 and accompanying text.
A major result of this shift by judges is that the plaintiff must prove she is far more qualified than previously tenured males in order to get a tenured position. If the plaintiff cannot prove this higher level of qualification, judges can state that the subjective factors in the decision weighed against the plaintiff. This defeats the spirit, if not the actual letter, of Title VII, as indicated by the congressional intent.

As previously stated, this shift in emphasis also increases an already difficult evidentiary burden on the plaintiff in tenure denial cases. To eliminate almost all categories of evidence from effective rebuttal evidence makes the burden nearly impossible to meet. Because of this heavy burden, there is only one case to date where a plaintiff convinced a court that she should be granted tenure because the reasons offered for denying her tenure were a pretext.

104. Namenwirth, 769 F.2d at 1251 (Swygert, J., dissenting).

105. As previously discussed, the original purpose of Title VII was to allow qualified minorities to enter areas where they were previously excluded. See supra note 15. In Zahorik, the Second Circuit Court of Appeals incorrectly stated that the plaintiff must prove her prima facie case by a preponderance of the evidence. 729 F.2d at 92. This is an incorrect characterization of the plaintiff's burden. If this test were to apply, the plaintiff's burden would be higher than it was originally meant to be, and proving that she was qualified would end the court's analysis because she would have proved her qualifications by a preponderance of the evidence. In the present analysis, she simply must show a minimum amount of evidence as to qualifications. The correct statement should be that the plaintiff must make out a prima facie case.

106. From 1970 to 1983, only four individual academic plaintiffs have won outright. Lee, supra note 57, at 281-82 n.18. Of the cases listed in the Lee article, only one of those cases involved tenure. See Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

In Kunda, the plaintiff was a physical education teacher who was denied tenure because she did not possess the highest degree available in her field. Id. While the plaintiff was not told at any time that this was a requirement for receiving tenure, male faculty members at Muhlenberg were notified of this requirement at some time during their probationary period. Id. at 539-40. The Third Circuit Court of Appeals ruled that the reason offered by the college was pretextual and that if Ms. Kunda would obtain this degree in a specified period of time, she should be granted tenure. Id. at 549. The majority insisted that this was not a grant of tenure, but that Ms. Kunda still had to complete the requisite schooling before she could be granted tenure. Id. The dissent reasoned that ordering a grant of tenure was an intrusion on the rights of Muhlenberg College and that the final decision should be left to the Board of Trustees. Id. at 552. This case illustrates the fact that procedure, not qualifications, is important because Ms. Kunda received many positive votes from departmental committees.

A major factor in allowing the district court's award to stand was that "Kunda's achievements, qualifications, and prospects were not in dispute." Id. at 548. Far from being an exception, Kunda illustrates how great the evidence of discrimination must be before a court will award a plaintiff tenure. But see Johnson, 547 F. Supp. at 433 (fact that plaintiff did not receive required performance evaluation was not sufficient evidence of discrimination). The "award" of tenure is not as novel as it would appear if one puts the decision in the context of any employment decision. Contra Note, Kunda v. Muhlenberg College, 19 Duq. L. Rev. 599, 613 (1981) (in nonacademic cases, Court took an active role in eliminating discriminatory practices from employment decisions).
B. The Rationale of Judges in Tenure Decisions

One explanation for judicial deference to university faculty is the assumption of judges that not all qualified candidates for tenure will, or should, receive tenure. This assumption strikes hard at the purpose of Title VII. Congress intended the amendments to Title VII to open areas of educational employment to qualified minority applicants who were denied positions because of their minority status. While Title VII does not require affirmative action, courts should display some sensitivity to past practices of discrimination at specific institutions. The increased burden on the plaintiff does not effectuate the intent behind Title VII. To explain this judicial deference, courts have given some reasons for treating these cases differently.

107. "Mere qualification depends on objective measures—the terminal degree, the number of publications, and so on. Tenure requires something more." Namenwirth, 769 F.2d at 1242. "(A)dvancement to tenure entails what is close to a life-long commitment by a university, and therefore requires much more than the showing of performance of sufficient quality to merit continued employment." Lieberman, 630 F.2d at 64.


There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of the educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars. When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGree, it was found that the primary factors determining the hiring of male faculty members were prestige and compatibility, but that women were generally to be outside the prestige system altogether. The committee feels that discrimination in educational institutions is especially critical.

