Golden Gate University Law Review

Volume 9
Issue 2 *Women's Law Forum*

Article 5

January 1978

Sex Discrimination in Academia: Representing the Female Faculty Plaintiff

Judith A. Mazia

Nancy de Ita

SEX DISCRIMINATION IN ACADEMIA: REPRESENTING THE FEMALE FACULTY PLAINTIFF

Judith A. Mazia* and Nancy de Ita**

Prior to the 1972 amendment of Title VII of the Civil Rights Act of 1964,[1] all educational institutions, including institutions of higher learning, were specifically excluded from Title VII coverage.[2] Since the Equal Pay Act[3] also specifically excluded academic institutions until 1972, women in academia had few, if any, means of redress against their employers.[4] In amending Title VII to include academic institutions[5] Congress recognized that "[t]here is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees — primarily teachers — from Title VII coverage."[6] Congress also recognized that "[d]iscrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment."[7]

* J.D., Hastings College of the Law, 1974. Ms. Mazia is an attorney in San Francisco in private practice, emphasizing employment discrimination.

** Fourth Year Law Student, Golden Gate University School of Law.

1. 42 U.S.C. § 2000e (1976).

2. Title VII excluded "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of that institution." Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964) (prior to 1972 amendment).

3. 29 U.S.C. § 206(d)(1) (1976).

4. The 1972 amendments to Title VII did not apply retroactively to cover discrimination in academia that occurred prior to March 24, 1972 unless the discrimination was deemed to be a "continuing violation" after that date.

5. Section 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e-1 (Supp. 1975)).

6. H.R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS, at 2155.

7. *Id.*

In spite of Title VII remedies,[8] women continue to be underrepresented on university and college faculties nationwide. Since the enactment of the 1972 amendments to Title VII and the Equal Pay Act, the percentage of women on college and university faculties nationwide has increased slightly.[9] Yet the percentage of women faculty members in institutions of higher learning in the United States has actually decreased in the last 100 years.[10] Many more women faculty members occupy the lowest teaching position of "instructor" rather than the highest position of "full professor."[11] Women also lag behind in salaries[12] and tenure.[13] At the same time, the number of qualified female candidates for academic positions has been on a steady increase.[14]

In passing Title VII, Congress recognized that "women have long been invited to participate as students in the academic process but without the prospect of gaining employment as serious scholars."[15] The legislative history of the 1972 amendments to Title VII provide a clear Congressional mandate for an all-out attack on sex discrimination in academia.[16]

The failure of Title VII to remedy sex discrimination in academia is due, in large measure, to the traditional reluctance of the judiciary to consider the qualifications of faculty members, or involve themselves with the problems of employment discrimi-

8. *See* cases cited at notes 19-21, *infra.*

9. In 1972-73, 22.5% of U.S. faculty members were female as compared to 25% in 1976-77. NATIONAL CENTER FOR EDUCATION STATISTICS U.S. DEP'T OF HEW, DIGEST OF EDUCATION STATISTICS 1977-79 98, Table 102 (1979).

10. In 1879-80, women comprised 36.4% of U.S. college and university faculties, whereas in 1975-76 only 24.2% of U.S. academic faculty members were female. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF HEW, PROFESSIONAL WOMEN AND MINORITIES 140, Table A-WF-1A (Oct. 1976 Supp.).

11. In 1976-77, only 9.3% of the nation's full professors were women, compared with 49% of instructors. DIGEST OF EDUCATION STATISTICS 1977-78, *supra* note 9, at 98, Table 102.

12. In 1976-77 the average salary for male faculty on an 11-12 month contract was $22,356 in contrast to $17,159 for women. *Id.*

13. In 1976-77, 58.5% of all U.S. faculty members were tenured; 63.3% of male faculty members were tenured compared to 44.4% of female faculty. In California in the same year 74.7% of all faculty were tenured; 77.9% of male faculty were tenured compared to 65.3% of female faculty. PROFESSIONAL WOMEN AND MINORITIES, *supra* note 10, at 146.4, Table A-WF-8C.

14. In 1970-71, 14% of all doctorates were earned by women; by 1974-75, this figure had increased to 21%. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEP'T OF HEW, EARNED DEGREES CONFERRED 1973-74, 8-9, Table 1.

15. H.R. REP. NO. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS, at 2155.

16. *Id. See also* 118 CONG. REC. 1992 (1972) (remarks of Sen. Williams).

nation in academia.[17] Given this "hands off" attitude of the courts toward employment discrimination in an academic setting, this article will discuss the procedural hurdles involved in

17. In large measure academic institutions have been left to their own devices in hiring and tenure decisions, based largely on subjective criteria. The traditional "hands off" approach of the courts to academic employment cases is typified by the attitude expressed in Faro v. N.Y. Univ., 502 F. 2d 1229 (2d Cir. 1974): "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Id.* at 1231-32. Illustrations of this attitude are also found in Huang v. Holy Cross College, 436 F. Supp. 639, 653 (D. Mass. 1977) and Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977).

A host of other district and circuit court decisions have adopted the reasoning in *Faro*, circumventing the clear Congressional mandate of the 1972 amendments to Title VII. *See* notes 5 - 7 *supra* and accompanying text. *See also* Cussler v. Univ. of Md., 430 F. Supp. 602, 605-6 (D. Md. 1977); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976); Labat v. Bd. of Higher Educ., 401 F. Supp. 753, 757 (S.D. N.Y. 1974). This hostility seems to stem from: 1) a resistance to sex discrimination actions in general; 2) the courts' unfamiliarity with academic employment practices; and 3) the courts' belief that academic employment decisions are made with considerable expertise and based on a desire for excellence. Green v. Bd. of Regents, 474 F. 2d 594, 595-596 (5th Cir. 1973); Lewis v. Chicago State College, 299 F. Supp. 1357, 1359-1360 (N.D. Ill. 1969); Application of Lombardi, 240 N.Y.S. 2d 119, 120, 122 (App. Div. 1963). Courts describe academic merit as "elusive" and argue that employment decisions cannot be measured by objective standards. Lewis, 299 F. Supp. at 1357, 1359; Lombardi, 240 N.Y.S. 2d at 119, 120-121.

In a small handful of cases, courts have taken strong exception to the traditional judicial policy of non-intervention. This minority view was best expressed by the First Circuit in Sweeney v. Board of Trustees, 569 F. 2d 169 (1st Cir. 1978):

> [W]e voice misgivings over . . . the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts' recognition that hiring, promotion and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.

Id. at 176. *See also* Egleston v. State Univ. College of Genesco, 12 FEP Cases 451 (W.D. N.Y. 1975).

