An Oasis within a Desert Palace: 
Proving Sex Discrimination in the 
New Millennium

IHELG Monograph

06-01

Crystal Gafford Muhammad, J.D., Ph.D.
North Carolina State University
Department of Adult & Community College Education
300 N. Poe Hall, Campus Box 7801
Raleigh, NC 27695-7801
Crystal muhammad@ncsu.edu
919-515-6295 (w)
919-515-6305 (f)

$5.00 © Crystal Gafford Muhammad, 2006
University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLIC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions—with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute’s activities:

Higher Education Law Library

Houston Roundtable on Higher Education Law

Houston Roundtable on Higher Education Finance

Publication series

Study opportunities

Conferences

Bibliographical and document service

Networking and commentary

Research projects funded internally or externally
Running Head: Oasis within a Desert Palace

An Oasis within a Desert Palace:

Proving Sex Discrimination in the New Millennium

By

Crystal Gafford Muhammad, J.D., Ph.D.
North Carolina State University
Department of Adult & Community College Education
300 N Poe Hall, Campus Box 7801
Raleigh, NC 27695-7801
crystal_muhammad@ncsu.edu
919.515.6295 (w) 919.515.6305 (f)

Submitted to

The National Women’s Studies Association Journal

November 15, 2005
Abstract

The Supreme Court’s 2003 decision in Desert Palaces v. Costa is helpful for women faculty, as the case clarifies and effectively expands the type of evidence that can be used to prove sex discrimination in a case where legitimate and illegitimate reasons are used to curtail employment opportunities. Nevertheless, the law remains quite limited in its ability to provide remedy in cases where similar treatment results in variations in outcomes on the basis of sex.
Catherine Costa is a “trailblazer” (Desert Palace v. Costa, 2002, p. 844). She worked along Teamsters as the only woman in the warehouses of Ceasar’s Palace – until she was discharged for dubious reasons. In her case, Desert Palace v. Costa (2003), the Supreme Court clarified and effectively expanded the type of evidence that can be used in sex discrimination suits in cases where both legitimate and illegitimate rationales bolster adverse employment decisions.

Catherine Costa’s case is relevant to women faculty as sex discrimination in higher education takes many guises. While sexist banter and ideas regarding the capacities of men and women to succeed in academia persist, nuanced forms of sex discrimination produce challenges. This essay discusses the current state of the law regarding sex discrimination, focusing on the oasis provided in Desert Palaces v. Costa. This oasis lays in the Supreme Court’s allowance of both direct and circumstantial evidence to illuminate sex differences in workplace treatment. The first part of this essay presents a discussion of gender bias in the assessments faculty productivity in the areas of research, teaching, and service; how the subjectivity of hiring, promotion, and tenure processes within academia place women faculty at a particular risk for being treated differently than their male counterparts. The second part of this essay then narrows towards the frameworks of anti-discrimination law and the Supreme Court’s broadened acceptance of direct and circumstantial evidence when building a sex
discrimination case. Overall, the subtleties of sex discrimination in academia make it difficult to recognize, and once recognized difficult to prove to others. Thus, the Court's ruling in this area is liberalizing those against whom discriminatory employment actions are made. Yet, challenges in legal formulations remain, particularly in the area of proving the specific intent of an academic institution to discriminate when institutional policies adversely impact people on the basis of sex.

Part I - Sex Discrimination in the Evaluation of Faculty Potential and Productivity

A recent letter to the editor appeared in *The Chronicle Review*, telling a tragic story by way of quip about the failure of the chair of a hiring committee to put forth the name of an Ivy League applicant for an assistant professor position at an unnamed regional university. When the then Dean of Arts and Sciences, John K. Urice, asked the chair about this omission, the chair responded, "You saw her didn’t you....Well, there’s your answer...She was simply too pretty for this job, and she would have distracted the male students!" (Urice, 2005).

Beyond hiring, women in academia face a myriad of challenges. Chilly campus climates, perceptions of competence, professional development, mentoring; administrative support, pay equity, and family balance issues
influence the daily course on college campuses (Baer & Ummersen, 2005; Valian, 2004). While these factors significantly influence job satisfaction and the retention of women faculty (Baer & Ummersen, 2000; August & Waltman, 2004; Jacobs & Winslow, 2004; Rosser, 2004), the areas of sex discrimination I would like to focus on for purposes of this essay are those institutionally-initiated transitions over the course of one's work life: hiring, firing, promotion, and tenure. It is within this realm that there are subjectivities that allow for interjections of sex-biased attitudes which impinge on employment opportunities. These subjectivities coalesce around the evaluation of faculty performance in the areas of research, teaching, and service.