Id. (quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19-20 (1972) (footnotes omitted)).

109. Evidence of past discrimination provides the court with a description of the atmosphere surrounding a tenure decision. Admittedly, some of the statistics in these cases were general and not in good form, yet they are treated by the courts as being almost totally worthless.

The district court was justified in excluding the Organization Report. Even if the information it contained could have been verified, which was not at all clear, the Report was in any event filled with statements that had nothing at all to do with the University of Connecticut, much less the English Department, as well as masses of irrelevant data.

Lieberman, 630 F.2d at 69 (footnotes omitted).

110. "It is not our place to question the significance or validity of such decisions." Namenwirth, 769 F.2d at 1243. "In this regard, I am clearly bound to accord the university decision makers certain deference." Hooker, 581 F. Supp. at 912. "Wherever the responsi-
A close examination of these reasons, however, reveals some severe
problems and misconceptions. When evaluating tenure denial cases, courts
are particularly reluctant to review colleges' decisions. The main reason
for this reluctance is the belief that a university faculty is better able to
judge academic qualifications. However, as the Seventh Circuit noted in
Namenwirth, this point creates major difficulties because the biases af-
flecting a tenure vote can knowingly or unknowingly affect the evaluation
of the plaintiff's qualifications.

One reason proffered by courts for deferring to the faculty's decision is
their perceived lack of qualifications. Nevertheless, courts evaluate many
complex areas and, with the help of experts, can make reasoned choices
between competing academic views. Judges are not psychologists, yet they
weigh conflicting psychiatric testimony in order to decide whether a criminal
defendant is insane. Despite statements to the contrary, judges also have
experience where academic qualifications are concerned. Judges must
deal with academic qualifications whenever a scientific method is used at
trial. There is no reason why the usual system of direct and cross
examination cannot be used to determine credibility in a dispute over a
plaintiff's qualifications for tenure. Therefore, judicial claims of lack of
expertise are unsubstantiated.

Courts hesitate to treat tenure denial cases as they treat other employment
discrimination cases because of their perceptions regarding the nature of
tenure decisions. Judges consider the granting of tenure to be a lifetime
employment decision, and thus different than typical employment deci-
sions. Furthermore, judges differentiate between hiring or promotion

111. See supra note 110.
112. The Namenwirth court stated that there were no alternatives to this situation. 769
F.2d at 1243. One alternative, however, would be to place greater weight on the evaluation
of the plaintiff's work by extramural scholars. This would be akin to calling in experts in
other types of trials.
113. See supra note 110.
114. See United States v. Hinckley, 529 F. Supp. 520 (D.D.C.), aff'd, 672 F.2d 115
(D.C. Cir. 1982).
115. Interestingly enough, while judges profess a lack of expertise, they do not hesitate
to review the evidence of the plaintiff's qualifications. See supra note 56 and accompanying
text.
117. "In contrast to an ordinary teaching position, terminable at the end of any academic
year, and in still greater contrast to employment as a bricklayer . . . advancement to tenure
entails what is close to a life-long commitment by a university . . . ." Lieberman, 630 F.2d
at 64.
118. Id.
decisions and tenure decisions. Occasionally, judges do attempt to clarify the reasons tenure cases are treated differently than other Title VII cases.

In Zahorik v. Cornell University, the Second Circuit Court of Appeals offered five factors which purportedly set tenure decisions apart from other employment decisions: the lifetime commitment, the noncompetitive nature of most tenure decisions, the decentralization of decision-making, the many factors involved in making tenure decisions, and the great disagreement over these decisions. A close examination of these factors shows that they do not have the conclusory effect that the Second Circuit gives them.

The first factor is the lifetime commitment. The belief that tenure leads to lifetime employment is a major argument behind the deferential treatment of tenure decisions. While the original reason for granting tenure was lifetime employment, a tenured position is not a guaranteed one. Most tenured faculty can be released for “adequate cause” and during financial emergencies. In fact, it is more advantageous for colleges to release tenured faculty during financial emergencies because tenured faculty typically command higher salaries than nontenured faculty. Financial exigency also works against women seeking tenure. Therefore, while tenured

119. See generally Bartholet, supra note 23, at 947 (concludes that courts have left methods for choosing teachers, lawyers, and managers undisturbed even when they are little justified and discriminating). One exception emerges from Judge Swygert’s dissent in Namenwirth, in which he stated:

In any event, I do not see a qualitative distinction between a tenure decision and any other employment decision. The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet, especially in the blue-collar context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities.

