

**THE ROLE OF THE CIVIL RIGHTS ACT OF 1991  
AND COLLECTIVE BARGAINING IN  
MAINTAINING GENDER DISCRIMINATION IN  
PUBLIC HIGHER EDUCATION**

**BERNADETTE MARCZELY, Ed.D., J.D.**  
*Professor, Cleveland State University*  
*Attorney at Law, Cleveland, Ohio*

**ABSTRACT**

The Civil Rights Act of 1991 is an example of how practical application can often elude legislative intent. The 1991 act, touted as the law designed to expand the scope of Title VII liability, at the same time has limited the kind of relief available to victims of *gender* discrimination. It has also prescribed a protracted format for processing discrimination claims that makes the collectively bargained agreement a party to the law's own chilling effect on a victim's willingness to pursue claims to the full extent of the law. This study analyzes the law's actual impact on women seeking promotion and tenure in public universities. Statistics show that university women still lag significantly behind their male counterparts in rank, tenure, and salary. The question addressed is why intelligent, motivated university women continue to languish professionally despite the seeming protections of law and contract. The answer offered applies to all segments of employment that continue to be plagued by gender discrimination.

Recent legislation may be having a chilling effect on the willingness of victims to pursue claims of gender discrimination in the courts. The Civil Rights Act of 1991 [1] contains several significant disincentives for those challenging gender discrimination, and a study of gender discrimination claims in higher education illustrates exactly how this legislation deters women from seeking redress for a history of discriminatory pattern and practice.

Public higher education provides a unique forum for studying the effectiveness of recent legislation in dispelling the impact of gender discrimination. University women are an unusually homogeneous group with respect to educational backgrounds, goals, and resources, and the U.S. Department of Education has historically gathered statistics monitoring their employment status in public higher education. These statistics indicate that women on university faculties, despite similar academic and professional goals and achievements, have always lagged behind their male counterparts with respect to tenure, rank, and salary.

In 1972, Senator Bayh introduced a higher education bill prohibiting sex discrimination by educational institutions and made the following observations [2]:

Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life work . . . the rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest with women . . . [W]omen who are promoted often do not receive equal pay for equal work. In 1965-66, at the instructor's level, the median annual salary of women was \$410 less than that of male instructors; at the assistant professor's level it was \$576 less; at the associate professor's level, \$742 less; and at the level of full professor, it was \$1,119 less [3].

Twenty-four years later the National Center for Education Statistics' report for the year 1995 [4, pp. 230, 236, 241, 246] indicates that a quarter of a century has seen relatively little change. Women still continue to lag significantly behind their male counterparts with respect to rank, salary, and tenure.

Gender and Rank

	Males	Females	M-Salary	F-Salary
Professors	123,173	21,168	\$61,857	\$54,746
Assoc. Prof	84,311	32,320	\$46,229	\$43,178
Ass't. Prof	76,129	50,215	\$38,794	\$36,169
Tenured	71.0%	49.9%		

The fact that these statistics show relatively little change in the employment status of women in higher education raises a significant research question. Why would intelligent, well-educated, and talented female academics continue to accept such obvious professional inequity? This is, after all, the nineties—a time when the victims of discrimination and inequity have recourse to the protection of Title VII [5], Title IX [6], the Civil Rights Act of 1991 [1], and their collective

bargaining agreements. What one finds, however, is that although academic women have turned to the courts and their contracts to fight inequity, it would appear that the laws and procedures designed to protect individual rights threatened by discriminatory practice have often actually had the opposite effect.

### TITLE VII AND THE CIVIL RIGHTS ACT OF 1991

Title VII was amended by the Civil Rights Act of 1991 to provide that a plaintiff establishes an unlawful employment practice when the plaintiff demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice [1, § 2000e-2(m)]. The 1991 act, however, has also modified the Supreme Court's holding in *Price Waterhouse v. Hopkins* [7] concerning the type of relief a plaintiff is entitled to in a case where the employer has been proven to act with mixed motives. In *Price Waterhouse* the Supreme Court held that once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant employer may avoid a finding of liability only by providing it would have made the same decision even if it had not allowed gender to play such a role [7, at 244-245]. The 1991 act, however, changes employer liability in that if an employer is able to establish that it would have taken the same action absent any illegitimate motive, the court is limited in the type of relief it may order [8, p. 163].