Research

In assessing the research productivity of faculty, individual institutions may have a targeted number of publications, primarily refereed journal articles and books, as well as grants, patents or copyrights one should have before tenure review (Fouad, et. al., 2000; Levin & Stephan, 1989). The amount of research and grant activity expected may vary by institutional type, with research extensive (R1) and research intensive (R2) institutions generally expecting more than masters comprehensive and liberal arts schools; however, the demands for research is increasing at institutions with less of a history of research (DiMaggio
& Powell, 1983; Jacobs & Winslow, 2004). At research institutions, in particular, research productivity is the key factor considered in faculty hiring, promotion, and tenure awards (Greene & Van Kuren 1997; Reis, 1997).

With respect to the quantifiable factors, the number of publications, grants, and so on, there is some evidence that overall men tend to publish more (Astin & Cress, 1998; Cohen & Gutek, 1991; Hensel, 1991; Jackson, 2004; Schiele, 1995). However, it may be the case that the fact of more publications by men is a function of pre-1970s time factors given the structural impediments inhibiting women’s access to doctoral degrees and later the professorate (Astin & Cress, 1998; Nettles & Pernal, 1995; Xie & Shauman, 1999). Of note, across the disciplines Nettles and Perna (1995) find women more productive in research than men when controlling for faculty rank and tenure status. In the area of grant productivity, nationally women’s research tends to be funded at the same rate as men, representing a 92% increase in awards to women PIs between 1988 and 1997 (Fouad, et. al., 2000). Given the overall assessment of the literature of women’s research productivity, the American Psychological Association’s (APA) report on Women in Academe chastises the higher education community for uncritically accepting the myth that women faculty are less prolific than men (Fouad, et. al., 2000, p. 34). By unwittingly perpetuating this myth we in higher
education may put women faculty in jeopardy, as the stereotypical expectation is that of less research productivity vis à vis men.

Yet, it is not merely the number of papers, scholarly presentations, refereed journal articles, and grants that count towards research productivity. Nuanced factors also play a role in the assessment of one's productivity. First, there are gender bias tendencies in the acceptance of manuscripts for publication, with the likelihood of publication higher if one has a male name (Goldberg, 1968; Swim, Borgida, Maruyama, & Meyers, 1989). Second, there is a particular bias in academia against feminists (Haddock & Zanna, 1994; MacDonald & Zanna, 1998) which may impinge on one's demonstrated research productivity.

In an evaluation of one's work quality, a hiring, reappointment, or promotion and tenure committee may consider the quality of the journals in which one publishes. "Quality" academic journals have the power to exclude as evinced by their low acceptance rates, which leads to many higher tiered journals being mainstream, androcentric in nature. To the extent that gender biases in publication exist, women may be marginalized in the publications process, publishing in lesser "quality" journals. This is an empirical proposition which can be tested in future research.

A committee may also consider the content of one's research. Looking specifically at the field of psychology, as an example, scholars such as Caplan &
Caplan (1994) and Grady (1981) document gender bias under-girding traditional research methods. Thus, opinions as to what constitutes “quality” research, especially when considering feminist methodologies, may also be laden with androcentric norms (Grady, 1981; Russo, 1999; Reinharz, 1992), resulting in biased assessments of work quality.

Teaching

While the value of quality teaching may vary across institutional contexts, since the 1990s there has been increasing attention to teaching effectiveness from constituencies external and internal to post-secondary education (Heller, 2001; Newman, Couturier, & Scurry, 2004; Reis, 1997). In this realm, teaching effectiveness is largely assessed by student evaluations and peer reviews. With respect to peer review and other measures of teaching performance such as portfolio assessment, there is little research generally, and the APA Women in Academe report found no research assessing gender bias (Fouad, et. al., 2000).

On the other hand, Centra (2003) found over 2,000 citations presenting research on the validity and reliability of student evaluations in the Educational Resources Information Center (ERIC) database. On the whole he assesses the literature to be positive, concluding that student evaluations are:
(a) reliable and stable; (b) valid when compared with student
learning and other indicators of effective teaching; (c)
multidimensional in terms of what they assess; (d) useful in
improving teaching; and (e) only minimally affected by various
course, teacher, or student characteristics that could bias results
(Centra, 2003, p. 496).