Namenwirth, 769 F.2d at 1244 (footnote omitted) (Swygert, J., dissenting).

120. 729 F.2d 85 (2d Cir. 1984).
121. Id. at 92-93.
122. Lieberman, 630 F.2d at 64.
123. Edwards & Nordin, supra note 8, at 218-19.
124. It is commonly believed that junior faculty must be removed before tenured faculty in the event of financial difficulties. One commentator has noted, however:

No court has formally stated that tenured faculty must be given preference over non-tenured faculty in such situations. Tenured faculty may be removed for financial reasons. ‘No case indicates that tenure creates a right to exemption from dismissal for financial reasons.’ In the several cases that have been brought by tenured faculty members objecting to their removal for budgetary reasons, the courts have consistently held that tenure is subject to termination by the institution if the governing body determines that the financial need for doing so is bona fide, made in good faith, and the rules of the institution are followed in effecting the terminations.


125. When junior faculty members are dismissed, quite often female faculty members are released first. As one commentator has quite harshly noted:

Where there are women, though, the department speaks with a single voice: ‘Scuttle them first.’ Naturally, some of the women are married. These women—
positions do provide a modicum of security, they do not necessarily provide secure lifetime employment.\textsuperscript{126}

The next factor discussed in \textit{Zahorik} is the noncompetitive nature of tenure decisions. The incorrect manner in which judges portray this factor becomes evident after examining the context of the tenure decision. Under a typical tenure system, every faculty member placed in a tenure-track position is considered for tenure after a probationary period.\textsuperscript{127} Because a decision to grant tenure does not seem to affect others seeking tenure, judges consider the decision noncompetitive.\textsuperscript{128} However, tenure decisions made in a tenure-track system are not made in a vacuum. The number of tenured faculty members already in a department and the field of study of the faculty member in question are important in making a tenure decision.\textsuperscript{129}

When a department has a large tenured faculty, there may be a limit to future tenure grants in order to continually attract young and promising faculty members to that department.\textsuperscript{130} This makes tenure decisions much more competitive than judges portray them. If the decision is truly non-competitive, two equally qualified candidates should theoretically get tenure. However, in reality, either candidate may not receive tenure for nondiscriminatory reasons. A decision may be made on finances or the depth of the department. But, in the long run, there truly are a limited number of positions, making each faculty member a competitor. Thus, the tenure system is very competitive, and judges should examine closely si-

\begin{quote}
or so the men assume—have no right to work. Of course, many of their own wives are employed, but that is different; they need the extra money to get the kids through college. Married women faculty have no excuse. They just want to be contrary, to take bread from the mouths of the men’s starving families.

\textbf{B. Richardson, Sexism in Higher Education} 168 (1974).

\textsuperscript{126} See \textit{supra} note 9 and accompanying text.

\textsuperscript{127} \textit{Edwards & Nordin, supra} note 8, at 227.

\textsuperscript{128} \textit{Zahorik,} 729 F.2d at 92.

\textsuperscript{129} With respect to the field of study, there may be discrete fields within a discipline. If a government department at a small college has one faculty member teaching American political theory, it is doubtful that it needs another. Thus, a second faculty member with that expertise may not get tenure unless he or she can teach a different subject. It can be argued, however, that if a court examines this type of evidence, it would infringe on academic freedom. \textit{But see Comment, Academic Freedom vs. Title VII: Will Equal Opportunity be Denied on Campus?}, 42 Ohio St. L.J. 989, 1008 (1981) (university’s academic freedom is not abridged by court’s inquiry into hiring and promoting policies, as long as court’s investigation involves only whether decision was based on applicant’s merits and not correctness of decision).

