Review Essay:

Academics In Court,
The Consequences of Faculty Discrimination Litigation

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At the height of his fame, Oscar Wilde, the celebrated 19th century novelist and playwright, ruined his career by initiating a libel action against the Marquis of Queensberry. On February 28, 1895, Wilde, who had recently returned from Algeria, where he had been vacationing with Lord Alfred Douglas, visited his club, the Albermarle, at about five in the afternoon. Upon arrival, Wide was handed a card which had been left for him by the Marquis of Queensberry. The words on the card were "To Oscar Wilde posing as somdomite" (sic). (The Marquis, the father of Lord Alfred Douglas, had previously accused Wilde of having an affair with his son.) Wilde subsequently consulted with a solicitor, and on March 1st, he filed a libel action. On March 9th, Queensberry was arrested on a charge of libel and was later released on bail. Wilde subsequently departed for a vacation in Monte Carlo.

Upon his return from Monte Carlo, Wilde learned that Queensberry's agents had been able to persuade a number of underworld figures, with whom Wilde had been associated, to testify against him. Nevertheless, Wilde continued to press his claim. During the ensuing libel trial, Wilde was forced to make several damaging admissions which included violations of the morals code. Wilde was subsequently charged with various criminal offenses under the Criminal Law Amendment Act of 1885. During the three weeks before his trial, Wilde was forced to declare bankruptcy and the contents of his house were sold at public auction. After the conclusion of the criminal prosecution, Wilde was found guilty and sentenced to two years of imprisonment with hard labor. The convic-
tion ruined Wilde's career and personal life. Wilde died two years later a broken man.¹

Academics In Court The Consequences of Faculty Discrimination

Litigation examines the impact of the litigation process on the lives and careers of the faculty involved in the proceedings. The most striking feature of this study is the dramatic and inordinately negative effect that such litigation has on the lives of the plaintiffs. The faculty plaintiffs who were studied in the book were usually drained emotionally and financially by the litigation; their professional lives were destroyed and they usually lost their cases.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2000e-17 (1976), details discrimination in employment on the basis of race, color, religion, sex, or national origin. Prior to 1972, colleges and universities were exempt from the anti-discrimination provisions of Title VII.² In 1972, however, Congress eliminated the exemption by modifying section 702.³ With this amendment, the clause exempting institutions of higher

¹ R. Croft-Cooke, The Unrecorded Life of Oscar Wilde (1972).

² Prior to 1972 section 702 contained the following language:

This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of , individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities, or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

³ Section 702 now states:
education was eliminated and they became subject to Title VII. Because of the 16 year history of the amended section 702, litigation alleging employment discrimination against colleges and universities is a relatively new phenomenon. Only one case was decided during the entire decade of the 1960's. By the 1970's, however, there were 145 decisions by federal courts involving academic discrimination cases. During the 1980's, an average of thirty-four academic employment decisions have been issued each year.

In Academics In Court, the authors surveyed all of the reported academic cases for the period 1972 through 1984. Their survey shows, among other things, that 156 cases were decided on procedural or jurisdictional grounds. In this group, the plaintiffs prevailed in fifty-eight cases. The defendants prevailed in seventy-seven cases and the twenty-one remaining cases were split decisions in which both parties won and lost on different issues. In the 116 cases that were decided on the merits, the plaintiffs prevailed in only thirty-eight cases. 4

Most of the reported cases involved discrimination claims asserted by individual white females against predominantly white institutions. Forty-seven of the 116 cases decided on the merits fell within this

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

4 G. La Noue & B. Lee, Academics In Court The Consequences of Faculty Discrimination Litigation 13 (1987) (hereinafter Academic In Court).
category. Ironically, the most successful group of plaintiffs have been whites who have sued predominantly black institutions. Plaintiffs in this category prevailed in eight of the twelve cases included in the survey. In contrast, minority plaintiffs who sued predominantly white institutions almost always lost.  

To measure the impact of the litigation process in the faculty setting, the authors developed a set of case studies in which the effects of the litigation on the parties involved were analyzed in detail. Focusing on five cases, the authors sought to probe beneath the decisions issued by courts. To accomplish their goal, the authors developed a series of research questions and mailed them to all of the named plaintiffs in cases that were decided on the merits (Cases decided on procedural and jurisdictional grounds were excluded). In total, 110 plaintiffs were contacted and fifty responded. The questionnaires were followed-up by telephone calls. The authors also sent questionnaires to university attorneys in order to determine the importance of employment discrimination litigation from the perspective of each of the defendant institutions.

To analyze the data received, the authors developed a framework which they used in their examination of each case. The factors included within the framework were:

(1) the triggering incident;

(2) the perception of alleged discrimination;

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(3) problem evaluation and informal consultation;
(4) use of internal remedies;
(5) settlement or litigation decisions;
(6) litigation preparation;
(7) pretrial impacts;
(8) trial impacts;
(9) decision impacts and
(10) post-trial impacts.

The authors believed that this framework provided a chronological and analytical focus for examining changes in issues, actors, tactics, and impacts as each case progressed.\(^6\)

The resulting material accomplishes the authors' objectives in an impressive fashion. The case studies reveal a wealth of information that cannot be found in reported decisions. In each case, the litigation had a dramatic effect on the lives of the plaintiffs. The plaintiffs endured years of protracted proceedings which drained them emotionally and financially and strained family relationships. None of the plaintiffs anticipated the time and resources that would be required. In the two instances in which the plaintiffs obtained favorable judgments, only one remained in higher education. The other prevailing plaintiff found it necessary to enter another profession. In the other cases, the plaintiffs' professional reputations were irreparably tainted. One plaintiff was forced by the expense of the litigation to petition for bankruptcy.