Yet, Basow (1998) finds that there is more variability by extraneous factors
in the evaluation of women faculty than men. Crader and Butler’s (1996)
assessment of the literature may be helpful in understanding this discrepancy.
According to Crader and Butler, student evaluations are largely a reflection of
the value alignment between student expectations and professorial delivery
(1996). In their own work, Crader and Butler find that teachers’ behaviors and
perceived abilities are the most important variables in student evaluations (1996).
To the extent that students perceive women faculty to be less credible, student
evaluations of teaching performance may be influenced by gender (Basow and
Silberg, 1987). Citing Basow (2000) and Basow and Silberg (1987), Louie and
Tom’s (2005) work lends support to the notion that male students, in particular,
tend to regard women faculty less highly than men. Additionally, Sandler (1992)
reports that students treat male and female faculty differently, holding women to
a stricter standard of professionalism and imposing more harsh negative
reactions to missed standards. Louie and Tom (2005) posit further that these gender biases have implications for reappointment, promotion, and tenure, and are especially dangerous to job status when student evaluations are used unreflectively by academic administrators (Fouad, et. al., 2000; Sproule, 2000).

In addition to differences in evaluations of effectiveness, there are significant differences in the teaching loads of faculty by gender. First, women are more likely to be employed at less-prestigious institutions and have heavier teaching loads (Fouad, et. al., 2000; NCES, 2000). Second, women are more likely to devote more time to teaching activities (Jackson, 2004; Valian, 2004) giving students more attention than male faculty (Fouad, et. al., 2000; Nettles, Perna, & Bradburn, 2000). The implication is that women make more time tradeoffs between teaching and research, rendering tenure attainment more stressful and contributing to higher tendencies of women to leave academia (Rosser, 2004).

Service

In the area of service, whereas men tend to find the greatest faculty rewards in good teaching and a prestigious research record, women additionally find service and civic engagement to be a significant component of work satisfaction (Astin & Cress, 1998; Viers & Blieszner, 2004). This tendency is significant in contexts where women are able to broaden opportunities for others
(Park, 1996; Twale & Shannon, 1996). Towards that end, women are more engaged in service to the college, the university more broadly, and the local community (Fouad, et. al., 2000; Jackson, 2004). Furthermore, the call for gender representation on departmental and college committees adds a further burden (Park, 1996), especially in fields where women are already underrepresented (Jackson, 2004).

The APA report specifically notes how the “wrong” type of service is “detrimental” women’s advancement in academia (Fouad, et. al., 2000, p. 36). According to the report, “[e]very minute spent in committee work is a minute that cannot be spent on scholarship” (Fouad, et. al., 2000, p.36). The report’s data, which are specific to the field of psychology, show that among whites, women tend to spend as much of their time on service as research, whereas men spend twice as much time on research than service (Fouad, et. al., 2000, p. 37). Most disturbing in these numbers is a finding that women spend almost half as much time on research than men. This pattern holds consistent for Hispanics, while there are variations for African Americans and to a lesser extent Native Americans who tend to spend more time on service than research.1 While the magnitude of these tradeoffs may vary by disciplines outside of psychology, similar patterns seem evident across disciplines (Astin & Cress, 1998). As

---

1 Among Asian Americans, both men and women tend to spend less time on service relative to research (Fouad, et. al., 2000, p.37).
research is more valued, especially in research institutions where few fail to
make tenure for lack of service, and women tend to devote more time to service
than men, service commitments can disadvantage women in the tenure process.

**Beyond Research, Teaching, and Service**

Beyond embedded biases within the evaluation of faculty productivity in
the areas of research, teaching, and service, there are some subjectivities that are
too nuanced to name in any kind of systematic manner. Due to these
subjectivities, courts may be more likely to extend the general deference to the
educational judgments of institutions across the education spectrum to the
context of faculty employment decisions. According to the Second Circuit, “[o]f
all fields, which the federal courts should hesitate to invade and take over,
education and faculty appointments at a University level are probably the least
suited for federal court supervision” (*Faro v. New York University*, 1974). In
short, the courts generally do not like to second-guess educational institutions;
the case of hiring, reappointment, promotion, and tenure seems no different.
Thus, the successful challenge of sex discrimination in academia is rare.

Here an example out of the case law may be illustrative. The case of
*Sweeney v. Board of Trustees of Keene State College* (1978) involved the two time
failure of Keene State College, a division of the University of New Hampshire, to
promote Dr. Christine Sweeney to a full professor of education position. The
courts noted that Sweeney's career at Keene State evolved swimmingly until
1971, when she was selected by a departmental committee to accompany a group
of students to England, as part of a study abroad – student exchange program
(Sweeney, 1978, p. 172). Without divulged rationales, Dean Clarence Davis of the
College of Education testified that he did not permit Sweeney to travel with the
exchange program, upon the recommendation of the program's coordinator,
who happened to be a woman (Sweeney, 1978, p. 172).