\textsuperscript{130} This was an issue in \textit{Zahorik}, when one of the plaintiffs was considered for tenure in a department consisting of five faculty members. Three of the present faculty members were tenured. \textit{Zahorik,} 729 F.2d at 90. While the department originally voted 2-1 in favor of granting Dr. Glasser tenure, the negative vote was from the department chairman who “questioned whether it would be wise to grant a fourth tenure position in a department of only five members, thus blocking the upward path of more promising scholars.” \textit{Id.}
tutions where, under the guise of subjectivity, university departments have a record of discrimination against women.131

The third factor mentioned by the Zahorik court was the decentralization of tenure decisions.132 Tenure decisions are typically made by a combination of faculty committees and individual administrators. A tenure decision usually begins with a departmental faculty committee and then goes through other committees and academic administrators before a final decision is reported to the college trustees.133 While this type of decentralized system may be unique, it carries with it a danger of discrimination. Individuals who are further removed from the plaintiff than the original faculty committee can overrule a faculty committee decision. This danger materialized in Kunda v. Muhlenberg College.134 In Kunda, faculty committees recommended Ms. Kunda for tenure on multiple occasions, only to have the overseeing dean refuse to pass that recommendation on to the president of Muhlenberg.135 At Muhlenberg, the president always followed the dean's suggestions regarding tenure recommendations and, therefore, Ms. Kunda's nomination was stifled.136 In a system where one person can veto the opinions of a group, the risks of discrimination are higher than normal.137 One person's biases can be substituted for the decisions of a group. Because of this danger, judges should scrutinize decisions made in this manner, not defer to them.

The last two factors set forth by the Zahorik court—the extensive number of factors involved in making tenure decisions and the great amount of disagreement surrounding tenure decisions—are related because a great deal of the disagreement surrounding tenure decisions stems from the amount of weight given to the myriad of factors which go into these decisions. Different faculty members often consider different factors to be important and this can create great disagreements. One factor usually involved is winning the esteem of one's colleagues. In Namenwirth, the Seventh Circuit noted that one aspect of receiving tenure is winning the esteem of

131. This is not to say that the discrimination that occurs in these cases is all deliberate. While some of the cases have blatant discriminatory statements, such as the ones made in Timper, in which the chairman of Ms. Timper's department referred to the plaintiff as "a peach" and expressed surprise that the plaintiff's husband would allow her to pursue graduate studies, 512 F. Supp. at 391, most discrimination is not conscious.
132. Zahorik, 729 F.2d at 92-93.
133. See supra note 3 and accompanying text.
134. 621 F.2d 532 (3d Cir. 1980).
135. Id. at 536-38. Ms. Kunda was recommended for tenure by her academic department, then called the Faculty Policies and Personnel Committee. Her appeal to the Faculty Board of Appeals was successful, but again the overseeing dean did not take the recommendation. Id. This followed recommendations for promotion by the same groups. Id. at 538.
136. Id. at 535.
137. The type of situation that occurred in Kunda is not unusual in this system because of the levels of review a tenure decision must go through. But when, as in Kunda, the recommendation to the Board of Trustees only comes from one person, there is great danger that the views of the other groups involved in the decision will be ignored.
one's colleagues or "collegiality." The opinions faculty members hold are important in the way a candidate's qualifications are viewed. If winning the esteem of one's colleagues is considered important to a tenure decision, no manner of comparative evidence will suffice to prove the plaintiff's case because a decision can always be couched in terms of collegiality. Consequently, a stellar candidate may be rejected on grounds of collegiality. For a department that has discriminated against women in the past as the Zoology Department did in Namenwirth, it is safe to assume that a woman may never meet the collegiality standard promulgated by her predominantly male colleagues.

The amendments to Title VII make it clear that all positions in educational institutions are subject to the precepts of Title VII. Colleges are primarily concerned with the effect of the procedures surrounding Title VII lawsuits on the effectiveness of the review system and academic freedom. Tenure decisions are primarily made in closed meetings and records and documents used in making these decisions are confidential. An area of concern for colleges is that these materials will be included in discovery requests and introduced at trial. This might result in a complete disclosure of the methods used in tenure decisions and, more importantly, the factors certain faculty members use in reaching their decisions. Additionally, there is a fear that the use of these materials in court will inhibit the reviewers and, thus, compromise the tenure system. In some situations, faculty

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138. Namenwirth, 769 F.2d at 1244. The result of this view is frankly stated by the Seventh Circuit: "[I]n a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose." Id.
139. See supra note 108 and accompanying text.
140. See supra note 2.
141. In Lynn, the plaintiff was denied her tenure review file at the discovery stage. The college did release the file to the trial court for in camera inspection but continued to refuse to disclose the contents to the plaintiff. The court of appeals held that when the trial court did not merely determine whether the file contained privileged information but used the file as evidence, the plaintiff's due process rights were violated. Lynn, 656 F.2d at 1346.
142. It is suggested by some commentators that this disclosure will affect faculty members' approach to tenure decisions and compromise the system. Lee, supra note 56, at 302.