Title VII generally provides for a wide range of remedies against an employer guilty of unlawful employment practices, but until the passage of the Civil Rights Act of 1991, Title VII provided only equitable remedies, those designed to make the plaintiff whole again, such as reinstatement and back pay [8]. The 1991 Act added compensatory and punitive damages to the remedies available under Title VII [1, §1981A], but in Section 107 placed the following new restrictions on the type of relief available where the employer's action was based on both legitimate and illegitimate motives:

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—  
 (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment described in subparagraph [706(A)] [1, §706(g)(2)(B)(i)(ii)].

Essentially, this means that in mixed-motive cases courts cannot award damages or issue an order giving the plaintiff employee the reinstatement, hiring,

promotion, or payment they came to court seeking. While an offending university may be enjoined from letting gender play a role in its promotion and tenure decisions, it will not be forced to award promotion or tenure to a plaintiff judged unworthy for other reasons as well.

### THE QUESTION OF MIXED MOTIVES

Unfortunately, the issue of mixed motives is almost always central to the promotion and tenure decisions made by universities. Quality of research and publications is based on subjective evaluation and is inevitably offered as one of the legitimate reasons for a university's decision to deny promotion or tenure. Yet, to many new and even more seasoned faculty, it is not clear what will be counted as research or as good research [9, pp. 3-9]. Contracts do not usually specify the number of publications needed to be considered for hiring, promotion, or tenure, or how editing of an anthology, contributing to a textbook, or writing of a chapter in a book edited by someone else will be evaluated [9]. Gender, more often than not, may be the legitimate motive for discrimination hidden in a field of what appear to be other lawful reasons why promotion or tenure should be denied. It is this mix of legitimate and illegitimate motives that brings these cases into the purview of Section 107 of the Civil Rights Act of 1991 with respect to the remedies available to the plaintiff, and it is the limitation of remedies dictated by this section that may victimize the plaintiff once again. In these cases, where an offending employer can show that while gender may have played a role in its decision, factors other than gender would have resulted in the same decision, the plaintiff can receive only declarative or injunctive relief, and *may* or *may not* be granted attorney's fee and costs directly attributable to the pursuit of the claim, but the plaintiff will not receive damages, or be issued an order requiring any admission, reinstatement, hiring, promotion, tenure, or payment. Practically speaking, this means a victory in the courts in a mixed motives case will be at best a pyrrhic victory for the plaintiff. Even the act's promise of attorney's fees is uncertain in mixed motive cases because under section 706(k) of the Civil Rights Act of 1964, the district court may award attorney's fees to a prevailing Title VII defendant on a finding that the action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" [10].

A case predating the passage of the Civil Rights Act of 1991 illustrates the devastating way in which the legal system may work when extensive litigation takes place. In 1973 Shyamala Rajender sued the University of Minnesota because she believed she was denied a tenure-track appointment in the chemistry department because of her sex and national origin [11]. In 1980 the university signed a consent decree without admitting fault that paid \$1.6 million, agreed to change its record-keeping system and affirmative action policies, and make it easier for women to sue for sex discrimination [12, p. 49]. Following the decree, the institution has handled more than 300 cases of sex discrimination at a cost of

over \$7 million [12]. However, Rajender received only \$100,000 with the remaining \$1.5 million going to pay legal fees, and she was no longer able to secure academic employment [12]. She is now an attorney [12]. Rajender won but lost in 1980, but the Civil Rights Act of 1991's concern for mixed motives and ambivalence with respect to legal fees is designed to legislatively replicate her experience.

Actually, the mixed-motive defense fostered by the Civil Rights Act of 1991 does no more than legislate the approach courts have historically taken in higher education discrimination cases. The courts have always been reluctant to substitute their judgment for that of the university on questions of promotion and tenure. Case after case reiterates the First Circuit's position concerning court-awarded tenure [or promotion] to justify the courts' own hands-off approach:

Neither the district court nor this court is empowered to sit as a super tenure board. . . . [C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions. Where . . . the university's judgment is supportable and the evidence of discrimination negligible, a federal court should not substitute its judgment for that of the university [13].