In a more recent case, Powell v. Syracuse Univ., 17 FEP Cases 1316 (2d Cir. 1978), the Second Circuit suggested that the courts take a middle ground between non-intervention and an activist approach to employment discrimination in the academic sector, and agreed with the First Circuit that courts must be sensitive to sex bias in academia and provide a forum for plaintiffs: "It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. Faro does not, and was never intended to indicate that academic freedom embraces the freedom to discriminate." *Id.* at 1319. Despite this dicta, the court affirmed the decision of the district court which upheld the discharge of a black female professor of architecture. *Id.* at 1321.

Title VII litigation against academic institutions and possible litigation strategies to be considered by plaintiffs' counsel.[18]

I. INDIVIDUAL V. CLASS ACTION: THE RISKS AND THE FINANCIAL CONSTRAINTS

Few Title VII class action sex discrimination suits have been filed against academic institutions.[19] Of those, few have been certified as class actions,[20] and only one has resulted in a classwide settlement.[21]

Many practical litigation considerations weigh heavily in favor of individual rather than class actions against an academic employer. Potential damage to one's career is a very real concern, particularly for those individuals who have invested long years in pursuit of an advanced degree and who face an ever-tightening job market. Very often, injunctive relief as to hiring, reinstatement, salary or tenure, is more important to the individual plaintiff than monetary relief in the form of back pay or long-range affirmative action for female applicants.

Before instituting a class action suit, plaintiff's counsel should take a number of practical factors into consideration:

1. The legal costs that might be incurred for class certification (including the cost of mailing notice of the pendency of the class action to individual class members) and for computer statistical discovery and analysis.[22] These legal costs will depend

18. The authors wish to acknowledge the assistance of Judith P. Vladeck, co-author of *Sex Discrimination in Higher Education: It's Not Academic,* 2 WOMEN'S RIGHTS L. REP. 59 (1978).

19. Solin v. State Univ. of N.Y., 416 F. Supp. 536 (S.D.N.Y. 1976); Sanday v. Carnegie-Mellon Univ., 15 EPD ¶ 8088 (W.D. Pa. 1976); Mecklenberg v. Montana Bd. of Regents, 13 EPD ¶ 11,438 (D.Mont. 1976); Melani v. Bd. of Higher Educ., 12 EPD ¶ 11,068 (S.D.N.Y. 1976); Lamphere v. Brown Univ., 16 FEP Cases 747 (D.R.I. 1976); Keyes v. Lenior Rhyne College, 15 FEP Cases 914 (W.D.N.C. 1976); O'Connell v. Teacher's College, 8 FEP Cases 525 (S.D.N.Y. 1974).

20. Mecklenberg v. Montana Bd. of Regents, 13 EPD ¶ 11,438 (D. Mont. 1976); Melani v. Bd. of Higher Educ., 12 EPD ¶ 11,068 (S.D.N.Y. 1976); Lamphere v. Brown Univ., 16 FEP Cases 747 (D.R.I. 1976); Keyes v. Lenoir Rhyne College, 15 FEP Cases 914 (W.D.N.C. 1976).

21. Lamphere v. Brown Univ., 16 FEP Cases 747 (D. R.I. 1976). *See* notes 122-131 *infra* and accompanying text.

22. FED. R. CIV. P. 23 (d): "[T]he court may make appropriate orders . . . (2) requiring . . . that notice be given in such manner as the court may direct to some or all of the [class] members of any step of the action. . . . " *See also* Oppenheim Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (plaintiffs required by FED. R. CIV. P. 23(b)(3) to pay cost

upon the geographical scope of the proposed class and the physical location and format of defendant's personnel records, including computer records.

A private Title VII plaintiff can rarely afford to finance class action litigation without outside financial assistance. This is especially so for academic employees, whose incomes at the junior faculty level are modest, and particularly for those employees faced with termination. By the same token, few members of the private Title VII plaintiffs' bar can underwrite class action litigation, given the risks involved, the complex procedural and substantive stumbling-blocks, and the judicial backlash against Title VII in general.

2. The existence of an organized employees' caucus or committee composed of class members who would take an active interest in the litigation and would be willing to participate as trial witnesses and provide information.

3. The possible participation of the Equal Employment Opportunity Commission (EEOC) or public interest organizations to provide financial and/or legal assistance. Since the enactment of the 1972 amendments to Title VII, the EEOC can institute "pattern and practice" suits against private educational institutions,[23] intervene in litigation against private academic employers brought by private party plaintiffs,[24] or participate in such litigation as *amicus curiae.*[25] Yet, in spite of its excellent track record in Title VII litigation, the EEOC has rarely participated in sex discrimination cases in the academic sector.[26] In a

of retrieving names and addresses of class members from defendant's computer records); Eisen v.Carlisle & Jacquelin, 417 U.S. 156 (1974)(plaintiffs required by FED. R. CIV. P. 23(b)(2) to pay cost of notice to class members of pendency of class action).

23. 42 U.S.C. § 2000e-5(f)(1) (1976).

24. 42 U.S.C. § 2000e-4(g) (1976): "The [Equal Employment Opportunity] Commission shall have power— . . . (6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision."

25. In Weise v. Syracuse Univ., 10 EPD ¶ 10,294 (2d Cir. 1975) and Faro v. N.Y. Univ., 8 EPD ¶ 9,632 (2d Cir. 1974) the EEOC participated as amicus curiae on appeal.

26. EEOC v. Tufts, 15 FEP Cases 495 (D. Mass. 1975) (EEOC as named plaintiff); Weise v. Syracuse Univ., 10 EPD ¶ 10,294 (2d Cir. 1975) (EEOC as amicus curiae on appeal); Faro v. New York Univ., 8 EPD ¶ 9,632 (2d Cir. 1974) (EEOC as amicus curiae on appeal).

few cases, women's rights organizations have sued as party plaintiffs[27] or provided legal counsel[28] to female faculty members.

4. The selection of named plaintiffs to serve as class representatives. The potential named plaintiff should be informed of the possible risk of harm to her career inherent in such litigation, including the possibility of blacklisting by other academic institutions. Years of protracted litigation are invariably stressful to the named plaintiffs, often resulting in untold anxiety and lasting psychological effects. As a practical matter, prospective named plaintiffs may never come forward, even as trial witnesses, for fear of damaging their professional reputation and alienating their male colleagues who are in power positions of granting or denying tenure and making other critical career decisions. Other potential plaintiffs may have valid complaints of sex discrimination, but lack documentary evidence to prove their cases.

