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Becoming A Plaintiff

Eleanor Swift†

In speaking at the National Conference on Women and the Law, my goal was to describe what it takes to survive the obstacles women face in changing from “tenure victim” into “discrimination plaintiff.” I wanted to share my perspective on two unenviable experiences—my original losing battle for tenure as a woman law professor and my subsequent pursuit of a sex discrimination grievance as a woman plaintiff—with that particular audience of women law professors and women law students. Making the change from victim to plaintiff involves both groups. The process requires a network of mutually reinforcing collegial relationships and there is also much that law students have done and can do to help.

Several discrimination lawyers told me after the Conference that my description of becoming a plaintiff was useful from their perspective also. Every lawyer understands one obvious premise of our system of justice: every lawsuit needs a plaintiff. But not every lawyer, and certainly not every prospective client, understands what it takes to become a plaintiff. What I learned about that process may be useful in both the practice and teaching of law.

My experiences began two years ago when I was denied tenure at the School of Law—Boalt Hall—at the University of California at Berkeley. In February of 1988, I filed a grievance alleging that my tenure denial was a product of sex-based discrimination, in that the Boalt Hall faculty had applied different and more onerous standards to my tenure case than it had applied to the men granted tenure at Boalt Hall during the 1980s. After a preliminary investigation, the campus-wide grievance committee at Berkeley soon issued a *prima facie* finding in my favor on my charge. This finding, the first of its kind in a gender case at U.C. Berkeley, meant that the committee found “sufficient reason” to conduct a full hearing on my grievance.

Thus in two years my “tenure denial” evolved into “my grievance,” and then into “my finding,” and then into “my case.” I retained two discrimination specialists as my lawyers to prepare for the grievance

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hearing: Mary Dunlap and Charlotte Fishman. "My case" then evolved into "my settlement," reached in December of 1988 on the eve of the scheduled hearing. This settlement gave the question of my promotion to tenure to a committee wholly outside of Boalt Hall.

Rather than discuss the details of my own experience, I want to discuss more generally the process of evolving from a tenure victim into a discrimination plaintiff. After talking with, and reading articles written by, women academics from many different fields who have filed gender discrimination grievances, I have discovered striking similarities in our experiences.

A tenure victim is a woman professor who has spent long hard years learning how to teach, learning to publish, and learning how to find her own place within male-dominated law faculties. For the tenure victim, these years culminate in a tenure vote, or an administrative tenure review, or an executive action that both fires you from your job and tells you (probably for the first time in your life) that you don't meet certain standards of quality. Usually you're told that it's your scholarship that fails—it's "unsuccessful," "unpersuasive," "overly ambitious," or "makes no contribution." These are bitter words to hear about your work. And if you know the weak points of your articles better than anyone else does, and if you believe that academic judgments aspire to objectivity, then you take these words very seriously and very personally. To be a tenure victim is to suffer a terrible blow to your self-esteem.

Being a discrimination plaintiff, by contrast, requires healthy self-esteem. An academic discrimination plaintiff is like an entrepreneur. You have an idea—your belief that your tenure case was decided improperly. You have capital to invest—your time and your money—to prove it. You take enormous risks—the risk of forever being known as a troublemaker; the risk that you can't prove the impropriety; the risk that you'll lose anyway; and the risk that you'll feel as bad as (or worse than) you did when you were denied tenure. And even should you win, you face the risk of isolation and retaliation at work.

Obviously, then, there are formidable obstacles to changing from a tenure victim into a discrimination plaintiff able to act as an entrepreneur. The first step sounds easy but is incredibly difficult: to identify the problem of your tenure denial not as a personal failure but as the product, at least in part, of social forces beyond your control. That is, to believe not only that the tenure decision-makers were wrong but that their decision was tainted by factors relating to your being a woman. The loss of self-esteem suffered by tenure victims can be a significant obstacle at this stage. A pervasive lack of information aggravates your self-doubt. The tenure process always culminates in a secret meeting of the faculty or department at which the initial decision is made. The department keeps the formal inputs into the decision confidential, to

either a greater or lesser degree. And of course, the *informal* inputs into the decision—the personal opinions formed in private conversations—are always secret.

Obtaining information that may refute the university's judgment that your work has failed is a significant obstacle. It takes hard work and courage to keep reading, and re-reading, and listening to the criticisms used to justify the negative decision. You have to develop insight into how the pattern of criticism developed. And you need luck to find solid information about how the decision in your case was actually made.

The tenure plaintiff can use the university's own tenure review mechanism at this information-gathering stage. The review process may help you obtain the full documentation on your case, and may uncover information you did not suspect. Stating the grounds for review forces you to analyze your own views about the merits of your tenure case, perhaps for the first time. You may find supporters who can help you. Because in-house review mechanisms are usually kept confidential, there is less personal risk in using them to unravel the facts.

If the evolution toward plaintiff is to progress after the tenure review process, it is because you have been able to overcome the obstacle of proof. Discrimination is hard to prove in tenure cases. The ultimate act—the tenure decision—is grounded on subjective evaluations of intellectual work. The ways in which women are perceived as less capable than men, and their work judged more harshly than men's, are rarely articulated. Something tangible has to emerge from the secrecy of the tenure process.

It is here, as you contemplate filing an actual discrimination complaint, that you must step into the role of entrepreneur. Most university grievance committees require the grievant to conduct an initial investigation of the tenure denial. This is a distressing job, particularly for those unfamiliar with the adversary system of litigation. A friend of mine, not in law, was shocked at the demands made of her. She said: "They expect me to do the work and find out the facts. How could I do this in my own department after being so grievously injured by these colleagues?"