The concept of mixed motives has been used time and again to make a university's underlying discriminatory judgment in awarding promotion or tenure supportable. One court even openly acknowledged the potential for discrimination to be masked in the university employer's mixed-motive defense when it said in dictum that "the context and nature of tenure decisions rarely benefit Title VII plaintiffs seeking to prove that a particular tenure decision was influenced by sex or race. . . . No tenure candidate is without blemishes and a resort to illegitimate considerations can be hidden in the weighing of the numerous factors which are relevant to a tenure decision" [14].

The bottom line is that if a university is successful in showing that its employment decisions are premised on factors other than gender alone, it will not have its decision overturned by the courts even if gender has influenced its decision. At most it will receive a judicial reprimand for letting a protected consideration play any role at all in its employment decision making, and a warning regarding future behavior. For the plaintiff, on the other hand, the bottom line is not merely loss of promotion or tenure, it may also include the loss of adequate legal fees, and will definitely entail the loss of face in the professional arena. In an academic discrimination trial, the plaintiff will be asked under oath during examination and cross-examination to prove the value to the institution of her performance

[15, p. 46]. The courts have said that statements of peer judgments as to departmental needs, collegial relationships, and individual merit may not be disregarded absent evidence that they are a facade for discrimination [14, at 93]. This telling testimony, once part of a public record, can seriously damage an academic reputation. In the final analysis, the fact that the Civil Rights Act of 1991 allows an employer to evade its more stringent remedies by producing motives other than gender discrimination to justify its employment decisions is an invitation to defensive fabrication. More importantly, the mixed-motive defense casts a chilling effect on a plaintiff's willingness to pursue claims to their ultimate end in a court of law.

### THE ROLE OF BINDING ARBITRATION

The Civil Rights Act of 1991 has also created a significant detour in the path to court redress of gender discrimination. While the act provides employees who have been discriminated against on the basis of race, national origin, gender, disability, or religion the right to jury trials, arbitration may be a prerequisite to court access. The act strongly promotes the use of alternative dispute resolution as a means of resolving employment cases based on statutory infractions:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Act [1 at § 118].

The committee report specifies that Section 118 will pertain to agreements in the context of a collective bargaining agreement or in an employment contract [16]. It is this provision for the use of alternative means of dispute resolution that makes the collective bargaining agreement and the collective bargaining agent a party to the administration of the Civil Rights Act of 1991, and ultimately, a party to the maintenance of gender discrimination in public higher education.

Approximately one third of all public universities collectively bargain [17], and most collectively bargained agreements provide that faculty denied promotion or tenure must submit their cases to bargained grievance procedures on the basis that the decision made was arbitrary, discriminatory, capricious, or in violation of the procedures established in the collectively bargained agreement. Thus, both contract and law promote the use of alternative dispute resolution in dealing with claims of gender discrimination in the awarding of promotion and tenure. The problem is that arbitration under collective bargaining agreements implies a tension between collective representation and individual statutory rights, a tension not present when parties represent themselves in the arbitral proceedings [18, at 1657]. Contractual rights are conferred on employees collectively to foster the

processes of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits for union members [19]. Statutory rights, however, concern not majoritarian processes, but an individual's right to equal employment opportunities [19, at 51].