II. CLASS CERTIFICATION

A. TIMELINESS

Federal Rule of Civil Procedure 23(c)(1) requires the plaintiff to move for class certification as soon as possible.[29] In the Northern District of California, the plaintiff's motion for class certification must be filed "within *six months* of the filing of [plaintiff's] first pleading, or at such later time as the assigned judge may order or permit."[30] The recently enacted local rules of the Northern Judicial District of California also require that the complaint include a "statement of facts showing that the party is entitled to maintain the action under paragraphs (a) and (b) of Rule 23."[31] These class certification rules place an almost impossible burden on the class action plaintiff. The plaintiff must be prepared at the time of class certification to present statistics as to the institution's employment practices that may require months or even years of exhaustive discovery, depending on the

27. League of Academic Women v. Regents of the Univ. of Cal., 343 F. Supp. 636, 4 FEP Cases 808 (N.D. Cal. 1972); Nat'l Organization for Women, Inc. v. President and Bd. of Trustees of Santa Clara College, 16 FEP Cases 1152, 1158 (N.D. Cal. 1975) (held that NOW had standing to sue as party plaintiff).

28. *See* Johnson v. Univ. of Pittsburgh, 16 EPD ¶ 8,194, 15 FEP Cases 1516 (W.D. Pa. 1977) (Counsel provided by NOW).

29. FED. R. CIV. P. 23 (c)(1): "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."30. U.S.D.C., N.D. CAL. R. 200-6(c).

31. U.S.D.C., N.D. CAL. R. 200-6(b)(iii).

availability of the information.[32] The class action plaintiff must, therefore, proceed with formal discovery as early as possible and be prepared to file motions to compel discovery, and for sanctions, if appropriate, should the defendant attempt to "stonewall" the discovery effort.

B. NUMEROSITY

Overcoming the numerosity requirement may depend on how the class is defined. Since so few women are employed on the faculties of most academic institutions, there may not be a large enough class of female faculty members to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1).[33] If such is the case, the class may be enlarged to include rejected female applicants.[34] Since restriction of the scope of the class to a single academic department may result in a class too small to satisfy the numerosity requirement of Rule 23 (a)(1), a broadly-based class encompassing female faculty throughout the institution (as well as rejected female applicants) may be sought.[35] A class may be sought which includes non-faculty as well as faculty employees.[36]

C. COMMONALITY

Federal Rule of Civil Procedure 23(a)(2)[37] requires a plaintiff to show that the decision-making process of the academic institu-

32. Judge Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 41 (1967):

> [T]he time when a hard determination is "practicable" as to the propriety of a class action will obviously vary from case to case. . . . [I]t may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action. It may be possible only to formulate a program of discovery and study under as stringent a timetable as the circumstances will allow, and then to reschedule the subject for determination under [Fed. R. Civ. P. 23] (c)(1).

(*Quoted in* Solin v. State Univ. of N.Y., 416 F. Supp. 536, at 541 (S.D. N.Y. 1976)).

33. FED. R. CIV. P. 23(a): "One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable."

34. Mecklenberg v. Montana Bd. of Regents, 13 EPD ¶ 11,438 (D. Mont. 1976).

35. Lamphere v. Brown Univ., 16 FEP Cases 747 (D. R.I. 1976).

36. *But see* Sanday v. Carnegie-Mellon Univ., 15 EPD ¶ 8088 (W.D. Pa. 1976) (proposed class including non-faculty members denied).

37. FED. R. CIV. P. 23(a): "One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (2) there are questions of law or fact common to the class."

tion is not left in the hands of the individual department but is ultimately controlled by the central administration. In many instances this is extremely difficult to show, since, in fact, the individual departments may exercise a large degree of autonomy in the selection of faculty and in salary and tenure decisions. Failure to make such a showing may prove fatal to class certification. In *Sanday v. Carnegie-Mellon University,*[38] the court refused to certify a broad applicant and employee class on that basis:

> It is indisputable that the employment practices of CMU are much different than those of, say, an industrial concern that operates under uniformly applied company policies respecting hiring, wage scales, promotions, job classifications, etc. The inherent difficulty with using that approach is that CMU employs no discernible uniform practices regarding its faculty employees. For purposes of hiring, salary, promotion, tenure, etc. each faculty member — male and female — is judged individually on merit alone and, at times, by his or her colleagues thus further removing the decision-making process from the auspices of the university.[39]

If the plaintiff can make a showing that the ultimate employment decisions are in the hands of the central administration, not the department, the commonality requirement can be satisfied.[40]

D. Typicality

At the time of class certification the plaintiff must be prepared to satisfy the typicality requirement of Federal Rule of Civil Procedure 23(a)(3)[41] with employment statistics demonstrating the patterning and practice of discrimination against the class. Such statistics should include: 1) the underutilization of women, compared with the availability of qualified women in the labor force;[42] and 2) the number of EEOC charges filed by puta-

38. 15 EPD ¶ 8088 (W.D. Pa. 1976).

39. *Id.* at 7316.

40. *See* Lamphere v. Brown Univ., 16 FEP Cases 747, 752 (D. R.I. 1976); Melani v. Bd. of Higher Educ., 12 EPD ¶ 11,068 at 4969 (S.D. N.Y. 1976).

41. Fed. R. Civ. P. 23(a): "One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class."

42. Mecklenberg v. Montana Bd. of Regents, 13 EPD 11,438, at 6498-99 (D. Mont. 1976).

tive class members.[43] If "across the board" class certification is sought, it may be advantageous to have a cross-section of named plaintiffs each of whom typify a different aspect of the class-wide discrimination.

E. Appeal of Denial of Certification

As the result of two recent Supreme Court decisions,[44] both decided on June 21, 1978, a court order denying class certification is no longer appealable as a matter of right. Previously a class action plaintiff could appeal as a matter of right from the denial of class action certification. The rationale was, that such denial was a "final decision" under 28 U.S.C. § 1291.[45] Such appeals were often successful.[46] The Supreme Court in *Coopers & Lybrand v. Livesay* rejected this "death knell" doctrine and held that a district court's determination that an action may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure is not a "final decision" within the meaning of section 1291(a) and is, therefore, not appealable as a matter of right.[47]

In *Gardner v. Westinghouse Broadcasting Co.,*[48] the named plaintiff, an unsuccessful female job applicant for a radio talk show host position, brought a class action seeking injunctive relief for the class. Class certification was denied. Plaintiff sought an interlocutory appeal from the denial of class certification under 28 U.S.C. § 1292 (a)(1). The order denying class certification was held to be nonappealable under section 1292 (a)(1).[49]

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43. The existence of EEOC charges other than the named plaintiff's may be an important factor in the court's willingness to certify a class. *See* O'Connell v. Teacher's College, 8 FEP Cases 525, 527 (S.D. N.Y. 1974) (class certification denied where no members of plaintiff's class filed EEOC charges). Plaintiff's counsel should be prepared to offer assistance in filing EEOC charges to potential class members with timely claims of sex discrimination.

44. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Gardner v. Westinghouse, 437 U.S. 478 (1978).

45. 28 U.S.C. § 1291 (1970) provides, in part: "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States. . . . " (emphasis added).

46. *See, e.g.,* Gay v. Waiters' Union and Dairy Lunchmen's Union, Local 30, 549 F. 2d 1330 (9th Cir. 1977).

47. 437 U.S. 463, 477 (1978).

48. 437 U.S. 478 (1978).

49. *Id.* at 480. 28 U.S.C. § 1292(a) (1975) provides, in part: "The courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . refusing . . . injunctions. . . . "

As a result of the Supreme Court's recent rulings, a plaintiff is left with only one possible recourse if a motion for class certification is denied. The plaintiff may move to have the district court's order denying class certification certified for interlocutory appeal under 28 U.S.C. § 1292 (b).[50] Since the granting of an interlocutory appeal under section 1292 (b) is a purely discretionary matter and requires the approval of both the district court judge who denied class certification and the court of appeal, in all likelihood, a motion for certification for interlocutory appeal will be denied. If this occurs, the plaintiff must litigate the entire case to its final conclusion on an individual basis, then seek an appeal from the denial of class certification after a trial on the merits.

The practical effect, if not the intent, of the recent Supreme Court rulings is to discourage plaintiffs from bringing class action suits.[51] In spite of the hurdles presented by these cases, class actions *have* been certified in Title VII cases, particularly in the Ninth Circuit,[52] including a number of cases involving employment discrimination in academia.[53]

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50. 28 U.S.C. § 1292(b) (1975) provides, in part:

> When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion . . . that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion permit an appeal to be taken from such order. . . .

51. Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1978)("the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of § 1291"). The Supreme Court recognized that the lack of redress through a section 1292(b) interlocutory appeal might induce a plaintiff to abandon the litigation. Respondents argued that "the class action serves a vital public interest and, therefore, special rules of appellate review are necessary to ensure that district court judges are subject to adequate supervision and control." *Id.* at 470. The Supreme Court held that this was "irrelevant to the issue we must decide" and was "proper for legislative consideration." *Id.* at 470.

52. *See* Gay v. Waiters' and Dairy Lunchmen's Union, Local 30, 549 F.2d 1330 (9th Cir. 1977); Gibson v. Local 40, ILWU, 543 F. 2d 1259 (9th Cir. 1976); Hariss v. Pan Am. World Airways, Inc., 74 F.R.D. 24 (N.D. Cal. 1977); *cf.* Lim v. Citizens Sav. and Loan Ass'n., 430 F. Supp. 802 (N.D. Cal. 1976)(class certification denied because section 1981 claim deemed invalid).

53. *See* cases cited at note 20 *supra.*

III. THE LITIGATION PROCESS

A. Application for Preliminary Injunction

The likelihood of obtaining a preliminary injunction in a Title VII case against an academic employer depends on a variety of factors. Given the courts' traditional "hands off" attitude with respect to academic employment,[54] a plaintiff must be prepared to make a strong factual showing in support of her application for a preliminary injunction. A number of courts have granted preliminary injunctions in academic settings;[55] an equal number of courts have refused to do so.[56]

Preliminary Injunction Granted

In *Johnson v. University of Pittsburgh,*[57] the court issued a preliminary injunction to permit the plaintiff to remain on the faculty pending a decision on the merits. The plaintiff made a *prima facie* showing of a reasonable likelihood of success on the merits and showed that the equities balanced in her favor.[58] In support of her application for a preliminary injunction plaintiff presented statistics to show that the School of Medicine paid male tenured faculty more than female tenured faculty, and granted tenure to male faculty in disproportionately higher numbers compared to their representation in the eligibility pool.[59] Plaintiff showed that she would suffer "irreparable harm" if she lost her position, including the damage to her reputation as a research scientist and the effect upon her National Institute of Health research grant.[60] The court held that the damage to plaintiff's professional career was much greater than any possible harm to the university if she were allowed to remain on the faculty.[61]

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54. *See* note 17 *supra* and accompanying text.

55. Wagner v. Long Island Univ., 419 F. Supp. 618 (E.D.N.Y. 1976); EEOC v. Tufts Inst., 421 F. Supp. 152 (D. Mass. 1975); Johnson v. Univ. of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973), *complaint dismissed and preliminary injunction dissolved,* 435 F. Supp. 1328 (W.D. Pa. 1977).

56. Faro v. New York Univ., 502 F. 2d 1229 (2d Cir. 1974); Theodore v. Elmhurst College, 421 F. Supp. 355 (N.D. Ill. 1976); Huang v. Holy Cross College, 10 FEP Cases 968 (D. Mass. 1975); Gilinsky v. Columbia Univ., 8 EPD ¶ 9703 (S.D.N.Y. 1974).

57. 359 F. Supp. 1002 (W.D. Pa. 1973).

58. *Id.* at 1009.

59. *Id.* at 1008.

60. *Id.* at 1010.

61. [T]his is not the ordinary case of a salaried employee who is wrongfully discharged where a remedy in dam-

In *Wagner v. Long Island University,*[62] the court issued a preliminary injunction to the plaintiff enabling her to continue her employment as assistant professor pending the court's decision on the merits on her denial of tenure. Irreparable harm was shown by: 1) rejection letters from four other colleges, showing her inability to find another teaching job elsewhere; 2) her expected loss of professional reputation in her field and her relationships with faculty and students at the school; 3) her uncompensated time in preparing her new courses for the coming academic year; 4) the possible loss of an offer from a publisher to publish her textbook; and 5) the anticipated rejection of two articles for academic journals if plaintiff were not teaching at a recognized academic institution.[63]

In *EEOC v. Tufts Institute,*[64] an application for preliminary injunction was granted to a female plaintiff-intervenor who had been denied tenure. In so doing, the court put great emphasis on her age (38) and the harm to her professional reputation if she were terminated.[65] The University offered statistics to show that the school hired and granted tenure to a disproportionately high number of female candidates.[66] The University also argued that a preliminary injunction should not issue because the applicant had been replaced by another female. Both of the defendant's arguments were soundly rejected by the court.[67]

Preliminary Injunction Denied

The following cases are not easily distinguished from the

> ages is adequate. Rather here we have a Ph.D. with an outstanding professional reputation which will be unquestionably damaged by this. Her ability to get a job will certainly be impaired because of inability to secure recommendations from her present employers. It appears that jobs are very difficult to obtain at this time for people in this field and the mere fact of her discharge or failure to receive tenure from the University of Pittsburgh would naturally chill her chances of obtaining another position.

