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STRIVING FOR EQUALITY UNDER LAW AND IN FACT: A PRACTICAL PRECEDENT

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ABSTRACT

The Essay describes the discrimination experienced by a particular female professor whose department initially voted to recommend that she be denied promotion with tenure despite her exemplary dossier. As described in the Essay, some of the colleagues who opposed her promotion had subjected her to sexual stares and innuendo or had failed to accord her time and views the same respect they gave those of the men in the department who were junior to her. This professor's application was also negatively affected because several of her male colleagues deferred to the sexist views of a few of her male students regarding her teaching, or to the untrained (and negative) opinions of other men with respect to some of her scholarship, rather than to the highly positive evaluations of other women who were experts in her field.

This one woman's story provides examples of the persistent, lingering, and often subtle forms of discrimination that many women still face in the workplace despite the fact that discrimination in employment on the basis of sex has long been illegal. The authors suggest that the law and popular consciousness must begin to recognize these more subtle forms of discrimination as prohibited sex discrimination in order to truly eradicate discrimination against women in academia and other workplace contexts.

Twenty years after Congress prohibited discrimination in faculty employment on the basis of sex,¹ our future client, a fe-

* Editors' note: While Heather Anderson and Elizabeth Robischon did not participate in the *UCLA Women's Law Journal's* Spring Symposium, their Essay contributes to the dialogue concerning discrimination against women in academia.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1988 & Supp. III 1991), generally prohibits sex discrimination in employment. As origi-

male candidate for assistant professor at a major university, is angered and embarrassed when a male professor — a potential colleague — openly studies her body upon their first meeting. Wanting the job for which she is interviewing, however, our client is in no position to complain about, or even to point out, this man's unprofessional and sexist conduct.

This same male professor later interrupts a scholarly discussion among a group of professors to call the group's attention to our client's appearance, asking whether she in fact looks like an attractive young actress. Later still, after dinner with a group of faculty members, he volunteers to drive our client to a gathering of the entire faculty for a professional, academic discussion that was part of the interview process. The five-minute drive takes a half-an-hour, as this man drives around town pretending to be "lost," and our client is then subject to the knowing looks and schoolboy jokes of her future colleagues, who of course "know what took *you* so long!"

The ogling continues after our client has joined the university faculty, making it abundantly clear that this man is not primarily interested in her as a colleague and intellectual equal. His inappropriate attentions are finally replaced by cold avoidance shortly after a female graduate student complains to the department chair of similar treatment. He never attempts to develop a truly collegial relationship with our client.

When our client joins the university as a post-doctoral fellow — for hiring freezes and lack of funding delay her hiring as an assistant professor for two years — the male chair of her department tells her she should attend department meetings because "the department would like it," but that she "should not speak up." Male graduate students are not given the same advice. She is asked to chair the department's speakers committee and is then criticized by the department chair for daring to recommend a particular speaker who seems to fit perfectly the committee's criteria. She is chastised for inviting "her friends" to speak and is directed to solicit the views of a first-year male graduate student as to whom should be invited. The chair dismisses her reaction, questioning why she has become "cold" and "distant." On several occasions he notes that our client will "never be a Southern Belle." During a candid discussion regarding our client's fourth-

nally enacted, however, Title VII excluded university professors from its prohibition. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §3, 86 Stat. 103, amended Title VII by, among other things, removing this exclusion.

year review, the chair states that “maybe she’s too aggressive,” suggesting that if she wants the department to support her for tenure, she should become more passive and compliant.

At the same time, yet another senior male colleague takes an unusual interest in our client’s work — or at least, in grilling her about her work and her progress. She is summoned to his office on a weekly basis, where she sits, often for hours at a time, attempting to explain and defend her work. Despite her efforts, the male colleague fails to understand, and their “discussions” become increasingly fruitless. He declines to share his own work or ideas with her, and it becomes clear that the meetings are serving no legitimate academic purpose. The untenured males in the department are not expected to participate in such interviews. After all, they have work to do, and their time is valuable. Nevertheless, our client, mindful of this man’s power over her career, tries to accommodate his unreasonable expectations — until a family member’s terminal illness and other personal circumstances intervene and she is, of necessity, less available than before. Although her research and her teaching do not suffer, our client’s long hours at the office and her availability to this man are unavoidably curtailed.

In the classroom, our client approaches her work with energy, dedication, and innovation. During her two years as an assistant professor at the University, our client teaches six different courses, including a graduate seminar, develops a new course that is permanently added to the curriculum, and updates several of her core classes to include feminist components and topics of current interest.

