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Peer Review: I'll Give You My Opinion if You Don't Tell Anyone What It Is: An Analysis of University of Pennsylvania v. EEOC

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Peer review: 'I'll give you my opinion if you don't tell anyone what it is'

by Barbara J. Fick

University of Pennsylvania
v.
Equal Employment Opportunity Commission
(Docket No. 88-493)

Argument Date: Nov. 7, 1989

ISSUE

In the course of investigating a complaint that the University of Pennsylvania engaged in racial, sexual and national origin discrimination when it denied tenure to one of its associate professors, the Equal Employment Opportunity Commission issued a subpoena for the peer review documents the university used in arriving at its tenure decision.

Now the Supreme Court is being asked to decide whether the university must comply with that subpoena.

FACTS

After Rosalie Tung, an associate professor in the Management Department of the Wharton School, University of Pennsylvania, was denied tenure, she filed a charge with the EEOC alleging that the denial was the result of race, sex and national origin discrimination.

In support of her charge, she claimed that she had been sexually harassed by the department chair and that he had submitted an unfavorable evaluation because of her negative response to that harassment. She also claimed that her qualifications equalled or exceeded those of five male colleagues who received more favorable treatment.

The EEOC began an investigation and requested documents from the university related to its tenure decisions on Tung and the five male faculty members identified in Tung's complaint.

The university, stressing that the confidentiality of peer review is an important component of the tenure process, refused to produce any records that reflected either the tenure committee's internal deliberations, or the opinions of Professor Tung's peers (from both inside and outside the university) as to the quality of her scholarship or her suitability for tenure. It also refused to produce these same types of documents for the five named male faculty.

The EEOC issued a subpoena for these materials and advised the university that it would initiate subpoena enforcement proceedings in court if the documents were not produced. The university refused to comply with the subpoena and the EEOC brought an enforcement action. The district court enforced the subpoena and, on appeal to the court of appeals, that decision was upheld. The Supreme Court granted the university's request for a writ of certiorari.

BACKGROUND AND SIGNIFICANCE

When Title VII of the Civil Rights Act was passed in 1964, it prohibited discrimination in employment because of race, sex, religion or national origin, but exempted from regulation "educational institution[s] with respect to the employment of individuals to perform work connected with the educational activities of such institutions."

Congress eliminated that exemption in 1972 after having determined that discrimination was as prevalent in the academic workplace as it was in the industrial workplace. Congress specifically found that statistics indicated that women and minorities were being excluded from prestigious and high-paying academic positions.

Although the protection afforded by Title VII was extended to university professors, the courts have shown a certain reluctance in enforcing this protection. As stated by the Second Circuit Court of Appeals, "education and faculty appointments are probably the least suited for federal court supervision." *Faro v. New York University*, 502 F.2d 1229, 1231–1232 (1974). This reluctance stems from the judiciary's recognition of the need for scholarly expertise in academic decision-making as well as its unwillingness to infringe upon academic freedom.

Adding to the effects of this judicial reluctance is the procedural posture of Title VII, which places the burden on the plaintiff-professor to prove that the adverse employment decision, such as denial of tenure or promotion, was caused by racial or sexual discrimination and not based on legitimate academic grounds.

Accordingly, the number of plaintiffs who have successfully challenged the academic employment decisions of colleges and universities has been few indeed. The decision reached by the Supreme Court in this case will either facilitate the process of proving discrimination or place additional obstacles in the path of plaintiff-professors.

In arriving at a decision regarding tenure, most univer-

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sities rely heavily on a process known as peer review. Unlike employment decisions in the industrial setting, which are based on supervisors' evaluations of workers, employment decisions regarding professors are based on evaluations submitted by the professor's peers, both from the professor's home university as well as from outside the university.

Peer reviews evaluate the depth and creativity of the professor's current scholarly work and assess the professor's potential for future scholarly contributions. These reviews often involve a comparison of the professor's work with that of other scholars in the professor's academic field. Many universities contend that, in order for the peer review process to function effectively, the reviewers must be assured of confidentiality.

On the one hand, if reviewers knew that their evaluations would be publicly disseminated, they arguably would refrain from the type of frank analysis that is critical to making an informed tenure decision. On the other hand, because these peer reviews play such a central role in tenure decisions, they may contain the only evidence of a university's discriminatory motives. The reviews may also disclose whether a university applied different standards in evaluating male and female candidates.

An example of how such reviews can be tainted by sex discrimination was presented to the Supreme Court last term in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989); 1988-89 *Preview* 69. In that case, an accountant was denied partnership in her firm after the firm's partners submitted written comments noting that she was "macho," needed to take a course in charm school, should dress more femininely and should wear make-up and jewelry.