\(^6\) G. La Noue & B. Lee, Academics In Court The Consequences of Faculty Discrimination Litigation 14-16 (1987).
Another suffered a fatal heart-attack not long after losing his trial. In almost every case, the burden and expense of the proceedings clearly outweighed the recoveries which were secured by the plaintiffs.

The impact of the cases on the attorneys for the plaintiffs was almost as significant and negative as it was on the plaintiffs. Attorneys who were employed by law firms left their employment at least partially as a result of their involvement in the faculty cases. Partnerships dissolved, and most of the attorneys who represented plaintiffs reported that they would not accept any new faculty discrimination cases.

The high costs of faculty litigation may be partially attributable to the heavy burden of proof. Plaintiffs in Title VII cases bear a difficult evidentiary burden because to prevail they must prove that an employer's actions were motivated by racial or sexual animus. Since this frequently involves proving a subjective state of mind, direct evidence of discrimination is often not available. Consequently, the plaintiff is usually required, through what amounts to a process of elimination, to present evidence which refutes all of the legitimate motives that an employer may have had for its employment decision. Once this is done, the judge can reasonably infer that the employer's decision was prompted by discriminatory motives.

In academic cases, this difficult burden is made even heavier by the doctrine of academic deference. This principle requires courts reviewing academic decisions (such as awarding or denying tenure) to accord deference to the expertise of academics. This principle is based on the notion that recognized scholars in a particular discipline are the only people who have the expertise to evaluate academic issues.

As one court explained:
There are so many legitimate factors which must be considered in determining the salary of a college professor that it would be most difficult, if not impossible, to apply the same rule of standard applicable to an industrial assembly line. The standards set by Colleges and Universities as to qualifications for employment and promotion and salaries and benefits of faculty members are matters of professional judgment and [a] court should be slow to substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.


In view of these extraordinary evidentiary hurdles, it is not difficult to begin to understand why the odds are weighed so heavily against academic plaintiffs. Each of the cases featured in Academics In Court tells its own, often tragic, story. In the first case, a female professor's vocal efforts to secure equal rights for women may have resulted in the denial of her request for tenure. In another case, a court affirmed the non-renewal of a black male's teaching contract despite an unrefuted showing of a hostile work environment and repeated episodes of racial harassment. Two other cases involved successful challenges to old-boy networks which operated by excluding women from the tenured faculty. In both of these cases, however, the plaintiffs paid very high prices for their victories. One plaintiff only received $5,000. Another prevailing plaintiff found it necessary to pursue another profession. In the only clear victory, the female plaintiff won only because she had the complete support of the entire faculty.

Each of these cases is discussed separately in the following sections of this review.

The Crusader Who Became A Martyr To Her Own Cause
In Lieberman v. Gant, the plaintiff, a female English professor, was hired by the University of Connecticut shortly after receiving her Ph.D degree. Lieberman was appointed to a part-time position in 1967 and began to serve in full-time positions beginning in 1968. Although her initial requests for a tenure-track appointment were denied, she received an appointment to a tenure-track position in 1970. By the fall of 1972, the University's regulations required the English Department to consider Lieberman for promotion and tenure.

The University of Connecticut's promotion and tenure regulations provided for a multi-step review which follows the peer review process that is used by most universities. At the first level of review, a departmental promotion and tenure committee prepared a preliminary evaluation. The tenured faculty later voted to adopt or deny the joint

7 474 F. Supp. 848 (D. Conn. 1979), aff'd, 630 F.2d 60 (2d Cir. 1980).

8 Unlike other large organizations in which the authority to select employees is delegated to one or two management-level individuals (sometimes subject to an approval at a higher level), tenure-track positions at colleges and universities follow a process that is probably unique to higher education. Selection, promotion and tenure of university faculty requires approval by a majority of the tenured faculty within a department. Department approvals are usually subject to review by the dean of the college, and there may be a separate committee at the college level which is also involved in the process. If a large university is involved, the academic vice president or provost (as that person is sometimes designated) must approve the appointment. The university's president is normally involved as an approving authority and the authority for final approval is vested with the boards of trustees. This peer-review process is grounded on the notion that recognized scholars in a particular discipline are the only people who have the expertise and experience to judge the academic potential of a candidate. The Lieberman case provides an example of this peer review and administrative approval process.
committee's recommendation. After receiving the committee's report, the department chair prepared a separate recommendation and would submit the candidates file to the dean of the college of arts and sciences.

The dean would later assess the candidate's qualifications and submit his evaluation, along with the other recommendations, to the University's academic vice president. The vice president would prepare a recommendation and submit it to the president. The president would subsequently add his recommendation and submit the candidate's file to the University's board of trustees for final approval.

In Lieberman's case, the votes were close but negative at every level. As a result, the board of trustees decided to deny Lieberman's request for tenure. Lieberman initially reacted by seeking an internal review of the tenure denial. This process involved reconsideration at each level involved in the original peer review process. The various committees and administrators reconsidered Lieberman's request but they all decided to affirm their original positions.

