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Mixed-Method Analyses of Federal Court Decisions During 1980-2007 Involving Race and Sex Discrimination Under Title VII of the Civil Rights Act of 1964 and Faculty Tenure Denial Decisions in Higher Education

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ABSTRACT

MIXED-METHOD ANALYSES OF FEDERAL COURT DECISIONS DURING 1980–2007 INVOLVING RACE AND SEX DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND FACULTY TENURE DENIAL DECISIONS IN HIGHER EDUCATION

by

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ABSTRACT OF GRADUATE STUDENT RESEARCH

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Purpose

The Civil Rights Act of 1964 has become the foundation of modern federal equal employment opportunity law. The application of this law to adverse tenure decisions, however, may differ from other adverse employment decisions because of judicial deference toward institutions of higher education. This present study analyzed published federal court cases decided during the period 1980–2007 involving Title VII, tenure denial, and higher education. This will contribute to understandings of the relationship between federal courts, faculty, and higher education by analyzing the extent of a statistical association between case and/or plaintiff characteristics and case outcomes; and isolating those institutional factors and practices that plaintiffs focus on in bringing

lawsuits and those that the courts consider most relevant in deciding cases. Understanding this information can help institutions maximize fairness and minimize their liability exposure when designing tenure processes and making tenure decisions.

Method

This study utilized legal, quantitative, and qualitative research methods to analyze 96 federal court cases involving tenure denial and claims of race and/or sex discrimination. The chi-square test of independence and Cramer's V were utilized to analyze the statistical association between the independent and dependent variables. Legal briefing and the qualitative historical content analysis approach were utilized to analyze the interplay between federal courts, faculty, and higher education. The content analyses process entailed: determining the coding system; perusing cases to identify concepts, trends, and themes; sorting cases in accord with emerging trends and themes; isolating trends and themes; discerning generalizations about data; and formulating constructs.

Results

The legal research method was used to identify, retrieve, analyze, and interpret the court cases involved in this study. For instance, Westlaw's computer-assisted database was examined to identify and retrieve the relevant court cases. This examination process resulted in 204 federal court cases. Each case was then analyzed to ensure subject relevancy. Further, a legal research process known as shepardizing was applied to the cases to ensure that no cases were duplicated and that each was terminated

during the period studied. These analyses resulted in 96 federal court cases identified for the purposes of this study.

Quantitative analyses involved in this study showed that there was no statistically significant relationship between the independent variables (plaintiff's sex, plaintiff's race, Title VII claim, institution class) and dependent variable (case outcome). However, there was a statistically significant relationship between the independent variables (court level, decision period) and dependent variable.

Further, qualitative analyses of the cases indicated that when bringing lawsuits of race and/or sex discrimination under Title VII, higher education faculty tend to make more than one allegation of discriminatory conduct/behavior against their employer (institutions). These allegations tend to surround the themes of procedural irregularities, ambiguous policies, disparate treatment, and hostile environments. Even so, discrimination is difficult for faculty to prove as the data suggest that most faculty fail to show that their institutions' reasons for denying them tenure is a pretext for discrimination. This finding indicates that the burden of proof under the disparate treatment theory is easier for institutions than for faculty, as courts tend to not question the merits of the institutions' tenure decision. Further, the data suggests that faculty tend to lose their lawsuits on appeal. However, faculty are more successful when they claim both sex and race discrimination. Further still, male faculty who file reverse sex discrimination lawsuits appear to prevail at a similar percentage as female faculty who file sex discrimination lawsuits. Another finding was that during the 1980s the courts' temporarily departed from their traditional practice of judicial deference. Faculty whose

cases were decided during the 1980s prevailed more than faculty whose cases were decided during the 1990s and 2000s.

Conclusions

When bringing lawsuits against their institutions for adverse tenure decisions based on claims of race and/or sex discrimination faculty tend to present more than one type of allegation/evidence of discrimination. These allegations/evidence tends to center around the themes of procedural irregularities, ambiguous policies, disparate treatments, and hostile environments. However, most plaintiffs lose their lawsuits because they either fail to show they were qualified for tenure or that the institution's proffered reason for denying them tenure was a pretext for discrimination. Even so, plaintiffs tend to be more successful when they claim both race and sex discrimination.

Court's general responses to plaintiffs' allegations/evidence is they will not scrutinize or question the soundness or merit of an institution's decision absent proof that the tenure decision was based on a prohibited factor or a showing of a nexus or causal connection by plaintiff. This judicial deference demonstrates that the burden of proof under the McDonnell Douglas theory is much easier for institutions than for faculty.

While case outcomes do not appear to be influenced by plaintiff's race or sex, outcomes do appear to be influenced by court level. The data indicates that plaintiff's experienced a higher success rate at the U.S. District Court level as opposed to the U.S. Appeals court level. As well, plaintiffs whose cases terminated during the 1980s prevailed at a much higher rate than those whose cases terminated during the 1990s and 2000s.

Regardless of who wins or loses a Title VII lawsuit based on tenure denial, the costs (intangible and tangible) can be substantial for the plaintiff and the institution. Based on the findings of this study, institutions should realize that any adverse tenure decision may result in a lawsuit.

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A Dissertation

Presented in partial Fulfillment

of the Requirements for the Degree

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DEDICATION

This dissertation is dedicated to:

My husband, William, who I'm sure wondered from time to time if he even had a wife as he had to go it alone for many a day and night! Also, without whose sacrifice, love, understanding, and support I would not have made it.

My mom, Pearl, and my siblings—Beverly, Arthur, Terrance, Andre, Debera, Cassandra, and Tasha—who neither saw nor heard from me for days on end, but, who stood by and loved me anyway!

My grandmother, Mattie, who became deceased during this project, whose faith in and love for me was unwavering.

My father, Arthur; my in-laws, the Crittendons; and countless other family members who served as my biggest cheerleaders.

And, lastly, my uncle Wiley, who overcame many adversities to attain both undergraduate and graduate degrees; and, as such, serves as a constant inspiration to me.