Our client is also generally well-liked by her students. Like most female professors, however, she does not enjoy the respect of all. One student, an older male, repeatedly and vocally challenges her knowledge of the subject matter, occasionally claiming to know more about her field of expertise — a topic that she has been researching since graduate school — than she does. After one particularly egregious incident, this student complains to the department chair that our client is “not old enough” to be teaching, and insists that one of her male colleagues be allowed to grade his final paper. Another student catches our client on her way to class and insolently stares at her body throughout their brief conversation. Word of our client’s less than warm reception to this student gets back to the department chair, who then criticizes her for being “rude” to a student who is quite friendly with

several of the male faculty. One student blusters that he "never had this sort of problem with the older male faculty" in the department.

In addition to her research and teaching responsibilities, our client serves both the university and her profession well through leadership of or participation in numerous committees and professional organizations.

Twenty-five years after Congress prohibited discrimination in faculty employment on the basis of sex, our client is reviewed for tenure.² At this point, our client has established herself as a well-respected scholar in two different fields of study: her primary field of specialization and feminism. She has nine articles that have been published or accepted for publication, a number which comfortably meets the vaguely-defined standard for tenure generally applied to scholars in her field, both in her particular department and at other universities. Four of her articles have been reprinted in at least one anthology — a distinction that none of her colleagues had attained at such an early stage of their careers. She has one completed article under review and another article in progress, has published several invited book reviews and book notes, and has presented a steady stream of papers at other departments and conferences throughout North America.

Eight of the top scholars in her two areas of scholarship — six in her main area of specialization and two in feminism — are solicited to review her work and to make recommendations with respect to her qualification for tenure. Her work is enthusiastically praised by all eight of these outside reviewers. These reviewers affirm that our client's writings in her main area of specialization:

2. The procedures for a vote regarding promotion with tenure vary among universities. As a general rule, the candidate's department will solicit the views of "outside reviewers": scholars within the same field of study but not affiliated with the university. The procedures for selecting outside reviewers also vary. For example, sometimes the tenure candidate is allowed to select reviewers from a list developed by the department, other times the candidate is permitted to propose a certain number of reviewers to be added to the list from which reviewers will be selected. Once the letters from outside reviewers are received, the members of the department who are eligible to vote (generally all tenured professors in the department) discuss and vote upon the candidate's promotion. After the department has voted, the department's recommendation is forwarded to the next level of the decisionmaking process as prescribed in the university's promotion procedure. The final decision is ultimately made by the president of the university, generally after several levels of review.

“reflect[] a thorough knowledge of the relevant issues and literature, and [are] extremely well-written and argued. The points she makes are original and significant”;

are “excellent,” “conclusive,” and “extremely important”;

make a “measurable contribution, of a critical nature, to an ongoing . . . debate”; and

are “clever and worth pursuing.”

She “is a significant scholar in her field . . . [who] has begun to make a name for herself internationally.”

The feminist scholars are similarly complementary with respect to our client’s research in that area, describing her papers as “major contributions” to the field which “display considerable . . . originality.” Indeed, as noted above, each of her feminist articles have been anthologized at least once, a notable distinction which underscores their significance in the field. The important contributions of our client’s feminist scholarship is similarly affirmed by the three feminist scholars in her department, each of whom enthusiastically supports her promotion.

A few of the male reviewers who do not work in feminist theory and are unfamiliar with that body of literature — and at least one of whom is notably *anti-feminist* in his philosophy — are less impressed with our client’s feminist scholarship and criticize the assumptions and/or the value of those articles.

In the end, seven of the eight reviewers, including those who were critical of our client’s feminist work, explicitly state that her research merits her promotion with tenure. One reviewer makes no recommendation either way. Our client is also enthusiastically supported by six of her fourteen tenured colleagues, including all three women.

Our client is opposed, however, by eight of her male colleagues. She is opposed by “the ogler,” whose review dwells at length on alleged deficiencies in her “service” to the university. (University regulations specify that service merits a weighting of 5% in a professor’s overall performance.) He explicitly describes our client’s behavior in this regard as “too often . . . wilful,” noting that “a number” of times — in reality, two — “she had missed examination committee meetings.”

She is similarly opposed by the colleague who took such an early “interest” in her work, who, significantly, also finds her “deficient” in the “not unimportant” area of service. His comments, however, make clear that this professor is not defining “service” in the traditional sense: as willingness to serve on uni-

versity and departmental committees. Rather, he states that service "includes general sociability and collegiality," and that in this respect, our client has fallen short. He finds her to be "a less than ideal colleague."

In evaluating her scholarship, both of these colleagues, as well as several of the others who oppose our client's promotion with tenure, ignore the renown her feminist scholarship has garnered and the praise of the other feminist scholars — all women — who have reviewed her work and recommended her promotion. They defer instead to those few male reviewers, all of whom are untrained in feminist theory and scholarship, who are unpersuaded by the quality of her work in this unfamiliar area. (This deference allows these (male) colleagues to gloss over the fact that when confined to their own areas of expertise, our client's reviewers were unanimous in their praise of our client's work and her promise as a scholar; to claim that our client's scholarship has drawn "mixed reviews" and "negative comments" and to conclude that a "deserving" candidate would not have drawn such reviews or comments.)