At this juncture, Lieberman decided to abandon her efforts to reverse the decision through the University's internal procedures. After retaining the services of an attorney, Lieberman filed a lawsuit in the United States District Court. Lieberman alleged defamation of character. Lieberman also claimed that she had been denied tenure because of her vocal efforts to secure equal opportunities for women. Lieberman filed a separate complaint of sex discrimination with the Equal Employment Opportunity Commission (EEOC) and, after receiving authorization from the EEOC, amended the District Court complaint to include a claim of sex discrimination.
The case proceeded through discovery and was later set for trial. The trial proved to be unusually long and complex. It began on April 20, 1976, and ended more than two years later, on May 26, 1978. Because Lieberman had joined the trustees and several university administrators as individual defendants, twenty defense attorneys were involved in the case. Several faculty members and a number of expert witnesses testified during the trial.

Lieberman claimed, among other things, that she had been the victim of sex discrimination because she had been judged more harshly than her male colleagues. At the conclusion of the trial, the judge ruled that Lieberman had not been judged by different standards and that any raising of standards which may have occurred resulted from a general University effort which was not directed at Lieberman. The court also held that Lieberman had not been penalized for advocating equal rights for women and that she had not been defamed by the individual defendants. The case came to an end after eight years of litigation, when the Court of Appeals upheld the trial court's verdict.

Although the authors do not explicitly reach this conclusion, it is not entirely surprising that Lieberman encountered difficulties with her colleagues. It is likely that the faculty felt, from the outset, that Lieberman had been foisted upon them. The English Department did not recruit Lieberman. Rather, Lieberman was placed in the Department as an accommodation to the University's efforts to recruit her husband who was a noted scholar in another field. The Department was reluctant to place her in a tenure-track position; it relented only after twelve other candidates refused its offer. During the period in which she was employed by the University, Lieberman either organized or joined several
groups which were devoted to women's issues. She was the co-chair of a
group which released a report which was critical of the University's
hiring record on the eve of a campus visit by the Civil Rights Division
of the Department of Health, Education and Welfare. The Office of Civil
Rights later issued a report which was highly critical of the Universi-
ty's treatment of minorities and women. Lieberman was also involved in a
successful effort to gain a women's locker room in what had previously
been an all-male gymnasium. These actions must have made Lieberman a
pariah in the eyes of her colleagues.

Title VII contains a provision which makes it unlawful for employers
to take retaliatory actions against plaintiffs who engage in "protected
activities," i.e., filing complaints of unlawful discrimination or taking
other actions to vindicate legitimate employment rights. Furthermore,
university professors enjoy the additional protection afforded by the
doctrine of academic freedom. The principle of academic freedom prevents
universities from retaliating against professors who advocate controver-
sial or unpopular views. Despite these prohibitions, Lieberman may have
become an unwitting martyr to her own cause. Although the court did not
believe that the faculty's attitudes towards Lieberman were caused by her
efforts to seek equal rights for women, the evidence suggests that there
may have been a connection between her activities for women's causes and
the tenure denial. During the trial, defense witnesses testified that
there was concern about Lieberman's "behavior in the department." Some
of her colleagues testified that she was "abrasive" or "aggressive."
Others described her as "strident." These statements make it clear that
the members of the English Department were not very comfortable with
Lieberman's deportment. If these attitudes resulted from Lieberman's
activities on behalf of women's rights Lieberman was the victim of sex discrimination.

Additional suggestions of sexual bias can be found in the reaction of Lieberman's colleagues to her research. Lieberman's research focused on women's issues. When Lieberman was being considered for tenure, there was considerable debate as to whether women's issues were a legitimate academic endeavor. Since several colleges and universities now have programs that are devoted to the study of women's issues, there seems to be little doubt that the topic is a legitimate area for scholarly research. Since Lieberman's personality and the subject matter of her research played a role in the tenure denial, the court should have taken a harder look at the faculty's motivations. If, as the evidence suggests, the tenure denial was the result of Lieberman's feminist activities as opposed to legitimate academic concerns, the court should have concluded that Lieberman was the victim of sex discrimination.

The litigation had a devastating effect on Lieberman's career and finances. During the pendency of the litigation, Lieberman was unable to find a permanent teaching position in an institution comparable to the University of Connecticut. She was a visiting professor during the 1974-75 academic year at Wesleyan University. She applied for teaching positions throughout New England, and she even applied for work at detective agencies, but she was not successful. She ultimately found a part-time job teaching an evening course at the University of Rhode Island. She was forced to give that position up when she went to work for a computer company to raise the funds needed to pay the costs of her appeal. Lieberman also worked as a kindergarten assistant at a religious school and taught United States history to twelfth graders at a salary of
$1,500.00 per year. Lieberman later taught a course for one semester at a community college and also had a one-year teaching position at a small college. Lieberman eventually abandoned her efforts to find a full-time position teaching college level English and enrolled in a creative writing and painting program at Brown University. Because of a substantial legal bill which included an award of $25,000 in costs to the defendants, Lieberman petitioned for bankruptcy.

The Lieberman case provides an example of the courts' reluctance to intervene in academic disputes as well as the professional and financial ruin that employment litigation can cause. Regardless of any doubts that may be raised by the courts' treatment of the legal questions, it remains clear that Lieberman would have been in a far better position if she had not decided to challenged the tenure denial.

A Unified Faculty Takes On The Administration

In Kunda v. Muhlenberg College, the plaintiff, Connie Rae Kunda, had been hired as an instructor in the physical education department of Muhlenberg College in Eastern Pennsylvania, in 1966. At the time she was hired, Kunda held a bachelor's degree in physical education, and she had taught in local public schools for eleven years. Shortly after the president of the college assumed office in 1969, he began to take steps to upgrade the quality of the faculty. The new president's efforts to upgrade faculty quality and to respond to shifting student preferences effectively halted tenure-track appointments. These and other changes

implemented by the president created campus tensions which were ultimately reported by the local press.