Subsequently, during the 1972-1973 school year, Sweeney was
recommended for promotion to the position of full professor, but was denied
unanimously by committee composed of all men. This conclusion was affirmed
by Dean Davis and no reasons for the denial were specified (Sweeney, 1978, p.
173). Sweeney appealed, soliciting outside letters of support to no avail. The
next year, because of the circumstances of her promotion denial and the
uncertainty as to the influence of the exchange program incident on that denial,
Sweeney was reconsidered without reapplication, but was rejected again. While
a committee of faculty at the university level, one member of which was a
woman, decried the unprofessional treatment of Sweeney, they could not
attribute her treatment solely to sex discrimination (Sweeney, 1978, p. 173).
Upon further pressing in cross-examination, the Dean divulged that in his opinion Sweeney,

had narrow, rigid, and old-fashioned views, tended to personalize professional matters, kept minutes of the graduate faculty meetings which fell below a professional caliber, and emphasized to her students the importance of maintaining an even height of window shades in a classroom (Sweeney, 1978, p. 173-174).

In analyzing the total set of circumstances, the First Circuit found that Sweeney should have been granted tenure the first time around. From the time she was denied promotion until three years later when she was promoted to full, she made no remarkable achievements, nor changed her work habits other than successful attainment of a Right to Read grant (Sweeney, 1979a, p.178 n.18).² There were no challenges to her credentials or scholarly contributions, as admitted by Keene State’s President Leo F. Redfern (Sweeney, 1979b, p. 111, n.7) and the Dean’s letter supporting her ultimate promotion alluded to her “good” teaching evaluations (Sweeney, 1979b, p. 112). There were some questions regarding the amount of service given to the College,³ however, it was

---

² While attainment of a grant may be part of tenure considerations nowadays, in the 1970s grants were generally a bonus, not a qualification for promotion.

³ Note that within a research university concerns regarding one’s service is a red flag for pretense as service ranks low on the rationales for reappointment, promotion, and tenure of faculty in research institutions (Fouad, et. al., 2000).
demonstrated that Sweeney was active in the University’s faculty senate and gave service to the state through service on the New Hampshire Board of Education’s Professional Standards Board (Sweeney, 1979b, p. 111). In fact, in the records supporting Dr. Sweeney’s ultimate promotion, the Dean referenced her "good record of service to her department and to the College," as well as service to the State (Sweeney, 1979b, p. 112). Thus, with respect to the measurable realms of professional productivity, Christine Sweeney was qualified upon her initial application for promotion to full in 1973.

With respect to the subjectivities, the Dean’s initial assessment of Sweeney as “narrow-minded,” “rigid,” and “difficult to deal with” was disputed by other faculty at trial (Sweeney, 1979b, p. 111). Sweeney brought in evidence of her ability to work with many different people in a variety of contexts, including colleagues. Moreover, her personality quirks were not raised as part of the documentary history of Sweeney’s tenure, granted in 1972. For these reasons, the First Circuit found these subjectivities as trivial, pretexts for discrimination.

Sweeney’s case exemplifies the type of idiosyncrasies that can emerge even when a woman reasonably meets productivity expectations in the realms of research, teaching, and service. There is wide latitude to find legitimate reasons to not hire, promote, or tenure a woman in the academic context, without resorting to blatant, direct evidence of sexism, such as Dr. Urice’s recount of the
"too pretty" otherwise highly qualified candidate. The reason is that sex bias is embedded within quantifiable measures faculty productivity. Furthermore, the institutional cultures which perpetuate the use of biased quantifiable measures also allow for subjective judgments regarding one's personality, "fit," collegiality and so on. This latter set of factors is particularly amenable to sexist attitudinal influences.

As nuanced sexism is probably the more dominant in academic culture, the Supreme Court's liberalization of evidentiary standards in proving discrimination in the case of Desert Palaces v. Costa (2003) is helpful for women building a case of discrimination along the legal frame of disparate treatment theory. The latter half of this article explains prior constraints on the type of evidence that can be brought in disparate treatment cases and how the Court's ruling in Desert Palaces is particularly beneficial for women in academia.

Part II - The Law Related to Sex Discrimination in Disparate Treatment Cases

The federal prohibition against sex discrimination in employment is anchored in Title VII of the Civil Rights Act of 1964. Title VII states that it is unlawful for an employer

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 (42 U.S.C. § 2000e-2(a)(1), 1964).

There are two types of discrimination with which the statute and subsequent regulatory promulgations are concerned. Disparate impact discrimination involves discrimination that occurs due to the differential impact of neutral rules on individuals on the basis of race, religion, sex, and so on. An example of disparate impact is the role of tenure rules on women of childbearing years: "six-years up or out" requires a different set of tradeoffs for women of childbearing age than similarly-aged men. The facial neutrality of these rules render disparate impact discrimination difficult to prove as the legal constructs require a finding of fault. For this reason, the courts require a showing of a specific intent to discriminate – a memo or testimony indicating purposeful actions on the part of an employer to burden one sex over the other (Washington v. Davis, 1973). This order generally is a tall one for those bringing sex discrimination claims.