Id. at 1009.

62. 419 F. Supp. 618 (E.D. N.Y. 1976).

63. *Id.* at 620.

64. 421 F. Supp. 152 (D. Mass. 1975).

65. *Id.* at 165.

66. *Id.* at 164.

67. "The plaintiff is entitled to have the opportunity to show at the hearing on the merits that the appointment of the replacement was made to conceal or cover up a discriminatory decision." *Id.* at 165.

preceding cases. In *Faro v. New York University,*[68] the Second Circuit, ridiculing plaintiff in the opinion, upheld the denial of plaintiff's application for a preliminary injunction.[69] In *Gilinsky v. Columbia University,*[70] plaintiff failed to obtain a preliminary injunction "enjoining Columbia from appointing white males to its faculty pending determination of the case on the merits."[71] The court, citing *Faro* as authority, based its decision upon several considerations. Plaintiff failed to establish the probability of success on the merits in that 1) the University's hiring statistics showed that females and minorities were hired in higher numbers than their percentage of the national labor pool; 2) plaintiff's individual complaint had been dismissed by the New York State Division of Human Rights; 3) the University's federal contract compliance agency, the Department of Health, Education and Welfare, found the University's affirmative action plan to be in full compliance; and 4) plaintiff, although claiming to represent a class, pointed only to statistics rather than any other individuals who had been the object of discrimination.[72]

In *Theodore v. Elmhurst College,*[73] a race discrimination case, a tenured black female professor was terminated, allegedly for economic reasons, and sought a preliminary injunction to prohibit her termination and the discontinuance of her employee benefits.[74] The court denied her application for a preliminary injunction on the grounds that plaintiff made an inadequate showing of "irreparable harm"[75] holding that mere allegations of a temporary loss of income and difficulty in securing other employment are insufficient to support a finding of irreparable injury, since back pay could be awarded if she prevailed on the merits.[76] In another race discrimination case, *Huang v. Holy Cross College,*[77] the court denied plaintiff's application for a preliminary injunction because there was no reasonable probability of

68. 502 F. 2d 1229 (2d Cir. 1974).

69. "As to 'irreparable harm' Dr. Faro is in no way different from hundreds of others who find that they have to make adjustments in life when the opening desired by them does not open." *Id.* at 1232.

70. 8 EPD ¶ 9703 (S.D. N.Y. 1974).

71. *Id.* at 5939.

72. *Id.* at 5940.

73. 421 F. Supp. 355 (N.D. Ill. 1976).

74. *Id.* at 356.

75. *Id.* at 357.

76. *Id.* at 357-358.

77. 10 FEP Cases 968 (D. Mass. 1975).

success on the merits, since the evidence showed that plaintiff's teaching ability and service to the college, not race, were the bases for denying him tenure.[78]

B. Pre-Trial Preparation and Discovery

There are two principal tasks involved in preparation of a Title VII class action suit for trial: 1) the preparation of a statistical case; and 2) the preparation of lay witnesses, both the named plaintiffs and members of plaintiffs' class. These aspects of pre-trial preparation are virtually inseparable. Although the Supreme Court has ruled that the plaintiff may rely on statistical proof in the presentation of the *prima facie* case,[79] testimony from live witnesses is desirable, if not essential.[80] Exclusive reliance on statistical evidence may prove fatal.[81] Nothing can really substitute for the flesh-and-blood testimony of class members with credible claims of sex discrimination.

From a practical standpoint, class members may be reluctant to come forward as witnesses at time of trial. Present employees may fear retaliation as a result of their participation in the lawsuit, or they may resist being labelled as women's rights activists.[82] Although retaliation of this nature is unlawful,[83] the

78. *Id.* at 971.

79. Teamsters v. United States, 431 U.S. 324, 339-40 n. 20 (1977).

80. *Id.* at 339.

81. Despite the voluminuous testimony in this case, not one individual has been identified who claims to have been discriminated against in the hiring process on the grounds of race. . . . While I realize that a plaintiff in a disparate impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant.

Scott v. Univ. of Delaware, 17 FEP Cases 1486, 1509-10 (D. Del. 1978).

82. For examples of this bias, *see, e.g.*, Peters v. Middlebury College, 409 F. Supp. 857, 860 (D.Vt. 1976) where the court, in its findings of fact, stated: "The chairman suggested that if [plaintiff] wished to actively pursue her interest in the women's movement, she should look for employment in an urban environment." In Pace Colllge v. Comm'n on Human Rights, 11 EPD ¶ 10,685 (S.D. N.Y. 1975) the court found it uncontroverted that

> [w]hat [plaintiff] did to cause her termination would not have been considered 'troublesome' if she had not been a woman. It often happens that those who are not supine and fight for their rights will be regarded as troublesome and those disturbed by the struggle would wish that the troublesome one 'would just go away'.

Id. at 6881.

83. 42 U.S.C. § 2000e—3(a)(1976) provides, in pertinent part:

> It shall be an unlawful employment practice for an employer

risks are nonetheless very real, particularly in academia. Declining college enrollments and the resulting fiscal crises breed job insecurity and the threat of imminent lay-offs, even for tenured faculty. It is therefore not surprising that a large proportion of the named plaintiffs in employment discrimination cases against colleges and universities have been former employees, who have obtained employment elsewhere before becoming involved in litigation.

Preparation of testimony of lay witnesses and named plaintiffs hinges on the availability of the employment records of both the females involved and their male counterparts. Letters of recommendation and written evaluations will often document the very subjective judgments that enter into faculty selection procedures. This information is rarely made available to plaintiff's counsel without protracted discovery efforts.

The decision of Judge Renfrew in *McKillop v. Regents of University of California,*[84] illustrates the difficulties encountered in the discovery of university personnel files. The plaintiff, who had been denied tenure in the Art Department at the University of California at Davis, moved for the discovery of all documents in her personnel file and all written materials in the personnel files of persons in "tenure-track" positions in the Department, persons who presently or previously held tenure positions in the Department, and persons in the "tenure-track" in the Department who were denied tenure.[85] The University refused to produce documents submitted or written in confidence on the basis that the documents constituted privileged official information.[86] The court agreed, denying plaintiff's motion.[87]

> to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

84. 386 F. Supp. 1270 (N.D. Cal. 1975).

85. *Id.* at 1272.

86. *Id.* The University further argued that "the efficacy of the peer recommendation system for faculty selection at the University of California hinges on preserving the confidentiality of evaluations submitted or made in connection therewith." *Id.* at 1275.