In the fall of 1971, the chair of the Physical Education Department recommended Kunda's promotion (without tenure) to assistant professor. The faculty personnel committee's evaluation resulted in an evenly divided vote, and the president later recommended against promotion. In the fall of the following year, the department chair renewed his promotion recommendation. This time, the faculty personnel committee concurred with the chair's recommendation. Nevertheless, the president declined to recommend the promotion and the board of trustees adopted his recommendation.

During the next academic year, 1973-1974, the department chair recommended promotion and tenure, and the faculty committee voted unanimously to adopt the chair's recommendation. Although Kunda now had the complete support of the faculty, the administration did not follow the faculty's lead. The dean recommended against granting tenure. The president agreed with the dean, and Kunda was later informed that she would not be awarded tenure. Kunda sought review through the college's internal grievance process. An appeals board recommended that the president appoint a special committee to reconsider Kunda's case in light of various irregularities which it had identified. The special review committee later voted unanimously to recommend tenure. Despite this endorsement, the president held firm and requested the board of trustees to deny tenure. The board ultimately adopted the president's recommendation.

After a dissatisfactory effort in the local county courts, Kunda filed a complaint with the Equal Employment Opportunity Commission. She
also hired two Philadelphia attorneys who were willing to take her case on a contingency fee basis. A civil action was filed in the United States District Court. Pre-trial discovery was long and arduous. Lengthy sets of interrogatories were exchanged and several depositions were taken. The trial began on May 10, 1978, and it lasted only four days. Several witnesses, including some of the most senior and respected faculty members, testified on Kunda's behalf. In addition, two male faculty members who were denied tenure testified that they were warned that a master's degree was a tenure requirement. This testimony corrobo-rated Kunda's claim that male faculty were advised of the degree require-ment and that she had not been so informed. The defense relied on the testimony of administrators. During this stage of the trial, the college president conceded that he had not advised Kunda of the degree require-ment. Moreover, Board members testified that instead of deferring to the faculty's academic judgment, they had made their own determination that Kunda did not possess the equivalent of a terminal degree.

In October of 1978, the trial court issued a ruling in Kunda's favor. The judge held that although the degree requirement was neutral on its face, it was, in reality, a pretext for sex discrimination because it had not been consistently applied prior to 1969. The Court also held that the college had discriminated against Kunda with respect to promo-tions because it had previously promoted male faculty members without requiring master's degrees. The Court also ruled that while the college could legitimately condition tenure on the receipt of a master's degree (since males who failed to secure masters' degrees had also been denied tenure), Kunda had been treated differently from similarly situated males because she had not been warned of the degree requirement. Based on
these findings, the Court ordered Kunda's reinstatement, back-pay and attorney fees. The court also granted tenure contingent upon Kunda's securing a master's degree within two academic years of the judgment.

Although the authors do not discuss this point, it is not clear that courts can award tenure as a remedy for a Title VII violation. Therefore, the award of conditional tenure generated a great deal of interest in academic circles and the college appealed. Amicus briefs were filed in support of both sides. In 1980, however, the United States Court of Appeals for the Third Circuit affirmed the trial court's decision (with one judge dissenting). After noting that the faculty has the primary responsibility for evaluating tenure candidates, the court held that the trial court had ruled correctly, and it affirmed the award of conditional tenure.

Some inferences that are not stated by the authors can be drawn from the Kunda litigation which may help to explain its outcome. A new president attempted to implement changes by raising the standards of the college. Since tenure-track positions had been put on hold, departments within the college were unable to function as they had prior to the president's arrival. This unexpected change created tension between the faculty and the administration, a relationship which is often less than relaxed in the best of circumstances. In addition to a strained relationship with the faculty, the president was also confronted with episodes of student protest.

In light of these conditions, the Kunda litigation may have provided a frustrated and perhaps angry faculty with a convenient vehicle by which to strike back at an unpopular president. Fortunately for Kunda, her case against the college came at a time when the faculty and the
community were receptive to her complaints. Unlike the plaintiff in Lieberman, Kunda was not challenging a unified faculty and administration. Here, the faculty and administration were at odds and their conflict probably contributed to the faculty's support of Kunda's position. Kunda was apparently well regarded by her colleagues, and it seems clear that their support was instrumental to her success. Kunda, the only plaintiff who clearly benefitted from the litigation process, returned to work in 1979 and received her master's degree in 1980. In 1987 she was promoted to full professor.

Enduring A Hostile Work Environment

In the Fall of 1970, Nolvert Scott, a black male, joined the University of Delaware's faculty as an Assistant Professor of Sociology. Scott received a Ph.D. degree from Pennsylvania State University and had taught for eight years at various Canadian colleges and universities. The University of Delaware had a history of excluding blacks from the student body and the faculty. The institution had been racially segregated by law until 1950 and it had not permitted black students to room with white students in university dormitories until 1961. By the time Scott's discrimination trial began in 1976, the undergraduate student population was only 3.4 percent black, compared to the states black population of 12 percent.

Scott's first two years at the University were marked by racial incidents, one of which involved a claim by a student that Scott had been observed lying on the campus grounds with a liquor bottle in his hands. In another incident, Scott was offended when an administrator stated that he didn't look or act like a black person. On another occasion, a faculty member stated that Scott had been hired as mere "window
dressing." Scott's relationships with students were difficult. He received hate mail and students complained about his teaching methods. Enrollments in his classes dropped. When he was evaluated at the conclusion of the second year, his colleagues were not satisfied with his research or his teaching record. Accordingly, the department faculty voted against the renewal of his contract.