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CHAPTER ONE

INTRODUCTION

> *It shall be an unlawful employment practice for an employer –*
> *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or*
> *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.* (42 U.S.C. §2000e-2[a])

Introduction

Discrimination is a negative force in American culture, but it is particularly destructive when it occurs in the workplace, where a person's livelihood is at stake (Cihon & Castagnera, 2005). Even though higher education administrators seek compliance with Title VII and other laws covering employment discrimination, universities remain vulnerable to lawsuits as it is postulated that they face an increasingly litigious environment (Kaplin & Lee, 2006). As evidence, the Equal Employment Opportunity Commission (EEOC) experienced the highest ever annual increase in discrimination charges during 2006, since 1993. Race and sex discrimination comprised the majority of the discrimination claims (Millman, 2008).

My study analyzes the relationship between the courts and higher education by using traditional (quantitative and qualitative analyses) and legal research methods to

develop specific findings about this all-important area. The presentation of my study begins with the statement of purpose, significance of the study, an overview of my research plans, limitations, and definition of terms. Next, I review the literature. In chapter 3, I outline the methodology. In chapter 4, I present my findings. Finally, in chapter 5, I discuss findings, conclusions, suggestions for future research, and recommendations for higher education administrators.

It has been over 40 years since the enactment of Title VII of the Civil Rights Act of 1964. The rationale for this law and others prohibiting discrimination in employment decisions is that characteristics such as race, color, sex, national origin, and religion are irrelevant for employment decisions. Title VII of the Civil Rights Act of 1964 is the most comprehensive and most frequently utilized of the federal employment discrimination laws (Kaplin & Lee, 2006). It was extended in 1972 to cover educational institutions both public and private (42 U.S.C. §2000e, P.L. 88-352).

Discrimination claims are particularly complex for university employees to prove and for universities to defend against. Contributing to this difficulty is the complex and subjective nature of hiring and promotion processes (*in parti*cular regarding faculty) in higher education (Baez & Centra, 1995). The federal court's basis for its interpretation of federal laws, specifically, Title VII of the Civil Rights Act of 1964, and its application to tenure in the higher education environment will be discussed later.

It is obvious that there has been progress since the passage of civil rights legislation in the 1960s in providing greater opportunities for women, minorities, and other groups. However, some of the most prestigious institutions of higher education have been found in violation of equal employment opportunity laws, and many have been

immersed in lengthy court battles because of questionable actions or personnel decisions involving female and minority faculty (Kaplin & Lee, 2006).

Purpose of the Study

The purpose of this study was to analyze published court cases terminated in the federal courts during the decision period 1980–2007 involving Title VII, tenure denial, and higher education. This analysis will help schools to understand the relationship between federal courts, faculty, and higher education by analyzing the extent of a statistical association between case and/or plaintiff characteristics and case outcomes; and, isolating those institutional factors and practices that plaintiffs focus on in bringing lawsuits and those that the courts consider most relevant in deciding cases. Understanding this information can help institutions maximize fairness and minimize their liability exposure when designing tenure processes and making tenure decisions.

The Problem

Discrimination in employment, whether intentional or unintentional, has been a major concern of many people who believe that our society has not lived up to its ideals of equality in employment opportunities for all people. The glaring inequities in our society sparked violent protests during the civil rights movement of the 1960s. African Americans, Hispanic Americans, and Native Americans constitute a disproportionate share of those living in poverty. Women of all races and ethnicities found access to challenging and well-paying jobs limited and, thus, frequently relegated to lower paying occupations traditionally viewed as women's work (Cihon & Castagnera, 2005). To help remedy these problems of discrimination, Congress passed the Civil Rights Act of 1964.

The Civil Rights Act of 1964 has become the foundation of modern federal equal employment opportunity law ("2007-2008 Almanac," 2008). The potential application of this law to faculty, however, may differ from its applications to other employees because courts often take account of the unique characteristics of institutional customs and practices regarding faculty, such as tenure (Kaplin & Lee, 2006).

Institutions of higher education constantly strive for overall excellence in the areas of teaching, scholarly research, and service. Employment decisions affecting faculty are viewed as crucial to attaining this desired status. Faculty employment decisions are approached as among the most important decisions made by an institution, decisions to be made only after the most serious deliberations and extensive debate have taken place (Blackburn, 1985). Tenure decisions by institutions of higher education often involve a mixture of promotion and discharge claims. Essentially, an individual who does not receive tenure not only does not receive a promotion to a permanent position, but also normally loses the job altogether (Franke, 2001). According to Curkovic (2000),

> the prospects for future employment may be grim. Those who are 'tossed from the ivory tower' lose prestige, security, and financial benefits associated with tenure, and are sometimes stigmatized as being 'unworthy' faculty members: as 'tainted goods,' their prospects of employment at other institutions of higher education may be very limited. (p. 727)

It is posited that the negative impact of an adverse tenure decision is one reason for the increase in litigation in higher education (Curkovic, 2000). As a result, administrators should realize that any adverse tenure decision brings with it the potential for a legal challenge on grounds of discrimination (Curkovic, 2000).

Tenure is granted after certain criteria have been met, including length of service, demonstrated excellence in teaching, the generation of scholarly research, and a record of

collegiality and service to the university and broader communities. Tenure brings with it increased prestige, compensation, and academic freedom (Leap, 1995b). Although universities often describe objective criteria to evaluate tenure candidates, the process is still to a large degree discretionary. The merits of the candidate are considered in tandem with the needs of the university, budget considerations, course needs, and projected enrollment (DiNardo, Sherrill, & Palmer, 2001).