In an arbitration pursuant to a collective bargaining agreement, the union holds exclusive control over the manner and extent to which the individual's grievance is presented, and a union's actions are considered arbitrary only where, in light of the factual and legal landscape at the time of the actions, the union's conduct is so far outside a wide range of reasonableness as to be irrational [20]. Unions have a considerable measure of discretion in determining whether to process an individual grievance to arbitration and then in conducting the representation before the arbitrator [21]. Thus, female plaintiffs at universities with collective bargaining agreements mandating the arbitration of statutory claims must rely on the union to effectively represent their minority claim in spite of its own primary concern for and loyalty to male majority interests. One recent study of 271 public sector arbitration hearings filed by male or female grievants represented by public sector unions indicates that women tend to lose more arbitration cases than men and suggests that women receive less support from the male union leadership due to stereotyped attitudes regarding gender roles [22]. It should also be noted that arbitrators are not necessarily lawyers schooled in the nuances of the most recent law. They are simply disinterested third parties charged with the task of evaluating each side's argument in a labor dispute. An arbitrator's job under a typical arbitration clause is to interpret and apply the agreement, and an arbitrator has no jurisdiction to decide a case claiming violation of a statute [23]. An arbitrator must confine judgment to the four corners of the contract and is not free to bring external law into play in making an award. The legal precedents surrounding a contract issue cannot be brought into play unless one side or another establishes a connection between legal precedent and the existing contract. The arbitrator, however, is not free to bring external law to the table in rendering a decision. Thus, the fine points of evolving law on gender discrimination may never come to the fore in an arbitration hearing unless one side or another is willing and able to present an argument linking statutory law and legal precedent to the contract. Nevertheless, in spite of this procedural oversight, an arbitrator's judgment is given considerable weight. An arbitrator's award is overturned only when the arbitrator has engaged in gross impropriety or where the award, on its face, demonstrates manifest disregard for applicable law [24].

The U.S. Supreme Court dealt with the question of whether the arbitration of contract-based statutory claims precluded later judicial review in *Gilmer v. Interstate/Johnson Lane Corp.* [18]. The Civil Rights Act of 1991, according to the Congressional Record, echoes the *Gilmer* decision in preserving a right to a judicial trial de novo following the arbitrated resolution of a dispute. Section 118 is intended to supplement, not supplant, remediation provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available

[25]. Nonetheless, it should be noted that of more than 1,700 labor arbitrations involving discrimination grievances, only 17 percent produced filings for judicial trial de novo [26]. Perhaps this is because at present the courts may defer to arbitrated decisions. While courts are not obligated to accord arbitrated decisions either *res judicata* or collateral-estoppel status, the value of the decision need not be dismissed [27]. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate [19, at 60]. Thus, plaintiffs who have lost at arbitration may be reluctant to invest the time, money, and emotional commitment required to bring a discrimination case lost in arbitration to court. A loss at arbitration may not be simply a detour on the way to the courthouse; it may be a virtual roadblock.

### THE ROLE OF TIME AS A DEFENSE WEAPON

Time is also a major defense weapon in the battle to discourage plaintiffs from seeking recourse in the courts. Although Title VII instructs the court to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited [28], judges and commentators have reported consistent delays in final judicial resolution of Title VII claims [29]. A final judicial decision in a civil action may take years because of persistent docket delays. In fact, stronger parties, such as universities represented by retained counsel, may actually force a plaintiff into litigation in order to take advantage of the process. Through tactical maneuvering with motion practice and extensive discovery, the defendant employer can make the judicial process so expensive that the weaker party is faced with the choice of capitulating or accepting a disadvantageous settlement regardless of the perceived merits of her case [30]. Perhaps this is why approximately 90 percent of filed actions result in settlement rather than final judicial adjudication [31]. With growing pressures on federal dockets, delays in judicial resolution of Title VII and other civil claims are only likely to persist and lengthen in the foreseeable future.

The Second Circuit in *Sobel v. Yeshiva* [32] painted a particularly vivid picture of why court appeals may not be the hoped-for answer to righting discriminatory wrongs plaguing universities:

In his masterpiece *Bleak House*, Charles Dickens painted a scathing portrait of the hopeless complexity of the handling of cases in England's High Court of Chancery. Dickens wrote, "Through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it." Mindful of the example of the never-ending litigation that marked Dickens's Chancery Court, it is with regret that we find it necessary to once again remand this nearly thirteen-year old action to the district court,

for new proceedings which we can only hope will at last end the litigation between these parties.

The *Sobel* case illustrates just how time-consuming and expensive litigation can be for the individual plaintiff.