In evaluating her teaching ability, at least four of our client's eight detractors are heavily influenced by the complaints of those few male students who had been unable to accept her as an authority in her field of expertise. According to one colleague, "I have heard persistent complaints from other students of good judgment about the character and quality of her teaching [T]he attitudes expressed have had more pervasive influence on me than the occasional indicators of productive success." Another notes: "More than one student has volunteered to me that [our client] teaches . . . from a perspective that is highly idiosyncratic and that her communication with them has not been satisfactory. I cannot deny this kind of testimony in an evaluation of instruction." A few complaints from male students with whom these male professors identify negates our client's overwhelmingly positive teaching reviews, her willingness to carry a heavy teaching load, and the dedication and innovation she has brought to the classroom. In the eyes of a few of her male colleagues, "there are times when [our client] appears to be below average as a teacher."

Having drawn an 8-to-6 vote against her promotion, our client is suddenly also opposed by the department chair, who until one month earlier consistently had indicated that he would support her for tenure "no matter what." In explaining his new-

found uncertainty regarding our client's qualification for promotion with tenure, the chair admits that he has been influenced by the fact that some "members of the department whom I really respect" were saying some "highly critical things." In deference to his male colleagues, the chair reverses course and conveys his negative vote to the dean of the college of arts and sciences for his consideration.

Like the colleagues with whom he votes, having determined to recommend against our client's promotion with tenure, the chair fills his evaluation with negative comments and criticisms to bolster his position. These comments and criticisms, however, are factually unfounded. Moreover, most of them would have been long known to him, but prior to the eve of her tenure decision had posed no impediment to his determination to vote in favor of our client's promotion. Thus, no comment or criticism plausibly explains the chair's ultimate decision in our client's case but are evidently fabricated attempts to rationalize a decision made for very different reasons.

The above chronicle paints a picture of the persistent, lingering, and often subtle discrimination that many women in the workplace — particularly women in academia or other professional positions — still face, despite the fact that such discrimination in employment has long been illegal.³

Title VII, of course, broadly states that employers may not "discriminate with respect to . . . compensation, terms, conditions, or privileges of employment . . . because of . . . sex."⁴ Affirming its view that in enacting Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." The Supreme Court specifically held in *Price Waterhouse v. Hopkins* that an employer may not refuse to promote a woman because she does not conform to traditional stereotypes of femininity.⁵ Thus, in *Price Waterhouse*, the accounting firm had acted illegally — had discriminated on the basis of sex — when it failed to promote a

3. For an in-depth discussion of the subtle, often subconscious discrimination facing women in academia and other professional positions, see Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 *TEMP. L. REV.* 68 (1994).

4. 42 U.S.C. § 2000e-2(a)(1), (2).

5. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quotation marks omitted) (quoting *L. A. Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

female accountant who, in the words of one partner, needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁶ Statements such as this, the Court held, indicated that the firm had impermissibly discriminated against Ms. Hopkins on the basis of her gender in refusing to promote her. In the words of the Court, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁷

This prohibition, however, has not trickled down sufficiently into the consciousness of American employers or the American legal community to prevent the more subtle pressure to conform to a stereotype as was required of our client. In her case, one colleague felt free to treat her publicly as a sex object — a potential date, if not mate — and to encourage the rest of her colleagues to view her in the same light. Another believed she should be “seen but not heard,” at department meetings, and apparently took a dim view of her “assertiveness” — both generally and as a member of department committees. Yet another treated her as the stereotypical subservient female, expecting her to be available to him at his convenience, with no regard for the other personal and professional demands on her time. All of these men ultimately punished her when she failed (or refused) to meet their expectations. Her failure to conform to the female roles they had assigned her led, in two cases, to reviews which seem to center around alleged deficiencies in her “service” to the university — a factor which is supposed to play a decidedly minor role in such an evaluation. It is hard to imagine a male professor being subjected to the same treatment or expectations — and indeed, in our client’s experience, the junior males in the department were not so treated.

In addition to the direct discrimination she experienced at the hands of male colleagues who — consciously or not — expected her to conform to traditional stereotypes of femininity, our client was critically impacted by more indirect discrimination. The sexism of a few students who were unable to accept her as an intellectual equal, let alone authority, and who explicitly expressed their preference for the “older men” on the faculty, apparently drove the reviews and votes of four of our client’s

6. *Id.* at 235.