Faculty employment disputes involving higher education, similar to discharge cases in non-university settings, present an ever-increasing concern to higher education (Hendrickson, 1999). A critical concern in tenure decisions is the long-term financial commitment on the part of the university. Unlike employment decisions in corporate America, once a decision to grant tenure has been effected by a university, it becomes very difficult to terminate the employment relationship with tenured faculty (Helms, 1999). Acknowledging this concern, Kenneth G. Wilson, Vice President of the University of Connecticut, advised in *Lieberman v. Gant* 23 (1979/1980),

> When in doubt, don't. Since the tenure decision is a commitment by the University to twenty or thirty years of support and several hundred thousand dollars of salary, from which there can be no turning back, we have felt that if we must err, we ought to err on the side of caution; we ought not to gamble widely. (p. 64)

Some university administrators may be tempted to make broad characterizations about precipitating factors and circumstances, patterns, and outcomes of higher education litigation without an adequate base of empirical research. While taking into consideration the cautionary advice of University of Connecticut's Vice President Wilson, it is imperative that university administrators become better informed regarding tenure decisions. Knowing which characterizations of the overall patterns in higher education tenure denial litigation are credible in the two most litigated categories of Title

VII employment discrimination (race and sex); as well, becoming more familiar with the judicial process and its relationship to higher education is essential for informed employment policies and practices and efficient management of potential litigation.

Sex discrimination lawsuits constitute the largest number of discrimination lawsuits filed by faculty against institutions of higher education (Abel, 1981; Franke, 2000; O'Neal, 1992). Between 1972 and 1984, women filed more than half of all academic discrimination claims. Given the under-representation of women among university faculty in general (although not as severe as the under-representation of racial and ethnic minority faculty), and particularly at the tenured ranks, the fact that there is an impression that women and minorities have not been treated on equal terms with male, non-minority faculty is understandable (Kaplin & Lee, 2006).

There is a lack of substantive and analytic data involving federal court decisions regarding employment discrimination cases based on race and/or sex (excluding sexual harassment) against institutions of higher education involving faculty tenure denial decisions. This void leaves universities and their administrators without all-important information and subject to liability that might otherwise be mitigated, diminished, or avoided. My study seeks to fill this void.

Methods and Research Questions

This study utilized legal, quantitative, and qualitative research methods to analyze federal court cases involving tenure denial and claims of race and/or sex discrimination.

The legal research method was used to identify, retrieve, analyze, and interpret the court cases involved in this study. For instance, Westlaw's computer-assisted database was examined to identify and retrieve the relevant court cases. This

examination process resulted in 204 federal court cases. Each case was then analyzed to ensure subject relevancy. Further, a legal research process known as shepardizing was applied to the cases to ensure that no cases were duplicated and that each was terminated during the period studied. These analyses resulted in 96 federal court cases identified for the purposes of this study.

The chi-square test of independence and Cramer's V were utilized to analyze the statistical association between the independent and dependent variables. Legal briefing and the qualitative historical content analysis approach were utilized to analyze the interplay between federal courts, faculty, and higher education. The content analyses process entailed determining the coding system; perusing cases to identify concepts, trends, and themes; sorting cases in accord with emerging trends and themes; isolating trends and themes; discerning generalizations about data; and formulating constructs. The Litigation Documentation Form (LDF), a data collection instrument utilized by Kuriloff (1975), Newcomer, Zirkel, and Tarola (1998), O'Connor Rhen (1989), and Tarola (1991) was also used in this study. The LDF, as modified for the purposes of this study is in the appendices as Appendix B.

My analyses addressed two sets of questions. One set is quantitatively based and the other is qualitatively based. The questions are presented below.

Quantitative

Despite ubiquitous judicial deference toward institutions of higher education (Baez & Centra, 1995; Copeland & Murry, Jr., 1996; Kaplin & Lee, 2006; LaNoue & Lee, 1987, 1990; Leap, 1995b; Lee, 1988; Wagner, 1991), might certain case and/or plaintiff characteristics influence the outcome of cases? More specifically,

1. Is there a relationship between the plaintiff's sex and the case outcomes within sex discrimination cases?

2. Is there a relationship between the plaintiff's race and the case outcome within race discrimination cases?

3. Is there a relationship between the Title VII claim (race, sex, or race and sex) and the case outcome?

4. Is there a relationship between court level (United States District Courts, United States Court of Appeals, United States Supreme Court) and the case outcome?

5. Is there a relationship between the institution's classification (public, private) and the case outcome?

6. Is there a relationship between decision periods (1980s, 1990s, and 2000s) and the case outcome?

Qualitative

7. In what discriminatory behavior or conduct do plaintiff faculty allege defendant institutions engage in Title VII and tenure denial lawsuits?

8. What has been the courts' response to plaintiff's allegations (found in research question no. 7) and other factors in deciding Title VII tenure denial cases?

9. What remedies do courts award to prevailing parties in Title VII tenure cases?

Significance of the Study

Employment discrimination cases can be difficult and costly for any employer to defend (Kaplin & Lee, 2006). A lengthy defense cannot only divert scarce dollars from student needs, but also can cause painful, sometimes irreparable, rifts in the community

in which higher education best flourishes (Slonim, 2003). Therefore, no employer can afford to ignore the growing body of substantive employment discrimination law, and institutions of higher education are no different. As a result, it is critical for institutions of higher education to become more knowledgeable about the relationship between the judicial system, institutions of higher education, and lawsuits involving claims of adverse faculty tenure denial decisions.

Further, it is important for researchers to study faculty in general because (a) faculty play an important role in shaping the United States' education system, (b) faculty advance the knowledge of society, and (c) ergo, contribute to the public good. Thus, it is in the public's best interest to become knowledgeable about and improve the quality of the faculty work experience (Adams, 2006). For colleges and universities the study of faculty is important as well because (a) expenses related to faculty represent their largest non-capital investment (salary for a tenured faculty member from time of tenure until retirement could cost the university on average $2 million [Brown & Kurland, 1993]), (b) faculty are crucial to their institution's reputation because they directly impact the quality of the institution, student enrollment, ability to raise funds, and attract research and grant monies, and (c) faculty deliver the essential products and services of the institution (Blackburn, 1985).