### THE ROLE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the interest of complete discussion, it should be noted that the Equal Employment Opportunity Commission is also, in theory, designed to assist the individual in redressing discriminatory wrong. The Equal Employment Opportunity Commission (EEOC) can, under the statutes, on its own authority, bring an enforcement action on a filed charge or on its own initiative [33]. The EEOC, however, will refuse to begin an enforcement action until all administrative processes for resolving the problem are exhausted. The EEOC will usually delay its decision to investigate a claim until the grievance process outlined in the collective bargaining agreement, including binding arbitration, if applicable, has been completed, because until these administrative remedies are exhausted, the plaintiff is not yet truly injured.

Nevertheless, arbitration, like private settlement, does not diminish a party's right to file a charge with the EEOC, which, based on the circumstances that are the subject of the arbitration, alleges a violation of statutory law dealing with discrimination [18, at 1653]. Some discriminatory practices are considered to be "continuing violations." A failure to promote because of a discriminatory system of promotions is an example of a continuing violation because it occurs each day the practice is followed [34]. The time limit for filing a charge with the EEOC involving a continuing violation is 180 days after the cessation of the discriminatory practice; however, as long as the practice continues, there is no time limit for filing a charge [34]. Thus, following the grievance procedures mandated in the contract will not interfere with filing a timely charge with the EEOC regarding a discriminatory practice.

Filing a charge with the EEOC, however, does not mean redress will be expedited. It usually takes eighteen months after a charge is filed for the EEOC to begin an investigation [34]. When the investigation is complete the EEOC will render a decision that either the charge has merit and there is *reasonable cause* to believe discrimination has taken place, or there is *no cause* and the charge has been found to have no merit [34, p. 43]. If reasonable cause is found, the EEOC will try to have the parties arrive at a conciliation agreement that may include provisions such as back pay, reinstatement, and affirmative action goals for the offending employer. If conciliation cannot be reached, the EEOC may issue the plaintiff a "right to sue" letter essentially acknowledging that the agency has found reasonable cause to believe that discrimination has occurred, but has been

unable to have the parties agree to resolving the issues. The "right to sue" letter gives the plaintiff ninety days to bring legal action in the courts against the employer [34, p. 44]. Occasionally, when conciliation fails, the EEOC's own litigation division evaluates the case to determine whether there is a significant legal issue involved, or if the case could have a significant impact on systematic patterns of discrimination, and, if one or both of these conditions exist, the EEOC will itself bring suit against the employer [34, p. 44]. Such suits, however, are the exception, not the rule, in discrimination litigation. In most cases, the EEOC simply provides the plaintiff with a right-to-sue letter acknowledging there is some evidence that discriminatory behavior has occurred. If the EEOC finds no reasonable cause for the charge, however, and the plaintiff still believes discrimination occurred, the plaintiff may still sue in court, but risks a finding that the action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith [10]. Under these circumstances, a prevailing Title VII defendant could be awarded attorney's fees.

Essentially, a charge of discrimination processed by the EEOC is no shortcut to justice, nor is it always an inexpensive alternative. A plaintiff issued a right-to-sue letter must still bring suit as an individual, assuming all the fiscal risks of that legal process discussed earlier.

### SUMMARY

The important thing to realize is that the law, the EEOC, arbitration, and court action all have quirks in the way they function that create a series of Catch 22s for plaintiffs charging gender discrimination. Legislation designed to eliminate gender discrimination is not working, and the statistics illustrating the continuing gap between the status of men and the status of women in public higher education make that undeniably clear. Women in this uniquely well-educated and professionally motivated segment of society continue to be the victims of discriminatory employment practices. Discriminatory practice is thriving in the very universities that should be the catalysts for social change, and existing law protects their right to defiantly resist change. The Civil Rights Act of 1991 has indeed made pursuing a gender discrimination suit more time-consuming, costly, and difficult, with only the doubtful hope of a pyrrhic victory in the end.

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Bernadette Marczely is a professor at Cleveland State University and the Director of the College of Education's Supervision certification and masters programs. She is also a licensed Ohio attorney with a private educational and employment law practice.

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Direct reprint requests to:

Dr. Bernadette Marczely  
Cleveland State University  
Rhodes Tower, Room 1419  
1860 E. 22 St.  
Cleveland, OH 44115