Thus, if the Supreme Court denies the EEOC access to such peer review documents, it may be difficult, if not impossible, to determine whether a university's decision was based on impermissible sexual or racial discrimination. If the Supreme Court grants the EEOC access, the candor of such reviews may diminish, undermining their value in the tenure process.

ARGUMENTS

For the University of Pennsylvania *(Counsel of Record, Rex E. Lee, Sidley & Austin, 1722 Eye St., N.W., Washington, DC 20006; telephone (202) 429-4000):*

1. Peer review materials are entitled to protection under the First Amendment. The First Amendment's guarantee of free speech implicitly recognizes a right of academic freedom. One aspect of academic freedom is the right to decide who will teach. Peer reviews are an essential element in making a tenure decision, which is, in essence, a decision about who will teach.
2. Peer review materials are entitled to protection under a common-law qualified privilege. Some federal courts have recognized a qualified privilege for confidential academic documents as a means of protecting academic freedom.

   Society has an interest in ensuring that universities promote the robust exchange of ideas. Academic freedom is necessary for universities to fulfill that role. The Supreme Court has recognized in similar situations that a qualified privilege is essential to protect the public interest in candid, objective and even harsh opinions where necessary to protect presidential decision-making (*United States v. Nixon*, 418 U.S. 683 (1974)) or judicial decision-making (*Clark v. United States*, 289 U.S. 1 (1933)). Several states have adopted a privilege to protect confidential communications in analogous contexts.
3. Requiring disclosure would infringe on a university's First Amendment rights as well as disregard a university's qualified privilege. Before requiring disclosure, the Court should require the EEOC to justify its demand for access.
4. The subpoena enforcement provisions of Title VII should be narrowly construed to include a qualified privilege for peer review materials. In the absence of a clear congressional statement authorizing intrusions by the EEOC on academic freedom, the Court should narrowly construe the statute so as to prevent any infringement on this First Amendment right.
5. A rule requiring disclosure upon a mere showing of relevance is not narrowly tailored to further a compelling state interest sufficient to justify an intrusion on a First Amendment right. Rather, the EEOC should be required to demonstrate a specific need for disclosure that outweighs a university's interest in confidentiality.

For the Equal Employment Opportunity Commission *(Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):*

1. The EEOC needs access to peer review materials in order to determine whether there is reasonable cause to believe that an educational institution has engaged in illegal discrimination.

   Congress expressly extended the prohibitions of Title VII to academic institutions and authorized the EEOC to enforce the prohibitions. Congress gave specific consideration to the effect Title VII would have on a university's tenure process and rejected all attempts to preserve an exemption for universities. Congress intended that academic employment decisions should be subjected to the same scrutiny and enforcement procedures as industrial employment decisions.

   In order to make the statutorily required reasonable cause determination, the EEOC must review the same materials that the university-employer relied on in making its decision.
2. The language of Title VII forecloses any argument that a qualified privilege should be read into the statute. The statute explicitly gives the EEOC the right of access to any relevant evidence. It also addresses the employer's

interest in confidentiality by making it unlawful for the EEOC to disclose any information obtained in its investigation. Thus, the statute has already struck the balance between the EEOC's need for relevant evidence and the employer's interest in confidentiality.

3. Granting access to peer review materials does not infringe on a university's academic freedom. Disclosure does not interfere with a university's right to decide on academic grounds who will teach. The EEOC seeks access to determine if the tenure decision was based on impermissible racial or sexual grounds, which invidious discrimination has never been afforded affirmative constitutional protection.

   Neither has the University of Pennsylvania demonstrated that confidentiality is essential to effective peer review; its assertion is based on unsupported opinion, not empirical evidence.
4. Assuming access to peer review materials infringes on a university's academic freedom, there is a substantial relationship between the EEOC's request to review the documents and the compelling national interest in eliminating invidious discrimination in employment at academic institutions. Elimination of employment discrimination is a national goal of the highest priority; this is particularly true of academic institutions, which play a major role in shaping society's future.

   Where peer review documents play a central role in a university's employment decision, access to those documents is essential to a determination of whether the decision was impermissibly based on race or sex discrimination.
5. Recognition of a qualified privilege would seriously impede enforcement of Title VII. A qualified privilege requiring a court to apply some type of balancing test would generate endless opportunities for procedural delays. Litigation over the application of a qualified privilege would substantially slow the investigation of charges filed with the EEOC.
6. There is no common-law privilege protecting peer review materials.

AMICUS BRIEFS

In Support of the University of Pennsylvania

The President and Fellows of Harvard College, American Council on Education, Stanford University, Yale University and Princeton University.

In Support of the Equal Employment Opportunity Commission

NOW Legal Defense and Education Fund and Rosalie Tung, et al.

Non-Aligned

American Association of University Professors.

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