> How faculty careers can be enhanced is a critical issue—for the sake of the students who seek the best education possible, for the sake of the institution which has societal obligations for the production of knowledge, for the transmission of culture and the education of future experts, for service to its many communities, and for the sake of the professors themselves. (Blackburn, 1985, p. 55)

Further, collecting, analyzing, and synthesizing information surrounding the relationship between law and higher education is essential to understanding the

implications of employment decisions involving faculty on policy and practice. Dr. Chester Kent, a scholar-practitioner in law and education at the University of Pittsburgh, articulates,

> We must focus our energy on helping future administrators gain the knowledge and skills necessary to function in a new world of standards and accountability. Part of that knowledge is to find and to convey the legal boundaries for administrators' behavior beyond which there is no return. The only accurate way to map the territory is to engage in analysis and synthesis of case law to identify relevant categorical trends. (Kent, 2002, p. 65)

The well-respected education law expert, Lee (1990), however, criticizes those researchers who assume "that simply counting the number of successful and unsuccessful plaintiffs will be useful" (p. 525). She asserts, "Outcomes analysis ignores the differences among discrimination cases and treats them as fungible. There is much more behind a court decision than simply a negative or positive ruling" (p. 525). Further, Lee implores scholars from both the legal and education fields to produce "other information that will help plaintiffs and defendants assess the substantive potential for success, as well as the statistical" (p. 526).

The significance of my study is its contribution to the void about which Lee speaks. Therefore, my study, which is substantive and analytic in scope, will provide substantial and meaningful information to administrators in higher education so that they can better understand the role of sex and race discrimination in tenure decisions. Not only can such information help institutions of higher education prevent discrimination by, for example, exposing areas for potential training of tenure decision makers, it can also help institutions maximize fairness and minimize their liability exposure when designing tenure processes and making tenure decisions.

Limitations of the Study

Limitations of this study are these: This study does not involve those court cases in which sex discrimination was based solely on claims of sexual harassment. Even though the courts recognized sexual harassment as sex discrimination, it is outside the scope of this study. The complexity and breadth of the topic of sexual harassment warrant a study in and of itself.

It also does not include class action lawsuits, as the focus of this study is on individual plaintiffs as opposed to groups. As well, non 4-year colleges and universities as defined by the Carnegie Foundation's (2008) classifications of institutions of higher education are not included. Many community and professional colleges' organizational structure regarding faculty and tenure operate differently from 4-year colleges and universities (Kaplin & Lee, 2006). As such, the study of these type institutions is outside the scope of this study. This study does, however, include both public and private 4-year colleges and universities.

Another limitation is that the database used to determine the sample for this study does not include all possible relevant federal court cases because not all court cases are published. Therefore, it is possible that this study's findings may be delimited and not generalized to the entire field of higher education. This delimitation, however, is minimized by use of the Westlaw computer-assisted database, which publishes 10% more court decisions than are offered in print. The number of cases unreported is unknown (Lupini & Zirkel, 2003).

Definitions of Terms

Academe/Academia: "A collective term for the scientific and cultural community engaged in higher education" ("Academia," n.d., para.1).

American Association of University Professors (AAUP): "The AAUP's purpose is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good" (AAUP, n.d., para.1).

Defendant: "Any party who is required to answer the complaint of a plaintiff or pursuer in a civil lawsuit before a court, or any party who has been formally charged or accused of violating a criminal statute" ("Defendant," n.d., para.1).

Plaintiff: "Also known as a claimant or complainant, is the party who initiates a lawsuit" ("Plaintiff," n.d., para.1).

Pretext: "Something that is put forward to conceal a true purpose or object; an ostensible reason; excuse" ("Pretext," n.d., para.1).

Prima facie: "A Latin expression meaning 'on its first appearance', or 'by first instance.' Prima facie denotes evidence that (unless rebutted) would be sufficient to prove a particular proposition or fact. If a party fails to establish prima facie on any required element of its case, its claim may be dismissed" ("Prima facie," n.d., para.1).

Proffer: "To offer evidence in support of an argument" ("Proffer," n.d., para.1).

Remedy: "The means a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes a penalty, or makes some other court order to impose its will" ("Remedy," n.d., para.1).

Reverse discrimination: "The unfair treatment of members of a dominant or majority group" ("Reverse discrimination," n.d., para.1).

Shepardize: "The process of finding newer documents which cite the original document and thus reconstruct the judicial history of cases and statutes" ("Shepardize," n.d., para.1).

Summary judgment: "A legal term which means that a court has made a determination (a judgment) without a full trial. Such a judgment may be issued as to the merits of an entire case, or of specific issues in that case" ("Summary judgment," n.d., para.1).

CHAPTER TWO

LITERATURE REVIEW

Introduction

The goals of my preliminary review of the literature were to gain knowledge and insight into the broad scope of employment discrimination litigation (particularly pertaining to higher education and tenure denial decisions) and become familiar with research related to my area of study.

A survey of the literature pertaining to higher education revealed it as quite extensive. It is easy to become overwhelmed by the wealth of information. Having read so much, it took some time to reconcile what should and should not be included in this literature review. I decided to employ a strategy and guiding principle described in Rudestam and Newton's (2001) book, *Surviving Your Dissertation: A Comprehensive Guide to Content and Process*.

Rudestam and Newton (2001) describe a literature organization strategy offered by their colleague Joseph Handlon that draws on a filmmaking metaphor. The book states that in filmmaking, there are "long shots," "medium shots," and "close-ups," and these same areas of foci can be employed to organize a literature review. For example, the long shot focuses on materials that serve as background and contextual information surrounding a particular topic. The medium shot is a little more in-depth than the long shot view and provides a "clear indication of the status of research as it pertains to the

orientation of the [dissertator's] study" (p. 62). The close-up requires careful examination of the literature most relevant and central to the dissertator's study. Correspondingly, I organized the literature into three main sections.

Section I, the long shot, provides a historical context for the federal court system, employment discrimination, Title VII of the Civil Rights Act of 1964 (as amended), legal theories, tenure in higher education, and faculty demographics in higher education.

