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Women, Tenure, and the Law

By Mary Ann Mason

It is well established in the research on higher education that women are less likely to achieve tenure than men.

In our research at the University of California at Berkeley, we found that to be true far more often for married women with children. According to a survey by the National Science Foundation, female scientists with children are 27 percent less likely to win tenure than male scientists with children, and are far more likely to become lecturers or adjuncts. A similar pattern occurs across all of the disciplines.

The stress associated with being denied tenure in our winner-takes-all promotion system is equally well documented. We may never fully know whether, or how much, the stress that Amy Bishop experienced over being denied tenure contributed to the shootings at the University of Huntsville at Alabama in February, but we do know that tenure denial for many assistant professors brings not only disappointment but pain and grief. For women, a critical factor in tenure denial is their gender and family responsibilities.

Some women who believe their tenure denial was based on sex discrimination do fight back with lawsuits, and a few even win. Since the 1980s the American Association of University Women's Legal Advocacy Fund has supported more than 60 of those women in their long court battles. Countless other cases have been settled before trial. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, national origin, or religion. The Pregnancy Discrimination Act is an amendment to Title VII and prohibits discrimination on the basis of pregnancy, childbirth, and related medical conditions.

What protection those laws offer has been the subject of evolving interpretation by federal courts. In the 1980s, a 41-year-old English teacher fought to overturn a tenure denial by Boston University, and pursued her case all the way to the federal First Circuit Court of Appeals. She prevailed, obtaining tenure and winning a large settlement, in part because she had direct evidence that the university's president at the time had told another woman enduring the tenure process, "And anyway your husband is a parachute, so why are you worried?" The plaintiff also supported her case by showing that her male peers with similar teaching and research records had been granted tenure.

During the past two decades, however, judicial interpretations have made it more difficult for a plaintiff in a tenure case to prove discrimination. The common reason why colleges and universities deny tenure is that the candidate's research or teaching are not up to department standards. But since the 90s, a plaintiff has had to prove not only that the tenure judgment

against her was untrue, but also that the real reason for the denial was sex discrimination. If discrimination can't be proved, even if the department is found to be intentionally lying about substandard work, other reasons for the denial, such as a faculty member's lack of collegiality, can be upheld.

An important tenure-denial case of the 90s, *Fisher v. Vassar College,* began in federal court in 1994 and eventually was heard in the U.S. Circuit Court of Appeals in 1997. Cynthia Fisher, a biologist, alleged that Vassar had discriminated against her based on her sex, marital status, and age. Fisher prevailed in her first trial, proving to the federal district-court judge that she was equally or more qualified for tenure than comparable scholars, using statistics to show that Vassar had a history of not granting tenure to married women.

But, ultimately, the circuit court decided that: "Individual decision makers may intentionally dissemble in order to hide a reason that is nondiscriminatory but unbecoming or small-minded, such as back-scratching, logrolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. ... The fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff."

As Fisher pointed out, most academics are too smart to make public statements such as "married women should stay home and take care of their families."

In a sex-discrimination lawsuit, plaintiffs may be awarded compensatory damages, back and front pay, or even reinstatement and tenure, as well as legal fees and costs. In practice, few plaintiffs are reinstated, and most compensation packages do not financially justify the enormous time and expense of the lawsuit and the shame of replaying a failure in the public eye. Colleagues may avoid you, and you may tagged with the odious label of "troublemaker," which almost guarantees you will not receive another job offer.

Still, the success of a few has changed the atmosphere at many universities, where some administrators seem to be realizing that, as with sexual-harassment suits, an ounce of prevention is better than an expensive lawsuit. At Berkeley, several sex-discrimination suits were brought in the late 80s and early 90s. Three were resolved out of court with the women receiving both tenure and a settlement. In a fourth, a court awarded a large settlement. As a result of those situations, the tenure experience on the campus became more open and the candidates were amply informed of their rights. This was a win for both men and women.

What did not happen was the establishment of a uniform practice of mentorship and guidance about what is required for tenure, including a yearly review of assistant professors. Some departments do this well, others do not. Often a chair is reluctant to point out a faculty member's deficiencies. A candidate may think all is going smoothly until he or she is rudely shocked to learn that tenure is denied.

And only in the new millennium have serious institutional efforts to create a more flexible tenure track been undertaken at Berkeley and other universities. That has been an important step forward for mothers and fathers who are now entitled to stop the tenure clock for a year, take

significant time off for both mothers and fathers who are equal caregivers, and choose part-time employment on the tenure track or posttenure, with a right to return to full-time work.

The University of California's new "Chairs and Deans Toolkit" for "creating a family-friendly department" expounds on the many policies available to support faculty parents, but also stresses faculty rights, particularly in the tenure process. The cautionary tale of a University of Oregon lawsuit, settled for $495,000, in which the department chair wrote in a memo that a female faculty member "knew as a mother of two infants, she had responsibilities that were incompatible with those of a full-time academician" is prominently presented.

Even with a fair, open process and family-responsive policies to help parents (still a distant goal at most universities), there will always be those who suffer the cruel sting of denial. I don't think the answer is abolishing the tenure system. I have argued in this column that tenure is the last best hope for a university system that is moving rapidly in a corporate direction with a fungible labor force. Instead, let's just get on with making a good system a fair system for men and women.

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