Nowhere is the expectation of confidentiality more important than in the appointive process. Because members must work with one another as peers over a number of years, and in the cases of decades, the utmost candor is essential in the evaluative process. Once a decision is reached, those who opposed as well as those who supported the decision must join together to carry it out. Confidentiality of the deliberations by members of the deliberative body and by those within the University to whom recommendations are transmitted is necessary for effective self-government of a university organized on a collective basis.

Id. at 302-03.

"Advocates of confidentiality also argue that experts outside the university who asked to review a faculty member's scholarship or research will either be reluctant to do so, or will soften their criticisms because the review may be made public." Id. at 308 (footnotes omitted).
members have been threatened with contempt of court in order to compel revelation of their vote and the reasons for that vote. This refusal to reveal the basis of a tenure vote relates to the special status courts give colleges and universities defending tenure denial cases. While there is certainly broad academic freedom in this country, the freedom to discriminate against women in hiring decisions is not included. In this respect, colleges are no different from factories. In contrast to this publicized claim of a chilling effect on reviewers is the possible chilling effect on female faculty members. If a department has consistently rejected feminists for tenure, women may conceal their views to gain tenure. One unfortunate result might be a lack of female faculty members interested in researching women's studies aspects of their fields.

Congress has chosen to make colleges and universities subject to the requirements of Title VII. If plaintiffs are not allowed access to the documents surrounding tenure decisions, Title VII protections for faculty members become useless. Without these records, it becomes virtually impossible for a plaintiff to bring a Title VII tenure denial case, much less win one. While there is the possibility of chilling the tenure committee's academic freedom, the societal interest in preventing discrimination and chilling a female professor's academic freedom is paramount.

V. Proposals

The McDonnell Douglas analysis does not effectuate the intent of Title VII in tenure denial cases. It allows lower court judges to defer to tenure decisions, thus enabling a college to conceal possible discriminatory motives for denying tenure. Its application renders useless the principles behind Title VII by effectively requiring women to prove that they are significantly more qualified than their male counterparts. When a woman can only show that she was equally qualified with male tenured faculty, she will lose in court, unless there were procedural abnormalities in the decision-making process. This is due to judicial deference. If the court will not review the substantive aspects of a tenure decision, the only option for a plaintiff is to challenge the decision-making procedures.

Title VII was meant to eradicate this kind of discrimination. If women cannot achieve higher level positions while courts defer to academic employers, Title VII offers no benefits. It is not the entry-level positions that

143. See In re Dinnan, 661 F.2d 426 (5th Cir. 1981), reh'g denied, 666 F.2d 592 (5th Cir. 1981), cert. denied sub nom., Dinnan v. Blonbergers, 457 U.S. 1106 (1982). In Dinnan, a professor refused to answer deposition questions concerning how he voted in the plaintiff's tenure decision. Id. at 427. The trial court held the professor in contempt. Id. On appeal, the Fifth Circuit Court of Appeals held that there was no academic freedom privilege attached to a vote on tenure. Id. at 432-33.

144. Discrimination against women's studies is not hypothetical. See Lynn, 656 F.2d at 1343.

145. Namenwirth, 769 F.2d at 1251 (Swygert, J., dissenting).
are closed to women but the positions with status in our society. Because Title VII does not distinguish between high-level jobs and other jobs, courts should not be given this discretion. Courts should strictly enforce Title VII, whether on the factory floor or in the faculty office area.

In order to make this area of the law more consistent with the underlying purposes of Title VII, some elements of the McDonnell Douglas analysis and the accompanying rationale must be eliminated. The major change in this analysis should provide that the plaintiff not have the ultimate burden of proof. Once a plaintiff can create an inference of discrimination, the defendant should be required to prove a lack of discriminatory motive rather than simply articulate a nondiscriminatory reason for denying tenure. This would shift the ultimate burden of proof and require the defendant to prove a lack of discrimination. The college would not only have to offer a legitimate, nondiscriminatory reason for denying tenure, but it would also have to prove that the reason offered is the reason the plaintiff was denied tenure.