Section II, the medium shot, discusses the relationship between the courts and higher education, and race and sex discrimination in higher education.

Section III, the close-up, analyzes the literature in varying degrees of relevancy to my study, including frequency studies, policy capturing studies, and litigation studies on higher education. The studies in this section were thoroughly reviewed and analyzed. While no other studies were identical to mine in methodology and subject matter, they served to inform my study.

All other literature/materials evaluated that did not fit into the scheme described above were considered irrelevant, and thus were not included in this literature review. However, many of the discarded literature/materials served valuable purposes (i.e., provided background or rudimentary information, helped identify pertinent information, provided strategy, technique, or ideas for my study).

This literature review demonstrated that while the literature is replete with studies pertaining to employment law and Title VII, little is known about the federal courts' interpretation of Title VII when it involves tenure and institutions of higher education. Given the vital role of higher education in our society and the scarce data on faculty discrimination involving tenure, the need for this study is clear.

Historical Context for the Federal Court System, Title VII, and Tenure

Overview of the Literature

An examination of the literature, especially that written over the past two decades, reveals that colleges and universities have come under increasing scrutiny and judicial intervention over their employment decisions and practices (Hendrickson, 1990; Kaplin & Lee, 2006; LaNoue & Lee, 1987, 1990; Leap, 1995a, 1995b; O'Neal, 1992; Schoenfeld & Zirkel, 1989).

Prior to 1972, there were few legal regulations effecting institutions of higher education. It has been argued that academe seemed to be above the law. Colleges and universities for the most part operated autonomously and under the auspices of an internal system of shared governance unique to academe (Kaplin & Lee, 2006). The American Association of University Professors (AAUP), in its 1920 Statement on Government of Colleges and Universities, first introduced the ideal of shared governance. The AAUP's 1920 statement emphasized the importance of faculty involvement along with trustees, administrators, and presidents in personnel decisions, selection of administrators, preparation of the budget, and determination of educational policies. Refinements to the statement were introduced in subsequent years, culminating in the 1966 Statement on Government of Colleges and Universities. Shared governance in higher education refers to the organizational structure, allocation of decision-making authority, and the processes by which decisions may be challenged (AAUP, 2006). While governance may be structured differently depending upon the institution's status (public, private, independent, or community college), most governance systems consist of collaboration among trustees, faculty, administrators, and students (Kaplin & Lee, 2006).

In the past, academia was perceived to be unique and complex, so complex that an outsider would not understand how it operated; *in parti*cular, when it comes to the ideal of tenure (LaNoue & Lee, 1990). Tenure, in general, is the status granted to a faculty employee usually after a probationary period, indicating that the newly tenured person may enjoy certain privileges not afforded to non-tenured faculty (i.e., due process in matters of termination and academic freedom protection). This status is usually granted based on standards of excellence in performance by the faculty in three main categories: research, teaching, and service (Leap, 1995b). Tenure, which will be discussed in more detail later in this section, is a coveted status that many desire, but not all who apply attain. In addition, the professoriate is built and sustained upon tenure's foundation. As such, much has been written about tenure (e.g., its process, pros and cons, and arguments for and against the restructuring or abolishment of tenure in academe).

The practice of self-regulation and the complexity of faculty employment decisions have been widely accepted and respected by outside entities, such as the legal system and the courts. As such, when faculty plaintiffs put into effect the few laws or regulations that affected academia prior to 1972 and found themselves in court, the court's posture was usually one of deference to the defendant institution (Metzger, 1979).

The Legal System—Federal Courts

Federal courts were established by the U.S. government to decide disputes concerning the Constitution and laws passed by Congress, called statutes, cases in which the United States is a party, cases between citizens of different states, and special cases such as bankruptcies, patents, and maritime law. There are several levels within the federal court system. Namely, the United States is divided into 94 judicial districts. In

each district, there is a U.S. District Court. These courts operate in the fashion with which most people seem to be familiar: They try cases, hear witness testimony, and select and instruct juries. Each of the 94 district courts is placed in one of 12 regional circuits, and each circuit has a court of appeals. If a case is lost at the district level, it may be appealed at the court of appeals level. There is also a Federal Circuit court of appeals located in Washington, DC, that hears special cases from all over the country.

The Supreme Court is the highest court in the nation. If a case is lost in the court of appeals, the losing party may ask the Supreme Court to hear the case. The Supreme Court hears only a very small number of the cases it is asked to review. For example, in 2006 the Supreme Court received over 8,000 requests for review; however, only 78 were heard (Federal Judicial Center, 2007).

Even though Federal Courts do not have the same broad jurisdiction that state courts have, they hear both civil and criminal cases. However, mainly they hear civil cases. For example, one type of federal civil case that is relevant to this study might involve a claim brought under Title VII of the Civil Rights Act of 1964 by a faculty employee alleging that her academic employer denied her tenure because she is a woman or because he is Black.

According to the Federal Judicial Center (2007), not every case reaches the level of a trial. Trials can be emotionally and financially draining, so a person may elect to forego his or her right to a trial and settle the case in lieu of a trial. In addition, many cases are decided by a judge, who may decide, based on interpretation of the relevant law, that there is no need to go to trial. It is estimated by the Federal Judicial Center (2007) that more than 9 out of 10 civil cases never make it to trial.

Employment Discrimination and Title VII

One of the basic principles of our way of life in America has always been that individuals would be free to pursue the work of their own choice, and to advance in that work, subject only to considerations of their individual qualifications, talents, and energies. --Richard M. Nixon

A 2007 Gallup poll revealed 71% of White Americans believe that Blacks have as good a chance as Whites to get any kind of job for which they are qualified. Black Americans, however, have a different perspective. Only 37% believe they have equal job opportunities. These beliefs no doubt carry over into the workplace (The Gallup Polls, 2007). Further, according to Gallup, "although women represent a majority of the population, they are still a minority in the U.S. workforce, and achieving equality there is an ongoing struggle" (The Gallup Polls, 2005, para. 1).