However, as the title of this section suggests, the focus of this article is disparate treatment discrimination. It is within the arena of disparate treatment theory that the Supreme Court has made moves towards liberalizing evidentiary standards in Desert Palaces v. Costa (2003). This section begins with a definition of
disparate treatment discrimination and the historical approach in building a
case under the *McDonnell Douglas* framework. The section then proceeds to a discussion of “mixed motives” disparate
treatment cases and the confusion in evidentiary allowances established through
Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*. In that
opinion, O'Connor states that direct evidence can be used to prove disparate
treatment in mixed motives cases; a statement interpreted to mean that only
direct evidence, to the exclusion of circumstantial evidence could be used. Last,
this section presents the case of *Desert Palaces v. Costa* and the Supreme Court's
resolution of the direct-circumstantial evidence debate.

**The Historic Legal Approach to Disparate Treatment**

Disparate treatment involves situations in which had the person been
male rather than female (or vice versa, e.g. *Mississippi University for Women v. Hogan*, 1982) the adverse employment decision would not have been made: i.e.,
she would have been hired, promoted or tenured; had a contract renewed; or,
not have been fired. This was in fact the finding of *Sweeney*, which was based
upon law and evidentiary constructs articulated in the *McDonnell Douglas* case.

The Supreme Court's 1973 decision in *McDonnell Douglas Corporation v. Green* put forth a four prong test to establish a case of discrimination under a
theory of disparate treatment. As the case arose in the context of racial
discrimination, the *McDonnell Douglas* framework states that a plaintiff must show

i) that he belongs to a racial minority; ii) that he applied and was qualified for a job for which the employer was seeking applicants; iii) that, despite his qualifications, he was rejected; and iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications (*McDonnell Douglas Corp. v. Green*, 1973, p. 802).\(^4\)

After a plaintiff, the one bringing a discrimination claim, puts forth evidence of each of the above elements, the defendant college or university can then bring rebuttal evidence, showing non-discriminatory reasons for its actions. It is then up to the plaintiff to show that the rationales proffered by the college/university are merely pretextual (Sullivan, 2004).

Under *McDonnell Douglas*, circumstantial or “indirect” evidence is sufficient to prove disparate treatment when it is a clear case of discrimination.

---

\(^4\)As both racial and sex discrimination are governed by Title VII of the Civil Rights Act of 1964, the Court has extended its analysis in *McDonnell Douglas* to the sex/gender context, as well as beyond hiring to include promotions and firings. Additional modifications incorporate the idea that members of dominant groups can be discriminated against among others (Sullivan, 2004). Thus, so long as race, sex, religion, or one or more of the other categorizations listed under the statute are factors in an adverse employment action, then a case for discrimination to be built.

Note the androcentric language articulated by the Court. The language subsumes that people of color discriminated against are/would be male and/or encapsulates men and women of color under masculine pronouns. This latter point highlights the invisibility of women of color in the law.
What I mean by a clear case here is that race, religion, gender, or other impermissible consideration is the sole difference between the person hired, promoted, or fired and the person who was not. In this vein, the definition of discrimination in law and economics is the inexplicable variation in outcomes between people of different demographic characteristics (Sullivan, 2004). In law, the idea is that “but for” one’s race, sex, national origin, age, and so on, work opportunities would have been more favorable.

Under the *McDonnell Douglas* framework, a plaintiff can use statistics and other evidence regarding the culture within an employment setting, to show the “but for”: how hiring, promotions, and lay-offs varies around factors such as race and gender. This is circumstantial evidence or “evidence in a trial which is not directly from an eyewitness or participant and requires some reasoning to prove a fact” (Hill & Hill, 2005).

As Hill and Hill (2005) note, circumstantial evidence receives a bum rap perpetuated through television legal dramas. However as Justice Thomas notes, pieces of circumstantial evidence are constructed together to build many criminal cases; cases wherein to convict, jurors must be certain beyond all reasonable doubt that the accused committed the act (*Desert Palaces*, 2003, p. 100). Certainty standards in civil suits, such as sex discrimination suits, are less onerous: a mere preponderance of evidence, a showing that an event was more likely than not.
In terms of composition, circumstantial evidence may include memos and other documents that are probative of discrimination. This may include statistics regarding hiring, firing, promotion, and tenure decisions that show a pattern of differential treatment on the basis of sex. While the statistics do not prove that a particular individual was discriminated against, it can be probative of patterns of differential treatment. Other circumstantial evidence in the academic context may include climate studies on a particular campus as well as evidence from witnesses to campus climate issues.