The burden of the litigation would shift to the party that can best afford it, namely the defendant. Since the defendant already has possession of all documents concerning tenure decisions, it would be easier for the defendant to produce those documents than for the plaintiff to subpoena them. Shifting the burden would also force faculty members to define precisely the reasons for denying tenure and possibly force them to make the decisions less subjective because they may have to defend those decisions in court.

Shifting the burden of proof would also force colleges to ensure that the bases for granting tenure are known to faculty members. It is only natural to have severe emotional reactions to the denial of tenure, and as a result, much hostility can surround a tenure denial.

146. See supra note 2.

147. This is not to say that faculty members are not appraised of their situations during their probationary period. However, the shifting of the burden of proof may cause the school to give a more exact evaluation of the plaintiff’s deficiencies. This would enable the plaintiff to improve her skills. It may also prevent situations similar to the situation in Johnson, where the plaintiff had received positive statements concerning her performance and was then denied tenure. Johnson, 547 F. Supp. at 433.

148. One commentator has suggested that the loss of a tenure-track position can cause very deep emotions, similar to those experienced at the loss of a loved one. E.K. Abel, supra note 2, at 61.

The women reported a variety of motives for filing grievances. Several had been involved in the civil rights and antiwar movements, and they viewed the present protest as a natural extension of their earlier social activities. Many women described themselves as having a ‘combative personality’ or being unable ‘to pass up a good fight.’ A black interviewee stated: ‘All blacks learn that they have to keep fighting for what’s rightfully theirs.’ Almost one-half of the plaintiffs turned to the example of a female relative—an aunt, a mother, or a grandmother—who they characterized as a fighter. In addition, a number of women stated that they had been aware of the psychic costs of taking no corrective action; had
While shifting the burden to the defendants will increase their litigation costs, requiring that a college prove its reasons for denying tenure are legitimate is not a heavy burden. The intent behind Title VII is to benefit women and minorities by requiring equality in employment opportunities. Yet, the way courts treat tenure denial cases penalizes the plaintiff for trying to assert her rights. Title VII cases should not be handled in this way by the courts.

Realistically, it is doubtful that there will be a change in the way these cases are handled. The Supreme Court has previously rejected a shifted burden and with the present composition of the Court, it is doubtful that there will be a change in the near future. Another possible approach, therefore, is through legislation. Title VII should be amended to require that defendants prove they did not violate the precepts of the statute.

The language of this amendment could borrow from the McDonnell Douglas analysis. The plaintiff would first have to create an inference of discrimination. After the plaintiff creates this inference, the defendant must prove by a preponderance of the evidence that there was no discriminatory motive for the tenure denial decision. This would eliminate the third phase of the McDonnell Douglas analysis.

A clear statement of legislative intent on who should bear the burden of proof in these cases is necessary in order to effectuate the true purposes behind Title VII. It is true that, in most situations, the person bringing the action begins with the greater burden of proof because she has brought the defendant to court. It is clear, however, that the allocation of burdens in Title VII tenure denial cases presently places such a high burden on the plaintiff that the defendant is the one ultimately protected by Title VII, contrary to the meaning of and intent behind the statute.

VI. CONCLUSION

While disparate treatment claims under Title VII are supposed to follow the McDonnell Douglas analysis, courts have created a different analysis
for tenure denial cases. Courts avoid comparing the plaintiff’s credentials with other faculty members and concentrate solely on whether there was a procedural irregularity or blatant evidence of bias. Without showing procedural irregularity or blatant bias, the plaintiff will lose the case.

In order to guarantee the Title VII rights of female faculty members, the *McDonnell Douglas* analysis should not be used in tenure denial cases. Rather, the defendant should be compelled to prove by a preponderance of the evidence that there was no discriminatory motive behind the denial of tenure. Because it is doubtful that judges will change the *McDonnell Douglas* analysis, Congress must act in order to put some force behind the strong words it wrote in 1964. Without a change in the common law or statutory law, female faculty members will continue to work in our colleges and universities without the protections they are entitled to under Title VII.

*John Anthony Palombi*