In the higher education environment, female full-time faculty members averaged lower salaries than their White male counterparts; White faculty generally had higher salaries than Black faculty. Further, females on the tenure track are less likely to be tenured than males on the tenure track (33% tenured and 67% tenured, respectively). The likelihood of tenure is even more dire for minority faculty (15% tenured). In addition, female faculty experienced higher population concentrations at junior-level tenure track positions at 43%, while only 29% of males were at the junior level. Minority faculty members are also concentrated in junior-level positions at 43%, while 30% of White faculty members are in junior-level positions (National Center for Education Statistics, 2007).

The representation of women and minorities among the faculty ranks in academe has increased over the past several decades. Nevertheless, it appears that the increase in faculty representation has not kept pace with the increase in the Ph.D. pipeline and thus

availability of women and minority applicants. For example, of those earning doctorates in 1974, 19.5% were women. In 2006, their portion of earned doctorates increased to 51%. Over a 22-year period (1984 through 2006), minorities earning doctorates went from 8.9% to 20%. Further, the distribution of those doctoral graduates who planned to work in academia was: 49% of men, 59% of women, 71% of American Indians, 44% of Asians, 54% of Blacks, 58% of Hispanics, and 59% of Whites (National Opinion Research Center, 2006).

Reasons offered for the differences and gaps in the representation of women and minorities in academia are age, education, and experience. The 2006 NCES survey suggests that, generally, White and Asian/Pacific Islander faculty were older, had attained higher education levels, and had more years experience in academia than women and minorities. Others suggest different reasons for the discrepancies such as bias, prejudice, and discrimination in the higher education environment (Abel, 1981; O'Neal, 1992).

Despite laws that prohibit this behavior, it is posited that discrimination (at least, the perception of it) is alive and well in higher education (Abel, 1981; O'Neal, 1992; Ware, 2000; Wilson, 2004). Offered as evidence is an increase in litigation in which faculty claimed to have been discriminated against by their college or university (Cantu-Weber, 1999; Hamill, 2003; Kaplin & Lee, 2006; LaNoue & Lee, 1990; Leap, 1995a, 1995b). "The volume of federal litigation escalated rapidly following the extension of the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 to academic institutions in 1972" (Leap, 1995b, p. 8).

Title VII of the Civil Rights Act of 1964 was borne out of civil unrest that began in the late 1950s and reached national prominence and visibility during the 1960s.

President John F. Kennedy and his administration were made aware of social injustices against various groups in the United States and decided to work to legislate the behavior of entities directly responsible (U.S. National Archives, 1964).

Their work led to legislation focused on discrimination in employment based on characteristics not related to an applicant's or employee's qualifications or performance (42 U.S.C. §2000[e]). President Kennedy (1963) expressed the following sentiment about the Civil Rights Act of 1964 during his nationally televised address to the nation on civil rights:

> It ought to be possible, in short, for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. But this is not the case. . . . The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities. (p. 1)

Despite the assassination of President John F. Kennedy in 1963 and a filibuster by opponents lasting 83 days, the bill proposing the Civil Rights Act of 1964 was passed. The bill was signed by President Lyndon B. Johnson and enacted on July 2, 1964 (Johnson, 1965).

Of any anti-discrimination laws, Title VII has the greatest potential for significantly influencing nondiscrimination employment practices because of its breadth and far-reaching scope and coverage. The Civil Rights Act of 1964 not only prohibited employment discrimination based on race, creed, color, national origin, and sex, it also outlawed segregation in businesses such as theaters, restaurants, and hotels. Further, it ended segregation in public places, such as swimming pools, libraries, and public schools ("Congress and the Civil Rights Act of 1964," 1979).

There have been two landmark amendments to the Civil Rights Act of 1964 since its passing, both designed to strengthen the Act. The first was the Equal Employment Opportunity Act of 1972. The second was the Civil Rights Act of 1991.

As it currently stands, Title VII of the Civil Rights Act of 1964, as amended and laid out in 42 U.S.C. § 2000e, prohibits discrimination in hiring, pay, promotion, termination, compensation, and other terms and conditions of employment of the following protected classes:

1. Race/color: This category includes Blacks, Whites, persons of Latina/o or Asian origin or descent, and indigenous Americans (Native Alaskans, Native Hawaiians, Native Americans).

2. National Origin: In *Espinoza v. Farah Mfg. Co.* (1971/1972/1973), the Supreme Court interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came" (p. 88). Discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question.

3. Sex: This provision prohibits discrimination based on sex, and applies to both men and women. Title VII does not prohibit discrimination against someone because of his/her sexual orientation. Discrimination based on sex violates Title VII unless sex is a BFOQ for the job in question.

4. Religion: The term "religion" includes "all aspects of religious observance and practice, as well as belief" (42 U.S.C. § 2000e-[j]). Title VII exempts from coverage a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the

carrying on by such corporation, association, educational institution, or society of its activities" (42 U.S.C. § 2000e-1[a]). The protection against religious discrimination does not cover jobs where the job function is "ministerial" in nature (*Alicea-Hernandez v. Catholic Bishop of Chi.* (2003). Title VII does not prohibit religious discrimination where religion is a BFOQ for the job in question.

For discrimination to be actionable, the plaintiff must have experienced an adverse action.

Title VII applies to federal, state, and local governments and private employers, labor unions, and employment agencies. Congress granted states' immunity from Title VII coverage under the Eleventh Amendment. An employer is considered "covered" by Title VII if it has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar years. The following types of employers are exempt from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (partial exemption) (42 U.S.C. §2000).

Title VII Legal Theories

According to Posner (2001), the term "theory" has long been used in law as a term for a litigant's legal explanation of the wrong committed by the defendant, or "as a generalization proposed to organize a body of case law" (p. 2). In the article, *Scientific Theory v. Legal Theory*, Doug Farquhur (2001) justifies the use of the term "theory" as it pertains to law. He asserts, "Legal theories undergo the same tortuous scrutiny as scientific theories: they are subjected to peer review, challenges, and political judgments, and they ultimately survive by the test of time" (p. 1).