For example in the *Sweeney* case, Christine Sweeney used statistical evidence in her case against Keene State that revealed double standards with respect to the salaries, hiring, and promotion of male and female faculty. In Sweeney’s particular case, the district court held that even if she were a man, given her qualifications, time at Keene State, and rapport with colleagues, she probably would not have been promoted (*Sweeney*, 1977). There was evidence that there were men with a longer tenure at Keene State who were employed at the lower ranks for a longer duration than Sweeney, some of whom were denied promotion and/or tenure on their first try (*Sweeney*, 1979a, p.178-179). Thus the fact that there is general institutional discrimination may not satisfy a court’s inquiry as to a particular case. As such it is important that in addition to general statistical and climate information, there must be evidence regarding how a
particular woman is treated differently vis-à-vis her male peers. In Sweeney's case, evidence was brought to trial that there were inconsistencies between the denial of her promotion for personality reasons and documentary supports for her tenure and ultimate promotion to full. Moreover, Sweeney was able to enlist the aid of colleagues to dispute both challenges to her service record and questions about her personality (Sweeney, 1979b).

Note also that a pattern of discrimination is not disproved by inconsistencies to the pattern (Sweeney, 1979a). In Sweeney's case, her salary was higher than that of some men of her status and credentials, but not others. In assessing the totality of the circumstances, however, the First Circuit found that there was a general discriminatory atmosphere wherein a balance of all the facts showed that "but for" her sex, Sweeney would have been treated differently (Sweeney, 1979b, p. 112-113).

Finally, the involvement of other women in the adverse employment decision-making process does not negate a case of sex discrimination. It was at the initiation of a female administrator that Sweeney was denied participation in the study abroad program, that another woman actually went, and that there were women serving on committees regarding her status. One woman served on the university's committee reviewing the College of Education's procedures upon Sweeney's first promotional denial and the other sat on the College's
committee reviewing Sweeney's dossier for her ultimate promotion. If these facts were significant in the district court's understanding of the case, the court seems to make one or both of the following fallacies. First, there may be an assumption that women will not discriminate against other women (Goldberg, 1968). While woman-woman discrimination may be less frequent than male-female or other across group discrimination, but when asserted as an absolute, the proposition that within group discrimination does not occur is false (Sullivan, 2004). On the other hand, the court may assume that women on the promotions committee and the University's review committee had enough power to influence decisions. As both women were the sole female representatives, regardless of their status within the university, under such circumstances they were likely tokens, having the constraints of token status (McDonald, Toussaint, & Schewiger, 2004; Sekaquaptewa & Thompson, 2003).

In sum, circumstantial evidence can be used to prove a general pattern of discrimination, yet specific evidence that could indicate discriminatory treatment in one's particular case is also important. In building that pattern, individual inconsistencies do not disprove the trend, and the presence of women decision-makers does not abrogate the university's otherwise discriminatory actions.

**Mix-ups in Mixed-Motives Cases**
In contrast to the clear circumstantial evidentiary approach in *McDonnell Douglas*, the Supreme Court’s divided majority opinion in *Price Waterhouse v. Hopkins* (1989) introduced controversy as to whether circumstantial evidence would be sufficient in what the Court calls “mixed motive” cases. In mixed motive cases, there is a mixture of legitimate reasons for impinging on one’s employment opportunities with illegitimate, discriminatory considerations of race, sex, religion, and so on. While the *McDonnell Douglas* framework accounts for an employer proffering non-discriminatory rationales for adverse employment decisions, it does so under the guise of pretense: that the non-discriminatory rationale is “window dressing” for an otherwise sexist, racist, age-ist, etc. decision on the part of an employer or an atmosphere in which sexism, racism, and age-ism are pervasive. The latter is illustrated in *Sweeney*.

Theoretically, mixed motives cases contrast from those in which pretense is involved because the rationales offered by the employer are understood to bear on business operations. In *Price Waterhouse v. Hopkins* (1989), Ann Hopkins was denied promotion to the position of partner within the Price Waterhouse firm. Hopkins’ accomplishments were deemed “outstanding” and no other partnership candidates were similarly successful in business. Yet, the partners and other staff, even her supporters, viewed her as overly aggressive at times, lacking interpersonal skills (*Price Waterhouse*, 1989, p. 278). Within these negative
characterizations was clear evidence of gender bias. According to the Court, descriptions of Hopkins by partners included “macho,” having a need to overcompensate “for being a woman,” and a direction to “take ‘a course at charm school’” (Price Waterhouse, 1989, p. 234). Ultimately, her candidacy was put on hold, with the suggestion that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” in order to be promoted (Price Waterhouse, 1989, p. 235).