87. *Id.*

C. Trial on the Merits: Sweeney

The courts' unwillingness to scrutinize the employment practices of academia has culminated in the recent Supreme Court decision in *Board of Trustees v. Sweeney*.[88] The Supreme Court's decision in *Sweeney* casts a grey cloud over the future of employment discrimination cases in general, and most certainly, Title VII cases involving academic institutions. The 5-4 *Sweeney* decision also points up the political schism in the federal judiciary itself and the increasing judicial backlash against Title VII litigation.

Plaintiff Sweeney sued Keene State College upon her failure to receive a promotion to the rank of full professor.[89] Although she had received a recommendation for the promotion from her department and the department chairman, the all-male Faculty Evaluation Advisory Committee (FEAC) unanimously voted not to approve the promotion.[90] The Dean, also male, approved the recommendation of the FEAC.[91]

The plaintiff in *Sweeney* charged that the college discriminated against her in salary at the associate and full professor rank (which she eventually received) on account of her sex.[92] Her salary discrimination claim was based on statistics of the defendant college showing higher salaries for male professors with equivalent qualifications and responsibilities.[93]

The trial court found that the failure to promote plaintiff to full professor was due to her sex, citing the "double standard" applied for males and females in the promotion process and the evidence that there "was and is a disproportionately small number of women in the high ranks of associate and full professors" at the college.[94] The trial court rejected plaintiff's claim of salary

88. 439 U.S. 24 (1978). For an excellent discussion of Title VII case law on sex discrimination in academia prior to *Sweeney* and the preparation of a statistical *prima facie* case, *see* Vladeck and Young, *Sex Discrimination in Higher Education: It's Not Academic*, 2 Women's Rights L. Rep. 59 (1978).

89. Sweeney v. Bd. of Trustees, 14 FEP Cases 1220, 1224 (D.N.H. 1977). Plaintiff was considered twice for promotion and was twice rejected. It was not until plaintiff's second denial for promotion that formal charges of sex discrimination were filed. *Id.* at 1225.

90. *Id.* at 1223.

91. *Id.*

92. *Id.* at 1221, 1230-31.

93. *Id.* at 1230.

94. *Id.*

discrimination, although the court acknowledged that the lack of objective standards for salary administration could result in discrimination against female faculty.[95]

On appeal, the First Circuit affirmed the lower court's ruling[96] and urged the federal judiciary to abandon its traditional "hands off" policy and take an active role in eliminating sex discrimination at colleges and universities.[97] In so doing, the First Circuit radically departs from a long line of federal cases which represent a reluctance by the courts to become involved in personnel decisions in academia, typified by the Second Circuit in *Faro,*[98] thereby denying the discrimination claims of female academic plaintiffs. In upholding the trial court's decision, the First Circuit in *Sweeney* relied primarily on the Supreme Court decision in *McDonnell Douglas Corp. v. Green*[99] and held that the college had failed to meet its burden of proof in showing the existence of a legitimate, nondiscriminatory motive.[100]

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95. Another factor that skews the salary scale in favor of males is the fact that the defendant college has no objective salary standard and schedule. Under the system in effect, longevity and judgmental factors, which cannot be objectively determined, weigh heavily in determining the salary of individual members of the faculty. The salary of an individual faculty member, as well as his/her promotion, depends on the discretion and judgment of his/her superiors. While this is necessary in the promotion of process, it should not play a large role in determining an individual's salary. Broad discretion inevitably leads to discrimination.

Id.

96. 569 F. 2d 169 (1st Cir. 1978).

97. *Id.* at 176.

98. Faro v. N.Y. Univ., 502 F. 2d 1229 (2d Cir. 1974). The *Faro* court explicitly stated that "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Id.* at 1231.

99. 411 U.S. 792 (1973). The Court identified the burdens assigned to plaintiff and defendant in such cases:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination: This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for the employee's rejection.

Id. at 802.

100. Sweeney v. Bd. of Trustees, 569 F. 2d 169, 177 (1st Cir. 1978).

The *per curiam* decision of the Supreme Court in *Sweeney*[101] rejected the First Circuit's reading of *McDonnell Douglas* and held that *McDonnell Douglas* only required the employer to "articulate some legitimate, nondiscriminatory" motive.[102] On this basis, the case was remanded for reconsideration. The effect of the Supreme Court ruling in *Sweeney* remains to be seen. Since *Sweeney* was an individual action, it is unclear to what extent the opinion will be applied to class action litigation under Title VII.

D. Other Remedies

Equal Pay Act

Prior to 1972, all professional employees, including those employed by colleges and universities, were excluded from coverage of the Equal Pay Act.[103] While professional employees outside of academia had Title VII remedies for salary discrimination,[104] academic employees did not.

In many respects, the Equal Pay Act remedies are superior to those under Title VII. The delays built into the procedural requirements of Title VII, *i.e.*, the filing of an EEOC charge and the 180-day rule[105] can be avoided. The Equal Pay Act provides

101. 439 U.S. 24 (1978).

102. *Id.* at 24. The Court's interpretation of *McDonnell Douglas* was based on its recent decision in Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).

103. 29 U.S.C. § 206 (d)(1) (1976) provides, in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

104. 42 U.S.C. § 2000e—2(a) (1976): "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual with respect to his *compensation* . . . because of such individual's . . . sex. . . ."

105. 42 U.S.C. § 2000e—5(f)(1) provides, in part:

> [I]f within one hundred and eighty days from filing of such charge . . . the [Equal Employment Opportunity] Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a

for liquidated damages[106] and a three-year statute of limitations period for an alleged willful violation.[107] Title VII has no provision for liquidated damages and has a 300-day statute of limitations for filing an administrative charge.[108] The Equal Pay Act also provides for criminal prosecution and penalties[109] whereas Title VII does not.

Title VII, on the other hand, has certain advantages over the Equal Pay Act. An Equal Pay Act class action cannot be brought without the written consent of the class members.[110] Title VII has no such requirement. Title VII contains provisions for injunctive

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member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

106. 29 U.S.C. § 216 (b) (1976) provides, in part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

107. 29 U.S.C. § 255 (1976) provides:

> Any action commenced . . . to enforce any cause of action . . . under the Fair Labor Standards Act of 1938, as amended . . . —(a) . . . may be commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

108. 42 U.S.C. § 2000e—5(e) (1976) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . .

109. 29 U.S.C. § 216 (a) (1976) provides, in part: "A person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both."

110. 29 U.S.C. § 216 (b) provides:

> Action to recover . . . liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

relief against future salary discrimination,[111] whereas the Equal Pay Act does not.