Below is a discussion of legal theories that are most utilized by plaintiffs in a Title VII lawsuit.

Few, if any, discrimination cases involve an admission of guilt or demonstration of overt discriminatory practices on the part of the defendant. As such, the courts must infer from complex statistics and deduce from conflicting testimony whether discrimination has occurred. In such circumstances, the decisive factor hinges upon who bears the burden of proof: the defendant or the plaintiff (Kaplin & Lee, 2006; Leap, 1995a, 1995b).

During the early years of Title VII, the courts experienced their most significant development as the core theories of employment discrimination evolved: disparate treatment and disparate impact. Just about all Title VII cases are litigated under one of these two theories, which evolved separately through two precedent-setting legal cases (Kaplin & Lee, 2006; Leap, 1995b). According to Kaplin and Lee (2006), most Title VII litigation in higher education involves allegations of disparate treatment. As such, the discussion will begin with an overview of disparate impact and end with disparate treatment.

Disparate Impact Theory and *Griggs v. Duke Power Co.* (1968/1970/1971/1975)

Even when an employer is not motivated by discriminatory intent, Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. This is the basis of the disparate impact theory.

The legal frame work for the disparate impact theory was established by the Supreme Court in 1971, in *Griggs v. Duke Power Co.* (1968/1970/1971/1975). In Griggs, the Supreme Court reviewed the selection procedures of requiring a high-school education and certain aptitude test scores used by the Duke Power Company for internal transfer and promotion to certain positions for employees. In short, African-American applicants, less likely to hold a high-school diploma and averaging lower scores on the aptitude tests, were selected at much lower rates for certain positions compared to White candidates.

The Court found that under Title VII of the Civil Rights Act of 1964, if such tests disparately impacted protected minority groups, businesses must demonstrate that such tests are "reasonably related" to the job for which the test is required. And, as such, Title VII prohibits employment tests when used as a factor in employment decisions that are not a "reasonable measure of job performance," regardless of the absence of actual intent to discriminate. Griggs places the onus of the burden of proof on the employer to produce and provide the business necessity of the contested selection procedure. However, in 1989, in *Wards Cove Packing Co. v. Antonio* (1982/1985/1988/1989), the Court reduced the employer's burden of proving a business necessity for a selection procedure to a burden of producing evidence of a business reason.

In 1991, Congress amended the Civil Rights Act of 1964 by way of the Civil Rights Act of 1991, which restored the burden of proof in disparate impact cases to that originally outlined in *Griggs v. Duke* (1968/1970/1971/1975).

As restored and codified by the Civil Rights Act of 1991 and as currently practiced, the theory of disparate impact, which hinges upon the plaintiff's and

defendant's responsibilities and abilities in establishing burden of proof, is outlined below.

1. *Prima facie* case: The plaintiff must prove, generally through statistical evidence, that the challenged practice or selection device has a substantial adverse impact on a protected group (42 U.S.C. § 2000e-2[k][1][A][i]).

2. Business necessity: If the plaintiff establishes adverse impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity" (42 U.S.C. § 2000e-2[k][1][A][i]).

3. Alternative practice with lesser impact: Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice that would satisfy the employer's legitimate interests without having a disparate impact on a protected class (42 U.S.C. § 2000e-2[k][1][A][ii]).

Because the central issue in disparate impact cases is the effect of employment policies and practices, it is irrelevant whether the employer intends to discriminate (Kaplin & Lee, 2006).

Disparate Treatment and *McDonnell Douglas Corp. v. Green* (1969/1972/1973/1975/1976)

Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue in disparate treatment cases is whether the employer's action was motivated by discriminatory intent, which a plaintiff may prove by either direct evidence or circumstantial evidence. In most cases, direct evidence of discrimination is not available, given that most employers do not

openly admit that they discriminate (*Clark v. Claremont*, 1992). A plaintiff may also proceed by offering circumstantial evidence. A common type consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" (Leap, 1995b; *Troupe v. May Department Stores*, 1993/1994).

The Supreme Court has created a structure for analyzing these cases, commonly known as the McDonnell Douglas burden-shifting standard (Kaplin & Lee, 2006). In *McDonnell Douglas Corp. v. Green* (1969/1972/1973/1975/1976) (and later refined in *Texas Department of Community Affairs v. Burdine* (1979/1981) and *St. Mary's Honor Center v. Hicks* (1991/1992/1993), the Supreme Court issued a substantive ruling regarding the burden and nature of proof in lawsuits filed under Title VII. Also established was the order in which plaintiffs and defendants present proof.

The disparate treatment analysis is as follows: A plaintiff filing a suit under Title VII must begin the process by establishing a *prima facie* case of discrimination. In doing so, she must show that (a) she belongs to a protected group, (b) she applied and was qualified for the vacant position, (c) she was not hired for the position, and (d) the employer continued to seek applications comparable to that of the plaintiffs (Hamill, 2003). The aforementioned four elements of the *prima facie* case are tailored depending upon the adverse action alleged.

The *prima facie* phase sets in motion a volleying process in the burden of proof between the plaintiff and the defendant. If the plaintiff is not successful in establishing a *prima facie* case, the Court may enter a summary judgment in favor of the defendant and

the case is over. On the other hand, if the plaintiff successfully establishes a *prima facie* case, the plaintiff has created an inference of discrimination and the ball is then in the defendant's court to refute that inference. The defendant must then produce evidence of a legitimate non-discriminatory reason for its employment action. In order to rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions.

The ball is then volleyed to the plaintiff, who must present evidence that the defendant's actions were indeed discriminatory, and thus the defendant's explanation is actually a pretext for discrimination (McDonnell Douglas Corp v. Green, 1969/1972/1973/1975/1976; Troxel, 2000). Proof that the defendant's asserted reason for its adverse employment decision is untrue permits, but may not require, a finding of discrimination (Kramer, 1982; Rasnic, 1991; Troxel, 2000). The case is usually over if the plaintiff fails this step.