Hopkins’ promotion denial occurred within a context where the promotion of women was limited. Of the 662 Price Waterhouse partners at the time of the suit, 7 were women, and Hopkins was the sole woman of the 88 candidates put forth for partner that year.

While the district court could not overlook the culture of sexism in promotions at Price Waterhouse, it could not ignore what it saw as legitimate considerations. Staff members found her abrasive and she was generally (Price Waterhouse, 1989, p. 235).5 As these limitations were acknowledged even by her supporters, as a manager she was likely to have difficulty with staff and other subordinates.

---

5 Query whether these negative interpersonal skills are also factors of impermissible stereotyping? There is research in the business literature regarding perceptions of interpersonal skills, and varied receptivity to men and women with strong personalities (e.g., Hare, Koenigs, & Hare, 1997). In fact the real difference between the Sweeney case and that of Hopkins is that Hopkins could not find one person to corroborate that she worked well in the organization. The issue of interpersonal skills is also raised in Desert Palaces v. Costa.
Weighing the situation as a whole, the district court found and the Supreme Court affirmed that Ms. Hopkins was discriminated against on the basis of her sex. In its weighing, the Court puts forth that in a mixed motive case, the illegitimate factor in an adverse employment decision must be a "substantial" or "motivating factor" in order to recover under Title VII (Price Waterhouse, 1989, p.249). This reading of the law was codified through the Civil Rights Act of 1991 (42 U.S.C. § 2000e-2(m), 1991).

The Supreme Court's decision in Price Waterhouse was a divided vote of 5-4, wherein a concurrence by Justice O'Connor stated that illegitimate factors could be shown by "direct evidence" (1989, p. 276). The direct evidence in Hopkins' case included the memos and testimony indicating a need for her to be less masculine, more feminine. The direct evidence requirement by Justice O'Connor took on its own life, and subsequent cases and law review articles explored differences in proving disparate treatment under the McDonnell Douglas circumstantial evidence approach and the Price Waterhouse direct evidence framework (Sullivan, 2004).

In contrast to circumstantial evidence, direct evidence is "real, tangible or clear evidence of a fact, happening or thing that requires no thinking or consideration to prove its existence" and usually takes the form of eyewitness testimony and written documents, but can also include audio or video
communications (Hill & Hill, 2005). In practical terms memos, emails, and other written communiqués that are of themselves examples of sex discrimination can serve as direct evidence. Direct evidence in this format is fairly reliable if it can be authenticated. Thus it is important not only to save everything while building a sex discrimination case, but also to document the context of acquisition. In this vein, a regularly kept journal can be helpful. Also note that in the case of email, even emails deleted and expunged from university accounts can be retrieved.

Eyewitness testimony is also direct evidence; however, its reliability can be more questionable. In the above example, should Dr. Utrice testify to that direct communication with the chair that too would be direct evidence.

However, a judge or jury would have to weigh the credibility of Dr. Utrice and the reliability of his recollection. Quoting the 1957 case of Rogers v. Missouri Pacific Railway Co., Justice Thomas in Desert Palaces v. Costa writes

"[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence" (2003, p. 100). One way to make testimony seem more reliable is through journaling: specific details of transactions hinting of differential treatment including dates, times, and conversational content.

Stories that openly display sex bias, such as that of the “too pretty” faculty candidate are probably more rare than pervasive in academia. In fact, the First
Circuit in *Sweeney* notes “[p]articularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available” (1979a, p. 175). Moreover, the subjectivity embedded in faculty review processes by their nature render it easy to generate and substantiate rationales to support adverse employment decisions. For this reason the Supreme Court’s 2003 decision in *Desert Palace v. Costa* provides an oasis for women disparately treated in academia.