More importantly, perhaps, the definition of "equal pay" under the Equal Pay Act is very narrowly defined[112] and does not readily apply to many forms of wage discrimination. Although the 1972 amendments expanded the Equal Pay Act to cover professional employees, it is extremely difficult to quantify white-collar jobs — particularly those in academia — under the rigorous legal standards of the Equal Pay Act. The content of one faculty member's job is rarely similar enough to that of another to meet the Equal Pay Act test for "equal pay."

Civil Rights Act of 1871

State colleges and universities can be sued under the Civil Rights Act of 1871.[113] Prior to the enactment of the 1972 amendments of Title VII and the Equal Pay Act, section 1983 was one of the few remedies available to redress sex discrimination in public academic institutions.

However, there are both procedural and substantive hurdles under section 1983. In a significant number of cases, section 1983 claims of sex discrimination against state colleges and universities have been dismissed on the grounds that the public institution was the "alter ego" of the state by virtue of state funding and

111. 42 U.S.C. § 2000e—5(g) (1976) provides, in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement and hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

112. For a discussion of "equal skill, effort and responsibility" and "similar working conditions" as defined by the Equal Pay Act, *see* Brennan v. Owensboro-Daviess County Hospital, 523 F. 2d 1013 (6th Cir. 1975).

113. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

therefore immune to suit under the Eleventh Amendment.[114] Other courts have taken the opposite view that, in spite of state aid and other ties to state government, a public university is not the "alter ego" of the state and therefore can be sued under section 1983.[115]

Section 1981 and Executive Order 11246

The courts have uniformly held that the Civil Rights Act of 1870[116] does not apply to claims of sex discrimination in academia.[117] The courts have also held that there is no private right of action under Executive Order 11246[118] to redress sex discrimination in colleges and universities.[119]

Faculty Grievance Procedures

In some cases, the academic faculty member may have the right to initiate a grievance procedure under the terms of a faculty union contract[120] or under the American Association of University Professor (AAUP) guidelines.[121]

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114. Jackson v. Univ. of Pittsburgh, 405 F. Supp. 607 (W.D. Pa. 1975); Braden v. Univ. of Pittsburgh, 343 F. Supp. 118 (W.D. Pa. 1975); Rackin v. Univ. of Pa., 386 F. Supp. 992, 997 (E.D. Pa. 1974); Davis v. Weidner, 13 EPD ¶ 11,592 (E.D. Wisc. 1976); Melani v. Bd. of Higher Educ., 12 EPD ¶ 11,068 (S.D.N.Y. 1976).

115. Lamb v. Rantoul 561 F. 2d 409 (1st Cir. 1977); Weise v. Syracuse Univ., 10 EPD ¶ 10,294 (2d Cir. 1975); Scott v. Univ. of Del., 10 FEP Cases 1064 (D. Del. 1974).

116. 42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to life punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

117. "There is nothing in the history of the Act [Civil Rights Act of 1870] to suggest that Congress envisioned any sexual differences when it established the white citizen standard." League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636, 639 (N.D. Cal. 1972). *See* Melanson v. Rantoul, 421 F. Supp. 492 (D.R.I. 1976); Jackson v. Univ. of Pittsburgh, 405 F. Supp. 607 (W.D. Pa. 1975); Rackin v. Univ. of Pa., 386 F. Supp. 992, 997 (E.D. Pa. 1974); Davis v. Weidner, 13 EPD ¶ 11,592 (E.D. Wisc. 1976).

118. Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e, at 281 (nondiscrimination in employment by government contractors and subcontractors).

119. Jackson v. Univ. of Pittsburgh, 405 F. Supp. 607, 611 (W.D. Pa. 1975); Braden v. Univ. of Pittsburgh, 343 F. Supp. 118 (W.D. Pa. 1975).

120. Labat v. Bd. of Higher Educ., 10 EPD ¶ 10,563 (S.D. N.Y. 1975); (associate professor at Queens College invoked Union grievance procedure to redress failure to receive tenure).

121. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, RECOMMENDED INSTITUTIONAL

Faculty grievance procedures may, in certain instances, offer a more expeditious and less costly remedy than Title VII, especially if the grievance constitutes a clear-cut violation of a provision of the union contract or the applicable faculty personnel manual. As a practical matter, the AAUP grievance procedures call for a hearing by a faculty review committee which can only render a recommended decision to the college administration. There are no procedural safeguards to insure that the appointed faculty review committee and the college administration will be fair and impartial.

IV. NEGOTIATION OF A CLASS SETTLEMENT: LAMPHERE V. BROWN UNIVERSITY

It is a discouraging statistic that out of all the sex discrimination Title VII cases against academic institutions, only one, *Lamphere v. Brown University,*[122] has resulted in a class-wide settlement. The *Brown University* settlement does, however, set good precedent and provide a good working model for negotiation of a class settlement with a major university. The *Brown University* Consent Decree entered September 12, 1977,[123] provides for monetary and injunctive relief as follows:

1. Class back pay of $400,000.00 to be distributed to class members under a claims procedure.[124]

2. Goals and timetables, including giving preference to female candidates who are equally qualified as non-minority males.[125]

3. Adoption and publication of specific objective criteria, standards and procedures for hiring, contract renewal, promotion, subject to approval of an Affirmative Action Monitoring Committee.[126]

REGULATIONS ON ACADEMIC FREEDOM AND TENURE (1976). *See* Johnson v. Univ. of Pittsburgh, 16 EPD ¶ 8,194 (W.D. Pa. 1977).

122. 16 FEP Cases 747 (D.R.I. 1976).

123. Consent Decree, Lamphere v. Brown Univ., No. 75-0140 (D. R.I. Sept. 12, 1977). A copy of the Consent Decree and further information may be obtained from counsel for plaintiffs, Milton Stanzler, Esq., Abedon, Michaelson, Stanzler, Biener, Skolnik and Lipsey, 220 South Main St., Providence, R.I. 02903.

124. *Id.* Paragraph 2 (M). In addition, three class members shared an additional $8,000.00 in back pay, and plaintiff Lamphere and two class members received academic tenure. *Id.* Paragraph 5(A).

125. *Id.* Paragraph 2 (A); Exhibit A.

126. *Id.* Paragraph 2 (C); Exhibits B and B(1).