The adversary system of litigation requires the aggrieved party to come forward with her complaint, make the investment in finding the evidence, and bear the risk of not persuading the trier of fact. The case cannot be brought into court, let alone won, unless someone assumes this entrepreneurial role. But every victim of injustice starts off in a weakened position to take such charge of her own complaint. Every plaintiff fighting a large institution feels outmatched and isolated. These realities are heightened for the discrimination plaintiff in a tenure case, because most tribunals extend great deference to a university's judgments of academic inadequacy.

In many cases, you discover a thread of proof during the fact-finding

stage that is crucial to your transformation into an entrepreneurial plaintiff. This thread of proof casts doubt on the integrity of the university's assessment of your work. This proof may be related to the statistics on hiring and tenuring of women at the university; it may be serious procedural irregularities that occur in women's cases; it may be ill-concealed hostility to the work of women within a department; or it may be practices showing different treatment of men. This thread of proof will have to lead to many others until an elaborate pattern emerges. But some fact usually becomes critical, both psychologically and strategically, to your case.

The proof you have uncovered nurtures the idea that the decision on your tenure was tainted by your gender. This idea fuels your willingness to invest more and more of your time in the enterprise and finally to make the decision to file a formal grievance within the university or to file a complaint in a state or federal agency or court. The practical obstacles here are many and obvious: finding a lawyer, financing your case, and financing yourself and your family while you are working full-time on the case. The monetary costs alone are staggering. Being trained in law gives you the skills to help deal with these obstacles. But actually, in most of the cases I have read, academic women functioned as indispensable members of their own legal team.

The personal costs of pursuing a formal grievance are incalculable. All of the articles by discrimination plaintiffs tell the same story at this point—if you decide to file a complaint and proceed to a hearing, your case takes over your life. You become single-minded. You work with your lawyer and you work alone. The case takes an enormous amount of your own time and energy in investigating, fund-raising and publicity. You lose touch with your real work if you have left the university; or if you are still there, you are painfully alienated. You sustain the burden of having charged your former colleagues with a truly terrible violation of academic principle.

You tell yourself, "no teaching job is worth all this." No, it isn't. Your ultimate goal is to vindicate your public stand against discrimination. That may be worth the struggle. But the vicissitudes of litigation make it risky to count on winning. And by now, the risk of losing is even more frightening than when you started. The process of evolving into a discrimination plaintiff has restored your confidence and your self-esteem. You've learned crucial facts about your own case. You have a new or deeper understanding of sexism. And your case is probably making waves in the university. You hate to risk losing all you have gained by losing at a hearing.

At this point, the discrimination plaintiff transcends the entrepreneurial role. You find that winning is not everything and you also realize that you are not in this alone. You share your principles and your fears

with your closest supporters—your family, your friends, your lawyers. You also get support from two groups I mentioned at the outset—your wider network of collegial reinforcement and your students.

Your network of collegial reinforcement includes those women who have also engaged in personal risk-taking for the sake of principle. Women who have done what you are asking yourself to do—risk a grievous personal loss in order to force the system to change—are a unique source of courage. They may be taking risks that are directly related to your case: they may be your advocates, members of your grievance committee, supporters within your department or within the administration, or crucial witnesses for your case. Others in the network may be mentors within the university or more personal sources of inspiration. I believe that persons of courage have to be there to make your case work. No tenure discrimination case can be won by your efforts alone—many others must take risks on your behalf. You need the fruits of their efforts; you also benefit from their example of going after principle. And they in turn take heart from your courage. This network is mutually reinforcing.

Students may also take risks in supporting your case. In fact, students play a crucial role at many stages of your evolution. Through relationships with students, you develop as a teacher. Students motivate you—and often you develop interests because of their interests. You are also their role model. You have to be courageous because it matters to them.

Students also evaluate you as a teacher. The university uses these evaluations in its tenure decision. Since many law school faculties do not greatly value good teaching, positive student input can be belittled. But strong evaluations, personal letters of support (particularly detailed and thoughtful ones), group petitions and even lobbying efforts by students can all have an impact on the actual decision. Students (and some faculty) have also begun to consider mechanisms for formal student participation in hiring and tenuring of faculty. And in a tenure review or grievance, good teaching can be treated as a more objective fact that may not be ignored.

Students can also support a discrimination complaint directly, through publicity, petitions, editorials, rallies, consciousness-raising, fund-raising. Every kind of help is necessary. That students can learn from you about acting on principle makes pursuing your grievance worthwhile.

Finally, there is something that many academic gender discrimination cases have in common, and that may make them unique. Each case testifies to the support and trust among women that is necessary to achieve any degree of success. Both before and after my settlement, I have received an enormous outpouring of support and willingness to help

from women law professors all across the country. This outpouring must be engendered by the kind of empathy that comes from shared experience, and the kind of pride that comes from shared victory. Perhaps against this background you really can no longer lose.

Epilogue

Professor Swift was promoted to tenure by the Office of the Chancellor on August 25, 1989, in resolution of the gender discrimination grievance she filed with the U.C. Berkeley Academic Senate Committee on Privilege and Tenure. The independent outside review committee of distinguished academics, established under the settlement of Professor Swift's grievance, unanimously recommended that she be promoted to tenure and found that she satisfied the University's standards for scholarship, teaching and service.