Because Scott believed that the non-renewal of his contract had been based on racial animus, Scott filed a complaint with the EEOC. After an on-campus investigation, the EEOC agreed and concluded that there was reasonable cause to believe that Scott had been the victim of discrimination. Scott subsequently retained the services of a Delaware law firm which had a history of successfully representing plaintiffs in civil rights cases. A lawsuit was filed on Scott's behalf and on behalf of a class of similarly situated blacks.\textsuperscript{10} Scott's trial began on April 4, 1977. It concluded approximately three weeks later on April 26th.

During the trial, Scott presented the testimony of several witnesses who testified about the incidents of racial harassment. Although the trial court did not dispute this evidence, it concluded that Title VII had not been violated because there was no causal nexus between the racial incidents and the faculty's decision to decline to renew Scott's contract. Scott also claimed that he had been subjected to disparate treatment and identified four separate examples of faculty members with

similar teaching and research records whose contracts had been renewed.\textsuperscript{11} Two of the three comparators were employed by the English Department. The judge accepted the explanation offered for their cases — that renewals in that department were automatic. Furthermore, the two English professors in question had been terminated at the end of the second contract period based on their lack of scholarly productivity.

The other comparator, Professor Nohara, was also employed by the Sociology Department. The University's witnesses explained that after Professor Nohara had been hired, the Sociology Department's emphasis had changed from teaching to research. Since Professor Nohara had been assigned a substantially heavier teaching load than Professor Scott, the University argued that it had not been discriminatory to allow Professor Nohara an additional contract term to satisfy the faculty's expectations for scholarly productivity. The court found this explanation credible. With regard to the remaining faculty member whose contract had been renewed beyond the normal terminal year, the court held that there were legitimate, non-discriminatory reasons for the University's actions.

In connection with the class action, Scott claimed that the University's hiring and promotion practices had a discriminatory impact on blacks in two ways: (1) the Ph.D. requirement resulted in a disproportionately low number of blacks on the faculty; and (2) the decentralized and subjective employment decision-making system was disadvantageous to

\textsuperscript{11} Disparate treatment occurs when a employer treats members of a protected group less favorably than its other employees. If a plaintiff establishes a pattern of disparate treatment, a court can infer that the employer's conduct is motivated by racial or sexual animus.
blacks. If an employer requires qualifications which exclude an inordinate number of women or minorities, the employer must show that the qualifications are reasonably related to the work to be performed. On this issue, the trial court, after considering the University's evidence, held that the knowledge and skill required to secure a Ph.D. degree were reasonably related to the ability to think creatively and to perform scholarly research. The court also concluded that there was an adequate nexus between a Ph.D degree and the ability to teach graduate students. As a result, the court concluded that the Ph.D. requirement was not a violation of Title VII.

In the case of the second class action claim, the challenge to the decentralized and subjective employment system, the court found that the University's employment system was not the cause of the limited number of black faculty members. During the trial, the University presented evidence of extensive but unsuccessful efforts to recruit black faculty. On the basis of this evidence, the court determined that the University's conservative reputation and its unattractive geographic location were the actual reasons for the low percentage of black faculty members. For these reasons, the court entered a judgment for the University.

Scott appealed the trial court's decision to the United States Court of Appeals for the Third Circuit. The EEOC and NAACP filed briefs urging reversal. Two days prior to the presentation of oral arguments, Scott died of a heart attack at the age of 45. The claims for reinstatement and punitive damages abated with Scott's death but the remaining claims survived. The Court of Appeals issued a decision which held that the trial court's decision on Scott's individual claim was adequately supported by the evidence presented during the trial. With respect to the
class action, the Court of Appeals held that Scott had not satisfied the numerosity requirement of Rule 23.\textsuperscript{12} Therefore, the trial court's judgment on the merits of the class issue was vacated. The Court of Appeals later denied a request for rehearing and on October 29, 1979, and the United States Supreme Court denied a petition for a writ of certiorari which had been filed on behalf of Scott's estate.

Although the authors do not note this, there is at least one aspect of the Scott decision in which the court's analysis was faulty. During the trial, Scott presented unrefuted evidence of a pattern of racial harassment. The court acknowledged the harassment, but it concluded that there was no causal nexus between harassment and the decision to deny Scott a new contract. This analysis is simply incorrect. If a plaintiff is subjected to a hostile work environment and his employer fails to take corrective action, the employee is entitled to relief under Title VII. Thus, contrary to the court's conclusion in Scott, a causal nexus between the incidents of harassment and the decision to deny contract renewal was not required to find a violation of Title VII. Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). For example, the plaintiff in Rogers, a Hispanic, did not claim that she had been deprived of any tangible job benefits. Rather, she claimed that by giving discriminatory service to its Hispanic clients, the firm created a discriminatory and offensive work environment.

\textsuperscript{12} Rule 23 of the Federal Rules of Civil Procedure allows class actions when the class is so numerous that joinder of all members is impractical; the questions of law and fact are common to the class; and the class representative will adequately protect the interests of the class members.
for Hispanic employees. The Fifth Circuit then concluded that the employer had violated Title VII, explaining that "terms, conditions, or privileges of employment" is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination.13

In a case somewhat similar to Scott, Lincoln v. Board of Regents of the University of Georgia, 697 F.2d 928 (11th Cir. 1983), the Court of Appeals for the Eleventh Circuit affirmed a district court's entry of judgment in favor of a female professor who was subjected to a hostile work environment based on episodes of student harassment. It is difficult to understand how the trial court could fail to apply the hostile work place principle in Scott, given the unrefuted evidence of harassment presented at the trial and the court's own conclusion that the University of Delaware's history and conservatism made it an unattractive place for blacks. If the appropriate legal analysis had been applied in Scott a different result may have been obtained.

Penetrating The Old Boy Network

13 See e.g., Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (Though employee could only prove isolated incidents, a pattern of offensive ethnic slurs would violate his Title VII rights); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-515 (8th Cir.), cert. denied, 434 U.S. 819 (1977) (segregated employee eating clubs condoned -- though not organized or regulated -- by on employer violated Title VII by creating discriminatory work environment); Gary v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (pattern of racial slurs violates Title VII rights to a nondiscriminatory environment).
In Mecklenberg v. Montana State University, the plaintiff, Helen Mecklenberg, received a bachelor's degree in chemistry from the University of Montana in 1951. After taking several years off to marry and raise a family, she decided to pursue a Ph.D. degree at the University of Montana's School of Agriculture. After she received the doctorate, Mecklenberg obtained a three-year post-doctorate appointment. At the conclusion of the post-doctorate appointment, she received a one-year instructorship in the Department of Zoology and Entomology. When Mecklenberg learned that similarly situated males had received appointments at the assistant professor level, she protested and her rank was upgraded to assistant professor.

Mecklenberg later moved to the Biology Department where she received a series of one-year appointments. After she was told that her University of Montana background was too narrow, Mecklenberg spent a year performing research at the University of Miami. When she returned in 1973 and re-applied for promotion to associate professor, Mecklenberg was informed initially that she was ineligible because of her recent return. She was later advised informally that someone in the administration disliked her.

The University of Montana operated on an informal tradition of handshakes and trust. The salary and promotion process at MSU was controlled by the department heads who exercised broad discretion. Promotion and tenure decisions were handled by a standing committee of the president's forum, yet, the affected department head attended all

meetings which concerned promotions from his department. By 1973, however, a women's faculty group began to hold regular meetings on campus at which they discussed their concerns about the University's attitudes toward females. This group ultimately decided to take formal actions to redress their grievances. In 1974, after receiving a right to sue letter from the Department of Justice, a class action was filed in the District Court which alleged that the University had established an employment system which denied equal opportunities to females. Specifically, the complaint alleged sex discrimination with regard to hiring, promotion and salaries, and it also asserted that females had been subjected to unlawful retaliation for their activities.

When the case came to trial, Mecklenberg's department chairman testified that she had not been promoted based on a meager research record and average teaching performance. This testimony was undermined when he admitted, on cross-examination, that he had recommended Mecklenberg for a promotion on one occasion and a raise without a promotion in another instance. The chairman also conceded that he had not given Mecklenberg an explanation for the promotion denial despite a faculty handbook requirement that he do so. Mecklenberg also presented statistical evidence which showed that seventy percent of the male faculty members with sixteen or more years of experience were full professors while only forty-two percent of the female faculty members who had the same years of experience had achieved that rank. Furthermore, seventy percent of the males who had sixteen years of experience and masters degrees were full professors compared to the fifty percent ratio of similarly situated females.
At the conclusion of the trial, the court entered a judgment for the plaintiffs. The Court concluded that women were victims of discrimination in the areas of promotion, tenure, selection, salary and appointment to important committees. The court held that the promotion process was too vague and subjective to avoid sex discrimination. It also held that women were disproportionately concentrated in the lower ranks; that they were paid less than males; and that they did not participate in the University's decision-making process. The court rejected the University's contention that Montana's climate and location were unattractive to women. Although a notice of appeal was filed, the University eventually decided to negotiate a settlement.

Settlement negotiations resulted in the development of a master plan which was designed to redress the inequities. Under the plan, quotas for female representation on university governance committees were established. The University's affirmative action plan was revised and strengthened. An ad hoc promotion review committee was established which was designed to rectify the problems in the promotion of women. Thirty females and eight males applied for promotions. The committee ultimately recommended promotions for seven women and two men. A faculty equity team was formed to make salary adjustments. Salary disparities were adjusted by pairing female faculty members to the male faculty members whose fields, educational levels and experience most closely resembled that of the paired females.

Despite the victory for the class members and the far-reaching relief accorded by the settlement decree, the named plaintiff's recovery was relatively limited. Helen Mecklenberg received a promotion and five thousand dollars in back pay. She now believes that her salary has
fallen behind the salaries of comparable colleagues and that she will never be promoted to full professor.

Rajender v. University of Minnesota, 15 involves another challenge to an old boy network which operated to exclude females from the tenured faculty. Shyamala Rajender, a native of Madras, India, received a bachelor's degree in chemistry in 1949. A few years later, she decided to pursue a graduate degree in the United States. She obtained a master's degree from the University of Wyoming in 1961, and she received a Ph.D. degree in 1965. Rajender was originally employed as an assistant professor by the University of Wyoming. In 1966, Rajender took a leave of absence from the University of Wyoming after accepting a one-year post-doctorate fellowship which had been offered by the University of Minnesota. At the conclusion of the first appointment at Minnesota, she received another one-year contract at the same level. At the end of the second contract term, Rajender accepted a third post-doctorate appointment. In 1969, Rajender was hired as an assistant professor on a temporary basis.

In 1968, the University appointed Robert Hexter to serve as the chairperson of the Chemistry Department. Hexter was given a mandate to upgrade and centralize the department. Hexter was also responsible for recruiting candidates for nine vacant faculty positions. Letters of solicitation were sent to several institutions and the positions were heavily advertised. Rajender applied for a position, but she was not seriously considered for any of the nine tenure-track positions.

During the same period, Rajender was moved involuntarily to four different offices. Rajender also concluded that she was not getting adequate laboratory space or research support. Moreover, during faculty meetings, male faculty members stated openly that hiring a woman would lower the department's image. The faculty member who had served as Rajender's mentor admitted in a letter to a research foundation that she had been as productive as the male faculty members. After expressly acknowledging the existence of "male prejudice" within the Chemistry Department, he went on to state "she is really disadvantaged - as a woman - at the University."\(^{16}\)

Convinced that she was the victim of race and national origin discrimination, Rajender filed a complaint with the University's newly created ad hoc committee on discrimination. She also filed a complaint with the Department of Health Education and Welfare. After the ad hoc committee concluded that the Chemistry Department had discriminated against Rajender, the department's chair prepared a detailed response which refuted the committee's decision. The committee's findings and the chairman's response were eventually sent to the University's president for resolution. After reviewing the matter, the president concluded that the Chemistry Department had discriminated against women in the past but had not subjected Rajender to any discrimination.

The president subsequently referred the dispute to the judicial committee of the faculty senate. That committee later held an eviden-

\(^{16}\) G. La Noue & B. Lee, Academics In Court The Consequences of Faculty Discrimination Litigation 183 (1987).
tiary hearing which lasted two days. After the conclusion of the hearing, the four-member panel disagreed. Two members sided with the Chemistry Department. The other two members found evidence of discrimination. The panel agreed, however, that Rajender had not sustained her overall burden of showing that the denial of a tenure-track position resulted solely from sex and national origin discrimination.

After she received the University's final decision, Rajender filed a complaint with the EEOC, and she later filed a civil action in the United States District Court alleging discrimination on the basis of sex and national origin. The complaint was amended to include class action allegations, and the trial court eventually certified a class which consisted of approximately 1300 female employees. On the same day that the class certification order was entered, the trial court judge scheduled a "pilot trial" - a mini-trial which would be limited to the individual claims asserted by the named plaintiff. After a series of settlement efforts failed, the pilot trial began in April of 1978, five years after the original complaint had been filed.

During the trial, the University's president conceded that the chances of women being hired by the Chemistry Department were minimal, and the department chair's testimony also damaged the University's defense. As a result, the attorneys for both sides developed a draft settlement decree and submitted it to the parties for approval. After the University officials objected to the draft decree, the pilot trial was reconvened. When the trial resumed, the University's defense began to deteriorate. Testimony by the University's affirmative action officer sharply contradicted earlier testimony by the chair of the Chemistry Department. The affirmative action officer testified that contrary to
the chairman's statements, there were, in fact, several qualified females in the field of chemistry. She also stated that the absence of women in the Chemistry Department was attributable solely to anti-female bias. Shortly after the conclusion of this testimony, the University decided to settle the case.

A consent decree was negotiated and submitted to the court for approval. The decree required the University to establish a comprehensive affirmative action plan and to create sex-neutral evaluation criteria. The decree also required the development of an equal employment committee within the faculty senate, and to establish a mechanism for the resolution of the claims of individual class members which involved evidentiary hearings before special masters. Rajender, who had left the University and obtained a law degree during the pendency of the litigation, received a cash award of $100,000. The attorneys for the class received a two million dollar fee award.

Although $100,000, is a substantial amount of money, it seems doubtful that it adequately compensated Rajender for the losses that she suffered. Rajender endured years of what must have been humiliating treatment, and her challenge to the University's actions took years to complete. In view of the sacrifices that she made to secure her Ph.D degree and the lengths to which she went to obtain post doctorate credentials that she hoped would satisfy her colleagues, Rajender's decision to abandon chemistry must have been the result of utter frustration. Thus, even with the substantial cash award, Rajender was not "made whole" by the judgment in her favor. 17

17 Title VII does not provide for punitive damages.
Nevertheless, Rajender may be able to take some solace in the lasting results of her efforts. Her case caused permanent change in the employment practices at the University of Minnesota. Dozens of women and men are the beneficiaries of her efforts. By waiting so long to settle the case, the University substantially diminished its bargaining position and was forced, as a result, to accept something tantamount to academic receivership. Under the consent decree, the appointments and promotions process is controlled largely by forces external to the University. The process is extremely cumbersome, and it impinges on the academic judgments of the faculties.

The financial consequences of the litigation were also substantial. The court awarded 2 million dollars to Rajender's attorneys and dozens of faculty members received cash settlements. Since Rajender's attorneys devoted hundreds of hours to the litigation, it is reasonable to assume that the University's attorneys devoted a comparable amount of time.

The mistakes made by the University of Minnesota should serve as a model of what universities should not do when they are confronted with a legitimate claim of discrimination. This case dragged on far too long, and the University paid an inordinately high price for the intransigence of a single department. If the University's administration had handled this case differently, it could have settled for a fraction of the financial costs and avoided the administrative nightmare contained in the consent decree.

CONCLUSION

The case studies presented in Academics In Court raise serious questions about the adequacy of the remedies provided by the anti-discrimination statutes. Individual plaintiffs, even highly educated and
reasonably affluent academics, usually cannot afford to bear the severe economic burdens imposed by protracted litigation. Although Title VII requires losing defendants to pay attorney fees and costs to prevailing plaintiffs, the interim expense of proceeding with litigation (possibly for several years) is far more than most plaintiffs can afford to pay. Deposition costs, witness fees, document reproduction expenses, and the high cost of expert witnesses can easily run the cost of a single case into the tens of thousands of dollars. When that amount is added to the costs of hiring an attorney, it becomes clear that the cost of litigation is beyond the means of most university professors.

Moreover, most plaintiff's attorneys cannot afford to undertake a discrimination case on a contingency basis. Unlike personal injury cases, the likelihood of prevailing in a discrimination case is difficult to evaluate at the outset. Employment discrimination cases are complex usually requiring several dispositions, the review of reams of personnel records and other documents. The strength or weakness of a particular case cannot be determined until a substantial amount of discovery has been obtained. With the exception of the most successful commercial firms (which do not normally represent Title VII plaintiffs), there are not many law firms that can afford to forego billable hours to devote time to a project in which the payment of a fee is uncertain. Consequently, putative plaintiffs in faculty discrimination disputes must decide whether they can afford to seek vindication by the courts, irrespective of the merits of their individual claims.

Although not expressly stated by the authors, it is not difficult to understand why only one of the plaintiffs remained in higher education. The professional stakes involved in employment litigation are probably
greater than the financial risks. In academia the number of qualified applicants almost always exceeds the number of available positions. Therefore, the selection of a candidate for a tenure-track position is the result of a highly competitive process. Selection, however, is only the first of a series of hurdles. Although the details may vary from institution to institution, tenure is normally awarded years after the initial appointment on the basis of the candidate's teaching ability, scholarly research and community service.

If a faculty member challenges a denial, the individual involved must prove that his or her academic credentials were as good as those of similarly situated colleagues, and that the denial was based on race, sex, age or national origin. To defend themselves, the tenured faculty must state why they found the plaintiff's scholarship and teaching performance inadequate. Several unpleasant things occur during this process. First, the plaintiff's record is scrutinized by attorneys who, with the aid of their academic clients, search for every weakness that can be found. Every negative student evaluation and every unflattering comment ever made by a colleague is presented in a courtroom for all the world to see. A permanent public record is created. Moreover, since the press often finds these kinds of disputes newsworthy, a plaintiff's neighbors and acquaintances learn the intimate details of the plaintiff's private affairs.

In addition to the public airing of private matters, professional and personal relationships can be deeply affected. Deposition and trial testimony are some of the most vexing circumstances that an individual can experience. It is not likely that these unpleasant episodes will ever be forgotten by the witness who experiences them. It is reasonable
to assume therefore, that the witness will not have amiable feelings about the person who caused him or her to endure those unpleasant episodes. If such a witness is later contacted by an acquaintance from another university who is inquiring about a plaintiff's employment suitability, the witness may find it difficult to respond with a positive recommendation.

When an application for tenure is denied, an academic's peers have made a negative professional judgment about the quality of a junior colleague's academic achievement. A legal challenge to that judgment is normally perceived as an assault upon the professional integrity of the tenured members of a faculty. Furthermore, since the tenure denial will have been reviewed and approved at several levels within the university, an academic plaintiff becomes a David to the university's Goliath. A group of proven academics with the vast financial resources of a university becomes the adversary to an unemployed individual. In these circumstances, the odds are heavily weighted against the plaintiff.

One consideration which is not directly addressed in the book is the vulnerability of colleges and universities. Despite the tremendous odds that faculty plaintiffs face, as potential defendants, colleges and universities are in a very precarious position. The number of women and minorities in tenured or tenure-track positions has not improved significantly since the cases featured this in study were adjudicated.\(^\text{18}\) In many instances, a female or minority plaintiff can probably establish a

\(^{18}\) Minorities In Higher Education American Council On Education Office of Minority Concerns Fourth Annual Status Report (1985)
threshold case based solely on statistics. In such a case, a college or university would be required to present a reason for the disproportionately low number of minority or female faculty. If the department in question has not actively recruited women and minorities, the defending institution may find it difficult to articulate a credible reason for its low numbers.

Furthermore, if a university's selection and promotion qualifications are not stated in a written document in some detail, the institution is vulnerable to discrimination claims. The faculty members of a particular department may be experts in their disciplines, but they are often ill informed in personnel matters and discrimination law. If each selection and promotion decision is made without consideration of previous promotion decisions, different standards could be applied to different candidates. If women and minorities are adversely affected, such an inconsistency could be viewed as evidence of arbitrariness or unlawful discrimination.

Another problem involves the peer review process. When hiring and promotion decisions are made, individual faculty members often have different reasons for their votes. (One faculty member may be unimpressed by a candidate's teaching performance, another may have problems with the candidate's research.) If, during a trial, a series of witnesses state different reasons for a decision, fact-finders, especially juries, could easily conclude that the inconsistent testimony reflects a lack of candor. This is especially true if the decision is not supported by documentary evidence. The credibility of witnesses is enhanced immeasurably when their testimony is corroborated by documentary evidence. Consequently, documentation of the actions taken by the various
committees and officials involved in the selection and promotion process is critical to the successful defense of an employment case.

The value of Academics In Court lies in the insight it provides which cannot be derived from other sources. Individuals who actually experience the litigation process may be aware of some of the information provided by the authors. However, because the authors have obtained a broad range of information from individuals who had participated in several different cases, they have assembled, in a single source, information previously unavailable by means of traditional legal research. No amount of legal research could reveal the human devastation involved in these cases. The information is obviously useful to parties who are engaged in, or are anticipating litigation. It is also essential reading for faculty and administrators who are involved in selection and promotion decisions.