7. *Id.* at 251.

colleagues. Unable — or perhaps unwilling — to recognize as such or to dismiss the discriminatory opinions of male students with whom they identified, these male professors allowed the students' discrimination to infect their own votes, and thereby became the vehicles by which that discrimination became translated into concrete action against our client. At least in part because of those students' sexist views and treatment of our client, four of her fourteen colleagues refused to support her promotion with tenure. The commandment of Title VII that "thou shalt not discriminate on the basis of sex" has not yet led to a de facto prohibition against giving credence to the sexist complaints of others — at least not in the context of the classroom.⁸

The negative faculty vote against our client was also heavily influenced by the devaluation of her feminist work as well as the women scholars who commented upon it. First, a few of the men reviewing our client's work apparently were operating under an assumption and view that feminist scholarship is not worthy of the same respect accorded other fields of study. Existing law under Title VII reflects a glimmering of understanding about this sort of discrimination. In 1981, the Court of Appeals for the Ninth Circuit ruled upon the case of Professor Therese Lynn, a feminist scholar who had been denied tenure at a major university.⁹ The university claimed that its actions were justified by alleged deficiencies in the quality of Professor Lynn's scholarship, which focused on women's contributions to and impact on French literature. The trial court, however, found that "[t]he criticism leveled at [Professor Lynn's] work by scholars and administration officials appears to reflect their disdain of this (women's studies) as a topic of substance in a scholarly work."¹⁰ The Ninth Circuit held that such devaluation of scholarship concerning the rights, status, and contributions of women reflected an underlying devaluation of or discrimination against women, and tended to support Professor Lynn's claim: "A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women."¹¹

8. At least in theory, there is a de jure prohibition against such reliance. See *id.* at 236-37.

9. *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337 (9th Cir. 1981).

10. *Id.* at 1343.

11. *Id.*

Perhaps having learned the lessons of *Lynn*, the men reviewing our client's work did not explicitly disclaim the value of that work because of its focus. Their devaluation was more subtle. Unlike other subjects or disciplines, in which the need to defer to experts in those fields is recognized, feminist scholarship is apparently "easy" and may be competently and authoritatively evaluated by any reader, no matter what his experience or expertise. Thus, at least some of our client's male colleagues and outside reviewers felt free to — and did — evaluate and criticize her feminist work despite their utter lack of expertise in that area. This more subtle form of discrimination is apparently not yet widely recognized as such, but survives, despite the influence of feminism and the dictates of Title VII.

In our client's case, compounding the discrimination caused by this failure of a few men to accord feminist scholarship the same respect they accord other disciplines, other male colleagues then deferred to the opinions of the men who had been critical, despite their lack of expertise, rather than to the prominent feminist scholars — all women — who affirmed the value of our client's work in that area. This deference is simply inexplicable on any nondiscriminatory ground. As the chair of our client's department recognizes, the male detractors of her feminist scholarship are "not competent to evaluate [it], since it falls outside of their areas of expertise and they are not well informed about the standard literature on such topics." The feminist scholars who praise this work, on the other hand, *are* plainly competent to evaluate it because it is within their area of expertise and they are "well informed about the standard literature on such topics." Nevertheless, it is the men whose views and critiques are accepted, and as a result, the votes to promote our client with tenure erodes. Our client is the victim of discrimination directed against other women, as well as against herself.

In our client's case, the discriminatory roots of her detractors' decisions to weigh the opinions of male reviewers more heavily than those of their female counterparts are relatively clear given the relative qualifications of the male versus female reviewers with respect to the subject matter. This, however, is a largely fortuitous and perhaps unusual circumstance. Many candidates for promotion, both in academia and elsewhere, may be disadvantaged or harmed to the extent that reviewers or decision-makers afford women's views less deference or weight than

those of their male colleagues. Title VII has not yet resulted in a great deal of sensitivity to this sort of discrimination.

It is likely in large part because of the continuing, subtle forms of discrimination such as those our client faced that despite thirty-five years of Title VII, the tenured faculty in American universities remains so heavily male.¹² The arguments suggested by our client's example, (among others, need to be raised in the years to come, before both courts and universities, to push both popular consciousness and the law toward an eventual eradication of discrimination on the basis of sex and an improvement in the statistics regarding women in academia. In our client's case, although the university never acknowledged the determinative role that sex discrimination played in her department's initial decision, an internal appeal raising these issues ultimately led to her promotion with tenure.¹³ With this Essay, a wider audience may become aware of and learn from her experience, and her case may, we hope, become a precedent for and harbinger of a better future.

12. Martha S. West, *Women Faculty: Frozen in Time 1999*, Table III (only 34.2% and 38.9% of tenured professors at public research universities and private research universities, respectively, are women).

13. After receiving our client's appeal, the university decided to solicit the views of additional outside reviewers on our client's feminist scholarship. When these additional letters proved to be overwhelmingly positive, the university returned our client's file to the department for a re-vote. The second vote resulted in a departmental recommendation that our client be promoted with tenure — a recommendation that the university accepted.