According to Kaplin and Lee (2006), most Title VII litigation in higher education involves allegations of disparate treatment. In general, Kramer (1982) agrees. Kramer (1982) examined the standards of disparate impact and disparate treatment that courts use to evaluate claims of discrimination under Title VII. Kramer asserts disparate impact analysis has rarely been used in sex discrimination lawsuits involving tenure due to the uniqueness of the tenure selection process, and the small numbers of qualified applicants would make it difficult to conduct an analysis that would be statistically meaningful. Both Kramer (1982) and Rasnic (1991) assert that courts have utilized the disparate treatment theory more often when evaluating the merits of a sex discrimination case as opposed to other types of discrimination cases (Kramer, 1982; Rasnic, 1991).

An Overview of Tenure and the Review Process in Higher Education

According to the AAUP (2006),

> Tenure is a means to certain ends; specifically (1) Freedom of teaching and research and of extra-mural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society. (p. 3)

In order to understand the interactions between higher education and the courts as they pertain to faculty employment decisions, an overview of the tenure process may be helpful. Therefore, this section provides an overview of tenure, the tenure review process, and the role of academic freedom.

Overview of Tenure

"The practical fact in most places, and the unexceptional rule at Yale, is that tenure is for all normal purposes a guarantee of appointment until retirement age" (Brewster, 1972). Duke law professor Van Alstyne (1971) defines tenure this way: "Tenure, accurately and unequivocally defined lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause" (Van Alstyne, 1971, p. 328).

As is demonstrated above, there seem to be varying beliefs surrounding the purpose of tenure as well as its origins. Many think tenure is a concept relatively new to academia when compared to other epic developments in higher education. On the contrary, Metzger (1979) suggests that tenure has been around as long as "academic man." He contends, "Academic tenure was not a new concept in 1950 or 1930; indeed, it

was hardly a new concept in 1330" (p. 3). Metzger asserts that tenure has revolved, evolved, and even devolved over time. However, its philosophical core has always involved "efforts to protect the realm of academic thought and teaching" and, as its product, "a set of institutional rules and practices designed to shield the inhabitants of that realm from arbitrary, repressive or unjust evictions" (p. 3).

Machlup (1996) offers a more expansive definition of tenure. Machlup identified four types of tenure: (a) tenure by state law, (b) tenure by contract where institutional policy statements and bylaws provide for continuous appointments, (c) tenure by moral commitment, which rests upon an institution's implied adherence to customary practice, and (d) tenure by "courtesy, kindness, timidity, or inertia" which is also known as *de facto* tenure (p. 311).

A more formal and specific definition is offered by the American Association of University Professors (AAUP) in its 1940 Statement of Principles on Academic Freedom and Tenure. According to the AAUP,

> Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities; and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligation to students and society. (AAUP, 2006, p. 3)

However, in recent years, tenure has come under increasing attack due to the financial costs on academic institutions and concerns regarding the creation of a system of disincentives for teaching and scholarly productivity. In addition, the tenure process has been criticized for denying opportunities to women and other underrepresented groups due to the often unstated application of collegiality as a criterion for selection, which some see as a pretext for discrimination (Adams, 2006). The Harvard Project on

Faculty Appointments revealed that a greater number of faculty are accepting non-tenure track appointments because many institutions of higher education appear to offer more of these types of positions compared to tenure track appointments (Trower, 1996).

The Tenure Review Process

The tenure review process usually begins when a person applies for and is hired for a tenure track position. Upon hire, the faculty is offered a 1- to 3-year contract that may be renewable contingent upon the faculty member's satisfactory performance. The standard maximum number of years a faculty member may be under a renewal contract period is 6 years. Many institutions allow faculty members to extend this period for 1 year based on research, medical, or primary caregiver leaves. This standard 6-year period is known as the probationary period. Usually, during the 6th year of probation a faculty member "comes up for tenure," where he/she submits a dossier that provides evidence of excellence in the areas of research/scholarship/publications, teaching, and service (to the profession, public, or university) (Leap, 1995b). According to Diamond (2002), the dossier should provide documentation in each area of the criteria that supports not only the quality of the tenure candidate's work, but the significance of it as well.

The dossier then makes its way through a multi-layered process: The process begins with an internal review by the tenure candidate's departmental peers who judge whether the tenure candidate is worthy of tenure. The internal peer review is augmented by external reviewers, who are asked to review a candidate's scholarship and opine on the quality of that scholarship. The departmental peer reviewers' recommendations are then submitted to the next level of decision makers; this may be the department head or dean of the college. The next step involves the chief academic officer (i.e., a provost).

Lastly, the ultimate decision-maker, usually the president of the university or the board of trustees, affirms or denies the recommendation of the chief academic officer.

Simply put, if the faculty member's performance in the three major areas is deemed to meet the standards and needs of the university, the candidate is granted tenure. If the faculty member is determined to be deficient in one or more of the three areas, he is considered not deserving of tenure. Upon reaching this conclusion, the university offers the denied faculty member a terminal 1-year contract. Often, institutional policies and especially industry standards dictate that faculty who are denied tenure be given timely notification of a year. Upon the expiration of this 1-year contract, the employment relationship between the faculty member and the university ends (AAUP, 2006; Baez & Centra, 1995; Diamond, 2002; Habecker, 1981; Hamill, 2003; Lee, 1988; Lewis, 1980).

There are exceptions to the tenure granting process described above. For various reasons, faculty members may be terminated before the end of the standard probationary period. As well, faculty members may be granted tenure before the 6th year of probation. In addition, tenure standards and criteria vary by institution. Smaller institutions (usually 2-year) often emphasize excellence in teaching and the willingness to work closely with students. Larger institutions, both private and public, usually emphasize research and scholarly activities (AAUP, 2006). In addition, individual colleges or departments within an academic institution may establish criteria for awarding tenure, taking into consideration the idiosyncrasies of that department or college. Tenure decisions may also depend upon department/program needs, student enrollment, and budget (Baez & