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Better Than Going to Court?

Resolving a Claim of Discrimination Through a University's Internal Grievance Process

Eleanor Swift[†]

INTRODUCTION

The final plenary session of the *Presumed Incompetent* symposium was titled "Solutions." Each of us on the panel spoke in quite personal terms about the battles for tenure that we had fought, or were fighting, at our respective colleges and universities. I was invited to speak about the gender discrimination grievance that I filed using the University of California at Berkeley's internal grievance process, which resulted in a settlement that provided a unique tenure review procedure. I was granted tenure in 1989 after having been denied in 1987.

The conference organizers thought that there were lessons to be learned from my grievance and its settlement. From conversations with women faculty at other universities, I had already learned that the internal procedures available to me at Berkeley are in fact pretty unusual. Private academic institutions in particular rarely seem to provide an internal grievance process in any form.

This essay explores some of the reasons why my grievance settled in my favor, and then compares the grievance process with the filing of a lawsuit in federal or state court. There is no one-size-fits-all solution to resolving discrimination claims in academia. My hope is that this essay will generate fruitful ideas for a variety of internal mechanisms that academic institutions could use to avoid or resolve grievances. Internal reform will of course be difficult, and will require significant support from faculties and administrators.

I will discuss below the three component parts that were essential to the success of my case.

First, the office of the Faculty Adviser to the Chancellor on the Status of Women and Title IX Officer at UC Berkeley,¹ which served a watchdog role over the hiring, tenuring, and retention of women faculty, played an important

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1. See *infra* note 3 and accompanying text.

role in my case.

Second, I filed my gender discrimination grievance with the faculty Committee on Privilege and Tenure at UC Berkeley. The Bylaws of the University of California empower this Committee to hear and decide faculty members' grievance claims about adverse actions taken against them by the University itself.

Third, a unique "comparative review" procedure was established by an agreement between the parties to settle my grievance. A special review committee compared my research and teaching to the research and teaching of six men in my age cohort who had been awarded tenure at the School of Law. Such a review was then unprecedented at the University of California, or at any other university that I knew of.

I want to be clear from the outset that my grievance did not result in any finding that the University or the School of Law actually discriminated against me in denying my tenure in 1987. Because my discrimination grievance was resolved through a settlement agreement that provided for the comparative review, the Committee on Privilege and Tenure did not decide whether I had been subjected to gender discrimination.² The special review committee was not asked, and did not decide, whether I had been discriminated against.

I. THE BERKELEY CAMPUS FACULTY ADVISER TO THE CHANCELLOR ON THE STATUS OF WOMEN AND TITLE IX OFFICER

My story starts with the important role played by a Berkeley faculty member who held this campus administrative position at the time of my tenure denial. In July of 1987, after my tenure was denied, I had moved out of the law school and was contemplating what I would do next in my legal career. Four months later, in October, I was contacted by Professor Sally Fairfax, who was at that time serving in the formal position of Faculty Adviser to the Chancellor on the Status of Women and Title IX Officer for the Berkeley Campus.³ The

2. I am able to speak and write about my grievance and the terms of its settlement only because no confidentiality clause was written into the settlement agreement.

3. Although this position sounds like two jobs, it was held by only one person. The position was created on the Berkeley campus in the 1970's as a half-time administrative position to be held on a rotating basis by a regular, tenured member of the faculty. Professor Fairfax was the third woman professor to hold this position. There was also a half-time Faculty Adviser to the Chancellor on the Status of Minorities.

The role of the Title IX Officer was required by 1972 federal legislation, which prohibited all forms of sex (Title IX) and race (Title VI) discrimination in educational institutions that receive federal funding. Those responsibilities are now within the Office for the Prevention of Harassment and Discrimination at Berkeley. The role of its Director is to administer the "complex legal requirements for resolving sex/race discrimination, sexual/racial harassment, sexual assault and rape issues, . . . [and to] help to create and maintain a University campus community committed to positive values of equal opportunity, and foster a climate free from all forms of harassment, exploitation, or intimidation." *Mission, OFFICE FOR THE PREVENTION OF HARASSMENT AND DISCRIMINATION,*

message she conveyed to me was that I had the right to file a gender discrimination grievance against the School of Law and the University with the Berkeley Campus Committee on Privilege and Tenure. She also told me that she was authorized to say that if I went forward with a grievance, her report “will see the light of day.”

The Provost of Professional Schools at UC Berkeley had authorized Professor Fairfax’s message. This Provost was particularly concerned about the School of Law’s denial of tenure to two successive female candidates: the first, Marjorie Shultz in 1985, and the second, me, in 1987.

I did not know what Professor Fairfax meant by her “report.” She was not permitted to tell me. What she meant, as I know in retrospect, was her highly confidential study of the hiring and tenuring practices of the School of Law regarding women and minorities over a period of more than twenty years. In her position in the Chancellor’s Office, with access to the personnel files of all of the candidates for entry-level positions, lateral positions, and tenure, she was able to compile a comparative analysis of the tenure cases put forward by the School.

The Faculty Adviser position and its mandate—to review individual cases of hiring, promotion and tenure of women faculty—was generated by the activism of women faculty at Berkeley in the 1970’s. Professor Fairfax played this role for women across the campus. This “watchdog” position, delegated to a faculty member with access to individual personnel decisions, could be institutionalized in other colleges and universities.

Every campus receiving federal funding must appoint a Title IX officer to enforce the federal prohibition of sex discrimination. At many schools, this position has tended to focus primarily on issues regarding women students rather than faculty. The Office of Faculty Equity and Welfare at Berkeley, the successor to the Faculty Adviser position, now routinely monitors the performance of campus departments with regard to hiring, promotion and tenure of women and minority faculty. It seeks to identify patterns of potentially problematic conduct and it provides counseling to individual faculty, ideally before a grievance surfaces. In my case, the role played by an insider who had a serious commitment to gender equity on campus was crucial. Vigilance against discrimination through routine internal review, plus the provision of resources to institutionalize it, should be considered a goal for organized action by women faculty.

<http://ophd.berkeley.edu/mission> (last visited Apr. 22, 2014).

My understanding is that part of the role of the Faculty Adviser on the Status of Women was to review the individual cases of hiring, promotion, advancement and retention of women faculty on the Berkeley campus, and to add commentary to the files that crossed the Chancellor’s desk before the final decisions were made. This understanding was confirmed for me by the first person to hold this position on the Berkeley campus. The position has now morphed into the Office for Faculty Equity and Welfare under the leadership of an Associate Vice-Provost who is also a professor, and who has held that position since 2001.

II. THE COMMITTEE ON PRIVILEGE AND TENURE AT THE UNIVERSITY OF CALIFORNIA

After months of soul-searching and consultation with my family and other advisers, I decided to file a grievance with the Campus Committee on Privilege and Tenure. I came to believe that it was the right thing to do for future women faculty and students and for the School of Law itself.

The Bylaws of the University of California establish and define the jurisdiction of the ten Committees on Privilege and Tenure that operate as part of the Academic Senate for each of the University's ten Divisions or Campuses.⁴ UC Berkeley publishes the role of the Committee on Privilege and Tenure as follows:

The Committee on Privilege and Tenure has jurisdiction over three categories of cases:

- grievance cases, in which a member of the Senate claims injury through the violation of his/her rights and privileges;⁵
- disciplinary cases, in which a member of the Senate is accused of having violated the Faculty Code of Conduct; and
- early termination cases, in which a Senate or non-Senate faculty member challenges whether there is good cause for his/her early termination.

In cases of personnel review involving tenure, promotion, or reappointment, such grievances may be based only on allegations: (a) that the procedures were not in consonance with the applicable rules and requirements of the University or any of its Divisions, and/or (b) that the challenged decision was reached on the basis of impermissible criteria, including – but not limited to – race, sex, or political conviction. The Committee is empowered to determine the validity of the grievances under (a) or (b) but is not empowered to re-evaluate the academic qualifications or professional competence of the grievant.

Senate members are asked to consult the Faculty Ombudsperson and Panel of Counselors before forwarding a case to the Committee on Privilege & Tenure.⁶

4. *Academic Senate Bylaws - Part III*, UNIV. OF CALIFORNIA SENATE, <http://senate.universityofcalifornia.edu/manual/blpart3.html#b1336> (last visited Apr. 22, 2014). Title III of the Academic Senate Bylaws, Divisional Committees and Faculties (hereinafter Bylaws), establish and define the jurisdiction and procedures of Privilege and Tenure Committees over faculty grievances in Bylaws Sections 334 and 335. These Committees also have authority over disciplinary complaints filed against tenured and tenure-track faculty by the University.

5. All tenured and tenure-track faculty at U.C. Berkeley are members of the Academic Senate.

6. *Committee on Privilege & Tenure*, BERKELEY ACADEMIC SENATE, <http://academic->

On the Berkeley campus, members of the Committee on Privilege and Tenure (hereinafter P&T) are appointed on an annual basis by an elected committee of Berkeley's Academic Senate, the faculty's governing body. There are at least seven members, and usually one or more of them are professors who are also attorneys. Thus, P&T is an entirely faculty-run enterprise.

Grievances filed with P&T generally focus on adverse personnel actions taken by the University against a faculty member—in my case, the denial of tenure.⁷ What follows is a brief summary of the three stages of review that P&T employs to evaluate a faculty member's grievance: reading the grievance, applying the sufficiency test, and deciding the case after a full evidentiary hearing.

The First Stage: Reading the Grievance

The written grievance document is read to determine whether the faculty member has made out a *prima facie* case of violation of the faculty member's rights and privileges.⁸ Importantly, the Committee's jurisdiction is limited to examining decisions made about the faculty member that are (1) made in violation of the procedures set forth in the rules and regulations of the campus or (2) reached on the basis of impermissible criteria (including, but not limited to, race, sex or political conviction).⁹ P&T has no authority to "re-evaluate the academic qualifications or professional competence of the grievant." Thus, the faculty member's claim is screened to ensure that it alleges facts that would show that either procedural violations or impermissible bias tainted the University's personnel action.

How the faculty member drafts the grievance is therefore critical. I drafted my grievance without the aid of a retained attorney, although I must acknowledge that I felt able to do this because I had practiced law in the civil litigation department of a large law firm for five years, and because my husband was also a law professor. I also showed my draft grievance to one or two experienced non-law members of the UC Berkeley faculty and received valuable advice. Since 1989, I have advised perhaps a dozen or so Berkeley faculty members who were deciding whether to file a grievance, and if they did, how to draft their complaining document. Some did retain lawyers; some did not. A non-lawyer faculty member can certainly draft an effective grievance. But a lawyer's analytic approach to the limited jurisdiction of P&T and practice in marshalling facts to fit within the jurisdictional grounds of a procedural or a

senate.berkeley.edu/committees/pt/committee-privilege-tenure (last visited Ap. 22, 2014).

7. The process by which P&T decides the merits of the grievance is fully set forth in the University's Bylaws as referenced *supra* note 4.

8. "A *prima facie* case shall be deemed established if the Committee concludes that the allegations as stated in the written grievance, if true, would constitute a violation of the faculty member's rights and privileges." § 335.B.2., *Bylaws*, *supra* note 4.

9. *Committee on Privilege & Tenure*, *supra* note 6.

discriminatory violation are very useful.¹⁰ Nonetheless, a very heavy burden always falls on the grievant personally to be an effective client—mastering both the procedural rules and the highly complex facts that will ultimately be needed for a successful grievance.

The central argument in my grievance was that I, as a female, had been held to a higher standard of performance under the University's principal standard for tenure—"superior intellectual attainment" in research, teaching and service¹¹—than the males awarded tenure in my age cohort at the law school. During the six years prior to my tenure denial, the law faculty had voted in favor of tenure for six males. The sole woman eligible for tenure during that same period, Marjorie Shultz, had been denied by faculty vote.¹² Thus, six men tenured, two women denied. I believed that these facts generated a strong inference of the law faculty's application of a discriminatory standard that would pass the prima facie test. Of course the strength of this inference could not be known without full review of the tenure files of the other tenure cases.

My grievance document also alleged procedural errors in my tenure process, none of which on its own would likely have amounted to a prima facie case. But these errors could have augmented my argument that there was a climate in the law school that permitted disparate treatment of women faculty.

I believe my grievance passed this first stage of review because its allegation of gender discrimination as the cause of my tenure denial fit squarely within the jurisdiction of P&T, and because it alleged specific facts as a plausible basis for inferring discrimination.¹³ Rather than telling a story, which some of the drafts written by non-law faculty that I have read tended to do, the grievance must focus its facts and analysis of issues that are within the jurisdiction of the internal grievance process.

10. Some advice and assistance to faculty members are provided on campus. Bylaws § 335.B.1 mandates that each U.C. campus shall appoint a panel of advisers (preferably former members of the P&T Committee) to discuss claims with a grievant and to provide advice on proper procedures to follow. Such counselors are not, however, to act as representative of any grievant. § 335.B.1., *Bylaws*, *supra* note 4.

11. § 210-1(d), "Criteria for Appointment, Promotion, and Appraisal," Academic Personnel Manual, Appointment and Promotion (revised July 1, 2005), <http://senate.universityofcalifornia.edu/committees/ucaad/apm210.pdf>.

12. After the faculty vote, Shultz appealed her tenure denial through the University's appeal process. The Chancellor of U.C. Berkeley awarded her the status of Senior Lecturer with Security of Employment at the law school. After the filing of my tenure grievance became public, the law school faculty voted in favor of her tenure as a Professor of Law. She and I remained good friends throughout this process.

13. I borrow this term "plausible" from the standard now applied in federal court for motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). Had there been fewer male tenure cases (say, only two) or had there been only my single female case, the inference of a pattern of discrimination might have been less plausible and the Committee might have found that my factual allegations would not constitute a violation of my rights. My grievance would have been dismissed at the first stage of review.

The Second Stage: Applying the Sufficiency Test

The P&T Committee then looks at the actual evidence, primarily documentary, that the grievant has presented along with the complaint. In addition, the Bylaws provide that the Committee can itself request information, including personnel files, from the University; it can discuss the documentary evidence with the grievant; and the employee authorized to respond for the University, as well as other persons involved in the underlying events, can submit information and meet with the Committee.¹⁴ For the grievance to go forward, the Committee must decide that there is “sufficient reason to believe that a right or privilege of the grievant may have been violated.”¹⁵ No standard of probability is set for this determination of “sufficiency.”

In my grievance, I focused on the recent history of tenure cases at the School of Law, some specific incidents concerning my tenure decision, and what I thought were procedural errors in my case. I mentioned the existence of the confidential report that had been written by the Faculty Adviser on the Status of Women, as discussed in Part I. The Chair of the P&T Committee requested this report from the University. Clearly, this report helped to persuade the Committee that there was “sufficient reason to believe” that my rights had been violated—that is, that the *prima facie* case of discrimination that I had alleged could be proved. This gave my grievance the “green light” to move to the third stage of review, a full hearing on the merits. This was the first time that a discrimination case had gotten so far in the P&T process at Berkeley.

Since 1989, some of the P&T grievances shared with me by Berkeley faculty have passed this “sufficient reason” test, and some have failed. What concerns me is that the “sufficient reason” decision is made without the grievant having full access to essential sources of proof that the University used “impermissible criteria” to reach the decision that is being challenged. For example, it is not clear from the Bylaws whether the grievant has full access to all of the information that the P&T Committee itself may obtain during its “sufficient reason” inquiry, including the grievant’s own personnel records, whether the grievant can also confront any “other persons” who are asked to meet with P&T, and whether the grievant may also present witnesses (or their statements) at this stage.¹⁶

14. § 335.B3., *Bylaws*, *supra* note 4.

15. *Id.*

16. Bylaws § 335.B.3. provides:

Upon an appropriate showing of need by any party or on its own initiative, the Committee may request files and documents under the control of the administration, including the grievant’s personnel files and confidential documents contained therein. Such confidential documents shall remain confidential within the committee unless disclosure is required by law. At this stage, the Committee may also give the administrator with authority to offer a remedy notice of the grievance and an opportunity to respond. To further facilitate its review, the Committee may also ask other persons involved in the events that gave rise to the grievance,

Thus, this second stage of the P&T process does not seem to provide the grievant with fair procedural opportunities for the development, presentation, and confrontation of evidence necessary to meet the “sufficient reason” standard. The grievant may even be unaware of the Committee’s own investigation. The summary judgment stage of litigation in state and federal court seems most analogous. A summary judgment decision is prior to a full trial, but it allows for opportunities for both parties to discover, and to contest, each other’s evidence. Moreover, summary judgment against a plaintiff in court is governed by a specific standard of proof. The defendant must persuade the court that the plaintiff has so little evidence, or the defendant has so much evidence in its favor, that the plaintiff could not succeed at trial under the governing substantive law.¹⁷ As stated above, the Bylaws governing the P&T process appear to place the burden of producing evidence on the grievant, with no specific standard of what is a “sufficient” reason to prevent dismissal of a grievance at this second stage.

The Third Stage: Decision after a Full Evidentiary Hearing

If the potential evidence does seem “sufficient” to the Committee, the parties then proceed to prepare for a full evidentiary hearing before the Committee.¹⁸ At that time, I had retained two women attorneys who were experienced with employment and gender discrimination litigation. I knew that I could not handle a full adversarial hearing on my own. Every P&T grievant I have spoken with has also been represented by a lawyer if the grievance reached the hearing stage. Preparing the case, requesting documents, interviewing witnesses, and conducting the hearing itself make a lawyer necessary in most cases.

Because of my litigation experience, my lawyers and I worked as a team. We conducted an informal “discovery” process under the auspices of P&T—interviewing potential witnesses in private, taking some formal statements in the

including the department chair, to appear before or provide information to the Committee.

Id.

17. The standard at summary judgment (“no genuine issue of material fact”) is treated in federal court as requiring the same degree of certainty as a directed verdict: That is, that a reasonable jury could not find by a preponderance of the evidence in favor of the non-moving party (here, the grievant), reviewing all the evidence in the record and drawing all reasonable inferences in favor of the grievant, and not making credibility determinations. FED. R. CIV. P. 56(a); *see also* *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).
18. The Committee also advises a campus official designated by the Chancellor that a grievance has been filed, that a prima facie case has been made, and that the grievant has earned the right to a full P&T hearing. § 335 B.5., *Bylaws*, *supra* note 4. That official is then charged with trying to promote a resolution of the controversy between the grievant and the campus officer(s) involved. *Id.* In my case, these negotiations took place between a newly-appointed University Provost and me, but the discussions went nowhere. I withdrew from the negotiations and continued preparation for a full P&T hearing.

presence of University counsel, and requesting documents from the law school. I would say that my lawyers and I were optimistic. We had found some further procedural violations, we had collected potentially favorable testimony from one faculty member, and my lawyers had been given the opportunity to read Professor Fairfax's confidential report that P&T had itself relied on in finding that my prima facie case was "sufficient."

As the date for the full hearing grew nearer, settlement negotiations among lawyers for the University and representatives of the School of Law, my lawyers, and myself were mediated by a highly regarded San Francisco attorney who was also a trusted alumnus of the law school.

III. STRUCTURING A COMPARATIVE TENURE REVIEW

This mediator met privately with each group to develop a process by which my tenure could be re-decided. An immediate award of tenure was out of the question—I do not think immediate tenure has ever been offered to resolve a P&T discrimination grievance. Thus, a new review was in store for me.

The only option for a new review that my lawyers and I would agree to was a "comparative" review. As I have said above, traditionally, a faculty member's tenure case is decided in isolation, measured against a college or university's abstract standard of excellence. A comparative review meant that a formally appointed Review Committee would compare my record for tenure with the records of the six men granted tenure by the School of Law within the past six (by that time, seven) years. That is, the University of California standard of "superior intellectual attainment" was not to be applied in the *abstract* to my research and teaching. Rather, the Review Committee would be charged with deriving the law school's *applied* standard from the research and teaching records of those whom it had recently tenured. Then, that standard would be applied to me.¹⁹

The University and law school representatives agreed to this "comparative review" process in principle. This was an amazing breakthrough that allowed my grievance to be settled. Of course, there were many specific issues to resolve in order for such an unprecedented process to be implemented. There were five major issues on which, it is important to note, we reached agreement on the basis of fair-minded argument and compromise:

1. *The comparative tenure cases.* As previously stated, during my eight years at the law school, six men had been granted tenure. This was a sizeable cohort, all from the same school, that made a comparative review possible. No male candidate had been denied by faculty vote in those years, but two untenured male faculty members had left the school prior to a tenure decision. The University wanted to include one of these cases in the comparison group. I

19. Unbeknownst to me at the time, the possibility of a "comparative" review had been raised even earlier by a Vice-Chancellor.

rejected this idea. No final faculty decision had been made on that case, and thus there was no conclusive data for the Review Committee to use in deriving the school's standard as applied.²⁰

Each of the male professors whose file was to be given to the Review Committee was asked for permission to disclose his file. Each agreed.

2. *My tenure records.* We agreed that the law faculty's evaluation of my scholarship would be redacted from my tenure file for the Review Committee. Only the outside review letters would be included. The full report of my teaching and service was included.

3. *The instructions given to the Review Committee.* The Committee was instructed to derive the tenure standard that had been applied by the law school faculty in the 1980's, based on the formal standard articulated in the University of California Academic Personnel Manual and on the tenure files of the six men awarded tenure. The Committee was explicitly instructed not to consider any issue of discrimination.

4. *Membership of the Review Committee and selection of the Committee members.* We agreed that there would be five members of the Review Committee, similar to a campus level Ad Hoc Committee that is appointed in each tenure case to review the decision made by a Department or School at UC Berkeley. Two members of the Committee would be from the Berkeley campus, but not from the law school. Three members would be Professors of Law from other universities. One of these would be a specialist in Evidence Law, which was my field of research.

The process we developed for selecting these five members was ingenious. The Dean of the School of Law and I met, each providing a short list of potential candidates for each of the five "slots" on the Review Committee. We discussed our lists, and each of us had the unlimited right to reject candidates on the other's list. We had to meet several times to conclude the selection of three potential candidates for each slot. Neither of us got our absolute first choices, but I think we were able to develop lists that we both thought were fair.

In addition, neither of us was to know who actually served on the Review Committee. The Provost and Chair of P&T made initial contact with one of the three candidates for each of the five slots, and then made a second contact if the first declined, and a third if necessary. The Dean and I did not know which candidates were invited, which declined, and which accepted. The University provided the non-Berkeley professors with a stipend for their service.

5. *The process to be followed internally within the University if the Review Committee held in my favor.* It was not acceptable to the University that it be bound by the decision of the outside Review Committee. Therefore, the decision

20. Both the University and I agreed that this former faculty member's tenure article and a memorandum from his faculty tenure review committee could be provided to the Review Committee without comment.

of that Committee was to be reviewed by the Berkeley's Budget Committee (the top campus personnel committee composed of relatively senior faculty members) and by the Chancellor. The settlement agreement provided that if University review resulted in a denial of tenure after the Review Committee had recommended a grant of tenure, I was to retain my right to file a lawsuit alleging the causes of action available to me at the time the settlement agreement was signed.

After the settlement agreement was signed in December of 1988, it took approximately four months to resolve other intricate details of the unprecedented review process, select the Review Committee, draft instructions for the Committee, and assemble the materials given to the Committee. The settlement agreement provided that if there was a dispute between the University and me about implementation of the new review, the Chair of P&T would be asked to resolve it. My recollection is that two such disputes were taken to the Chair.

I believe that the Review Committee was finally empanelled in April 1989, and that it reached its decision in June. This decision was then reviewed at the campus level, presumably by the Budget Committee and the Chancellor. Therefore, the decision was not disclosed to me until August 1989, one week after classes had started at the School of Law. I had a hint as to the outcome, however, because I was scheduled to teach a large first-year class in Civil Procedure.

On the Friday of the first week of classes, I received a telephone call from the Chancellor's Office saying that it was holding a letter for me setting forth the final decision. My husband made the trip to campus and brought the letter home. We opened it to read the formal recitation of the award of tenure signed by the Chancellor. We then left Berkeley for San Francisco for a press conference arranged by my lawyers. We celebrated that evening with my lawyers, our family members, and some enthusiastic friends, at home.

IV. EVALUATION OF THE INTERNAL GRIEVANCE PROCESS

Was the internal grievance process provided by the University better than going to court? Since the outcome in my case was successful, of course one would think "yes." That outcome was achieved, however, by the pressure put on the University to settle my grievance and to agree to the comparative review. This pressure came from two sources.

First, Professor Fairfax's established position within the University made her a watchdog over the appointment, tenure, and retention of women faculty. It is not clear that a report such as hers can ever again be compiled at UC Berkeley, but a faculty member with firsthand knowledge of a range of personnel cases can still provide important insight into the fairness of the procedures and the possibility of discrimination within its Departments and Schools. Every campus obtaining federal funds has to have Title IX and Title VI officers, whose role encompasses preventing and remedying discrimination in academic employment.

And every campus should be open to creating its own internal office with a specific mandate such as I discussed in Part II above.

Second, power was vested in the P&T Committee to obtain personnel records and other documents from the University, such as the report concerning the law school. The P&T Committee acted very quickly to obtain that report and to use the report to decide that my grievance met the “sufficient reason” standard and was eligible for a full hearing. The P&T Committee was also willing to move quickly toward the full hearing and to support my requests for documents from the law school and interviews with law school and University faculty.

If these factors are built into the operation of internal academic grievance procedures, then they can be advantageous. Internal procedures could be institutionalized at all public and private colleges and universities, barring some kind of special circumstances. All of the above put pressure on the University to settle my grievance before a hearing.

I am aware of two other instances in which UC Berkeley agreed to settlements of claims of discrimination in the denial of tenure. These two grievances were brought by women professors in academic disciplines very different from law and from each other. In neither was there a report such as had been crucial to my case. Both women obtained what was then called (within Berkeley) a “Swift Settlement”—that is, a review that compared their tenure files with other tenure cases in their departments. Both of these cases were successful and these women professors are now tenured at UC Berkeley.

V. EVALUATION OF GOING TO COURT

There are very few successful employment discrimination lawsuits based on denials of academic tenure. Why is this so? Some of the reasons are obvious.

1. *A lawyer is required.* It is probably impossible to mount a civil lawsuit in a tenure case without a lawyer. But there are very few lawyers who take these tenure cases. Promotion to tenure is judged solely on a single candidate’s record under a standard of “academic excellence” (or “superior intellectual attainment” at UC Berkeley). Scholarly research and publication, followed by teaching, are the most important criteria. The candidate is evaluated on the basis of other professors’ opinions, many of them experts in the candidate’s particular field. If these opinions are mixed, determining whether discrimination has occurred is extremely difficult, time-consuming, and not within the usual expertise of most employment lawyers. Their discrimination cases usually deal with more objective performance data within a workplace that also provides comparative cases. Neither is the norm in tenure cases.

2. *Cost.* The use of a lawyer in a civil lawsuit is, accordingly, very, very expensive. Universities defend these cases aggressively, and therefore many hours are spent developing the facts necessary to drafting a complaint,

responding to a motion to dismiss, obtaining discovery against claims of academic privilege,²¹ responding to a motion for summary judgment, and then preparing for trial. The lawyers bill at an hourly rate, as very few, if any, accept a tenure case on a contingent fee—a percentage of the client’s monetary award if she wins—because a professor’s recovery of back pay is likely to be quite modest. The costs to the professor-plaintiff can therefore be prohibitive.

3. *The legal standard.* The legal standard for proving discrimination under federal law is also very high. A discriminatory motive or intent is required in a disparate treatment case. Under the *McDonnell Douglas* doctrine in Title VII discrimination cases,²² the professor-plaintiff has to show that the valid grounds cited by the University for the denial of tenure (typically, inadequate research or teaching) are a “pretext.”

Unless there is a “smoking gun” (evidence that convincingly demonstrates a biased mental state of one or more faculty decision makers), the best chance of proving pretext, I believe, lies in the use of comparative tenure cases to *disprove* the University’s claim of the individual’s own failure to satisfy University standards. But this requires a cohort of similar cases with which the candidates can be fairly compared. The best cohort would be tenure cases close to each other in time, and from the same academic department, if not from the same specific discipline. If the professor-plaintiff is a member of a small academic department, or works in a highly specialized discipline, a cohort of comparative cases within a college or university may be hard to find.

4. *The decision maker.* The decision maker in a lawsuit will be a judge or a jury. It is very difficult for judges or jurors to evaluate a dispute over the quality of academic teaching or research in higher education—especially research—on their own. Remember that the tenure decision is based on the opinions of other professors. If such professors are used as expert witnesses by both the professor-plaintiff and the university-defendant, then the decision maker is faced with a battle of the experts over the intellectual attainment of scholarly research. Such judgments of abstract quality are extremely difficult for lay juries to resolve, and I have heard it said that judges are prone to defer to the professional judgment of colleges and universities.

The decision makers in an internal grievance procedure are faculty members, perhaps not experts in the field of the grievant, but nonetheless familiar with academic discourse. They are perhaps more willing to read more carefully the grievant’s published work, and less intimidated by the scholarly

21. In *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the United States Supreme Court refused to recognize a federal privilege protecting the confidentiality of academic peer review materials in a case alleging discrimination in employment on the basis of race and sex.

22. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-806 (1973). *See also* *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (finding that the ultimate question is simply whether there was a pattern or practice of disparate treatment that was racially premised).

dispute over the quality and contribution of that work.

VI. REFLECTIONS

The telling of the story of my tenure grievance is not complete without a few personal reflections. As I have written previously, the personal evolution from being a “tenure victim” who has suffered a terrible blow to her self-esteem into the entrepreneurial role of a discrimination plaintiff is painful, costly, and enormously risky.²³ Throughout the grievance process, I received powerful sustaining support from my husband, my family, and my lawyers. But, as I have said many times, I would never have gone to court with my case. That would have meant additional years of living in a state of even more extreme tension, of even greater worries over expenses, and of even greater disruption of my personal life and family. Of course, as a lawyer, I did have viable career alternatives open to me. Many academics probably do not.

During the sixteen months in which my case was ongoing—from the filing of the grievance to the receipt of the Chancellor’s letter—I received remarkably generous support from a network of women law professors, some of whom I knew personally, and some of whom I did not know. I relied on this network for advice on many issues, perhaps most importantly for the names of law professors, male and female, whom I could propose as members of the Review Committee. Without this assistance, I could not have engaged effectively in the selection process with the Dean of the Law School.

Professor Fairfax and I talked very occasionally during the several months it took me to decide to file a grievance with P&T. During that time, she was operating under ethical and administrative constraints as to what she could say to me. If we touched on a topic that was off-limits, Professor Fairfax would deflect it with her own catch phrase: “Three swans are flying over the rice fields.” Of course, she believed in the validity of the work she had done. Had she not undertaken her study of the law school, my grievance could easily have failed. Her courage and determination in preparing this report remind us how rare and necessary these qualities are in every institution of authority.

Finally, and personally, the outcome of the settlement of my grievance allowed me to engage in a law teaching career that I have loved. Of course it was awkward to return to a faculty that I had charged with discrimination, but it was not unbearably difficult. It helps to be a good winner, to be determined to make it work. And it helps if the other side is a good loser, and the faculty was. The Dean welcomed me back, and years later told me that he had come to understand

23. An essay that I published in the *Berkeley Women’s Law Journal*—now *The Berkeley Journal of Gender, Law & Justice*, the publisher of this volume—discusses in some depth the personal process of allowing oneself to “become a plaintiff” and file a gender discrimination grievance. It is not an easy process. See Eleanor Swift, *Becoming a Plaintiff*, 4 BERKELEY WOMEN’S L.J. 245 (1988).

BETTER THAN GOING TO COURT?

351

that I was loyal to the school, rather than the opposite. That loyalty was further played out in the many institutional roles that I assumed, notably two years as Associate Dean and many years as a leader of the effort to promote all types of experiential learning at the School of Law—in-house clinics, our community law center, lawyering skills, and enhanced academic components to field placements.

Most satisfying is the current increased gender diversity in the law school faculty, including several women of color. Appointment, promotion, and retention of a considerable number of young women professors have changed the place. I greatly admire these younger colleagues and the relationships of mutual respect and equality that they and their male counterparts have forged.