4. Development of a review procedure for decisions concerning hiring, contract renewal, promotion and tenure to determine whether the selection procedures were applied in a nondiscriminatory manner.[127]

5. Development of a faculty grievance procedure for complaints of sex discrimination other than matters of hiring, contract renewal, promotion and tenure.[128]

6. Search procedures for hiring of new faculty.[129]

7. Access by any faculty member to comparative salary information for both male and female faculty members of comparable rank and service.[130]

8. Access to all employment recommendations by a department concerning hiring, contract renewal, promotion and tenure. An unsuccessful applicant for a faculty position may obtain a copy of the Compliance Report stating grounds for selection and the selectee's *curriculum vitae.* A faculty member is provided access to his or her own personnel files, except confidential letters of recommendation.[131]

To date, under the *Brown University* Decree, approximately 100 class members have filed back pay claims by giving initial notice, as provided by the terms of the Consent Decree. Of those, fifty class members have followed up the initial notice by providing the detailed facts of their claims and supporting documentation to the hearing panel. Of the fifty back pay claims, approximately thirty-two claims have actually been heard and disposed of, either by way of settlement or decison of the hearing panel. Out of the $400,000.00 for class back pay, approximately $85,000.00 to $100,000.00 has been awarded to date. Another $75,000.00 is in issue. The remainder of the unclaimed money will revert to Brown University under the Consent Decree.

127. *Id.* Paragraph 2 (E); Exhibit D.

128. *Id.* Paragraph 2 (6).

129. *Id.* Paragraph 2 (F); Exhibit E. If a male candidate is hired over a female, or if a female candidate is not recommended for contract renewal, promotion or tenure, the Department of Division has the burden of proving to the Affirmative Action Monitoring Committee that the decision was not discriminatory as to sex.

130. *Id.* Paragraph 2 (H).

131. *Id.* Paragraph 2 (I).

Negotiation of a class-wide Title VII settlement raises many critical questions for which there are no simple answers.

1. *Class-Wide Back Pay: Formula v. Claims Procedure:* Processing claims necessarily entails a lengthy procedure of gathering documentation, evaluation of the claims, and providing hearing and review procedures. Because of fear of retaliation or black-listing in the profession, many class members will shy away from filing back pay claims, even if their claims are meritorious. Few, if any, of the class members may actually receive any monetary award. The *Brown University* Consent Decree is a case in point.

In recent years some settlements have incorporated a "formula" back pay procedure to avoid the problems encountered with a claims procedure.[132] Employers find the "formula" back pay attractive for many reasons, including the prospect of avoiding additional attorneys' fees for the processing of back pay claims. On the other hand, an equitable formula may be difficult or impossible to devise. Certain class members may receive a "windfall", while others may receive far less than what they deserve.

2. *Claims Procedure: Open-Ended, Lump Sum or Reverter:* Because of fear of retaliation and the onerous procedure of processing back pay claims, all of the money allocated for class back pay may not be claimed. Many consent decrees, including the *Brown University* Consent Decree, contain a reverter clause whereby any unclaimed money in the class back pay fund is returned to the defendant. A reverter clause provides the employer with an incentive to discourage class back pay claims from being filed. On the other hand, many defendants are unwilling to enter into monetary settlement without a reverter clause or will insist upon an "open-ended" claims procedure[133] where no limit is set for the amount of class back pay.

3. *Affirmative Action Plans, Goals and Timetables:* In light of recent Supreme Court decisions,[134] and the specter of reverse

132. *See* Consent Decree, Smith v. Reader's Digest Ass'n, No. 73 Civ. 4883 (S.D. N.Y. 1978).

133. *See* Consent Decree, Brudreck v. Crocker Nat'l Bank, No. C-75-1100 CBR (N.D. Cal. 1978).

134. *See, e.g.*, United Steelworkers of America v. Weber, ___ U.S. ___, 99 S. Ct.

discrimination suits in the emloyment context,[135] it may be difficult to predict the legal implications of affirmative action plans that will be acceptable to the employer.

4. *Monitoring:* Selection of a monitoring committee or agency is critical to oversee the implementation and enforcement of the consent decree. A professional monitor is desirable to insure that the monitoring will be effective.

5. *Attorneys' Fees and Costs:* As a matter of negotiation strategy, it is advisable to defer any negotiations of plaintiffs' attorneys' fees and costs until all other issues of the consent decree have been resolved. This was the approach used by plaintiffs' counsel in the *Brown University* Consent Decree.[136] Potential conflict between plaintiffs' counsel and the members of the class over a monetary settlement offered by the employer is thereby avoided.

Approval of the proposed consent decree by the class is often a stumbling block. Even if the court has ordered Notice of the Pendency of Class Action to be sent to the class members,[137] many class members may not know about the existence of the litigation until they receive notice of the proposed consent decree. Understandably, many of these class members will feel angry and frustrated by their prior lack of knowledge about the lawsuit and Title VII litigation process, in general. Other class members may already know about the lawsuit but feel intimidated by the legal process. As a result, they may be reluctant to contact class counsel.

Ideally, there should be a steady stream of information between class members and class counsel. Often, however, this is

2721 (1979); Regents of Univ. of Cal. v. Bakke, 429 U.S. 953 (1978). Discussion of these cases and their implications in the context of class-wide negotiations is beyond the scope of this article.

135. Affirmative action programs for female faculty at academic institutions have already resulted in litigation by male faculty members who allege "reverse discrimination" in favor of their female counterparts. *See, e.g.,* Cramer v. Va. Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976) (affirmative action program constituted preferential hiring and violative of Title VII), *remanded for reconsideration,* 586 F.2d 297 (4th Cir. 1978); Bd. of Regents of Univ. of Neb. v. Dawes, 522 F.2d 380 (8th Cir. 1975) (failure to similarly apply minimum salary schedule to males held violative of the Equal Pay Act).

136. Consent Decree, Lamphere v. Brown Univ., No. 75-0140 (D. R.I. Sept. 12, 1977) at ¶ 8.

137. FED. R. CIV. P. 23 (d)(2). *See* note 22 *supra* for the text of Rule 23(d)(2).

extremely difficult. Class members no longer employed by the defendant may have moved on to another job or may have left the geographical area. Their present addresses may not be available to class counsel. Class members who are current employees may feel too intimidated by their employer to come forward as witnesses or to join an employee coalition or committee to support the lawsuit. The very size of the class, which can number hundreds or even thousands of employees, may make it difficult or impossible for class counsel to develop ongoing communication with the class members. While grievance procedures, both union and non-union, may offer the most expedient remedy to an aggrieved individual, they do not provide for class-wide relief.

V. CONCLUSION

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 and the Equal Pay Act to cover employment discrimination by educational institutions. Yet today, women remain underrepresented and relegated to the lowest positions on college and university faculties. Few Title VII actions have successfully addressed the issues of the hiring and promotion practices of academic institutions as they affect female faculty members and job applicants. The procedural hurdles are substantial but not insurmountable. The viability of Title VII actions to redress sex discrimination in academia depends in significant part on pursuading the courts that employment decisions by academic institutions should not be immune from judicial scrutiny.