**The Oasis in Desert Palace**

*Desert Palace* (2003) bridges the *McDonnell Douglas* and *Price Waterhouse* lines of cases. Along the *McDonnell Douglas* line, there are cases in which an adverse employment decision is clearly discriminatory. In these cases it is apparent that but for one’s sex, she would have received an employment offer, been promoted, tenured, or not fired. A case falling in this category is the situation involving the “too pretty” faculty candidate. In these cases, circumstantial evidence is sufficient in building a case. However, most cases are more nuanced, containing both legitimate and illegitimate rationales for an adverse employment action. These mixed motives cases, followed *Price Waterhouse*, and required a showing of direct evidence of sex discrimination. This is no longer the case after *Desert Palace v. Costa* (2003).
A warehouse worker operating forklifts and pallet jacks for Ceasar’s Palace and Casino in Las Vegas, the Ninth Circuit in Desert Palace v. Costa states emphatically that Catherine Costa “is a trailblazer” (2002, p. 844). Costa’s work was evaluated as “excellent” to “good,” with her supervisor testifying that “[w]e knew when she was out there the job would get done” (Desert Palace, 2002, p. 844). Costa was the only woman on the job and over time she noticed differences in treatment with respect to opportunities for overtime and was cited for minor incidents such as tardiness (as little as one minute late), unauthorized lunch breaks, and profanity usage. To make matters worse, one supervisor “stalked” her, seeking to find further errors and her disciplinary file was stacked and at least one citation found to be fabricated (Desert Palace, 2002, p. 845). While there was testimony that she got along with most people on the job, Ceasars’ management consistently depicted her as "strong willed," "opinionated," and "confrontational," (Desert Palace, 2002, p. 845-846). In addition to these gender “neutral” characterizations and disciplinary citations, Costa was subject to numerous blatantly sexist characterizations: “the Lady Teamster”, “bitch”, and “fucking cunt,” having “more balls than the guys” (Desert Palace, 2002, p. 845).

Costa was fired after an altercation with a colleague regarding her reporting his unauthorized lunch break. He cornered her in a warehouse elevator and bruised her arm. Both were disciplined after she reported the
incident and it was investigated. Ceasars’ investigation concluded that the situation amounted to a factual dispute, giving him a five day suspension and firing Costa. She filed suit.

Given what was perceived as both gender neutral “legitimate” and discriminatory reasons under-girding Costa’s termination, the Supreme Court in Desert Palace had its first chance to address the direct – circumstantial evidence debate. Here the Court resorts to statutory construction noting that Title VII specifies only a demonstration that inappropriate factors were at play, without reference to the type of evidence. Whether circumstantial or direct, so long as a preponderance of the evidence points to a finding that an impermissible factor was considered in an adverse employment decision, then an employment act is unlawful. For women in academia, this is the oasis. Given the sex-bias of institutional environments and the prominence of subjectivities in employment decisions, evidence of institutional patterns of discrimination will count in court, even when there are alleged legitimate reasons for adverse employment actions.

This evidentiary allowance should aid in the ability of women who are discriminated against to be recompensed. With respect to the Desert Palace case, the Supreme Court affirmed the Ninth Circuit’s opinion which supported a jury’s verdict that Costa was discriminated against. For her troubles, the jury
awarded Costa $200,000 in compensatory damages, $64,377.74 in back pay, and $100,000 in punitive damages (Desert Palace, 2002, p. 863-864).

Conclusion

The Supreme Court’s ruling in Desert Palace provided an oasis, not only for Catherine Costa, but for women in the workplace generally. This case is of special significance to women in academia, as the subjective nature of the hiring, promotions, and tenure processes are likely to yield rationales for adverse employment decisions which on their face may seem legitimate.

Across institutions of higher learning in the United States, female students outnumber men, and the numbers of women faculty on campus are growing, albeit at a slower rate. These trends, among others, leave many to believe that sex discrimination a condition of the past, making sex discrimination even harder to prove to a jury of peers. Yet behind the scenes within an androcentric, politically correct nature of many academic environments, illegitimate reasons on the basis of sex influence who we hire, who we promote, and who gets tenure. Few institutions will leave behind “smoking” memos or memoirs of faculty members “too pretty” to hire. Towards that end, the ability use circumstantial evidence, statistical evidence, as well as rich description of the workings of sex
bias within a given institution, is helpful towards the making of a case of sex
discrimination under disparate treatment theory.

For the future, faculty can employ their research skills to help in the
substantiation of the global case of sex bias in faculty employment decisions.
First, in terms of identifying where sex bias turns into a discriminatory action,
there is a need for cross-institutional research on management-committee power
relations within academia, as well as analyses of within committee deliberations.
Second, a merger of research on the marketization of higher education with work
on how tenure rules commodify, standardize, faculty a legal argument can be
made that the rationale for subjective judgments in faculty employment
decisions is limited. Additionally, there would be less of a reason to entertain
judicial deference to academic institutions. Finally, evidentiary hurdles in
proving disparate impact litigation is a consummate quest for legal scholars: the
Court’s decision in Desert Palaces leaves unaddressed a vast desert of sex
discrimination in which policies and procedures are sex/ gender neutral in tone,
but differentially affect the lives of men and women in academia.
References

Statutes & Case Law:


Faro v. New York University, 502 F.2d 1229, 1231-32 (2d Cir. 1974).


Sweeney v. Board of Trustees, 604 F.2d 106 (First Cir. 1979), cert. denied, Board of Trustees v. Sweeney, 444 U.S. 1045 (1980).

Sweeney v. Board of Trustees, 569 F.2d 169 (First Cir. 1978).


Books, Reports & Journal Articles:


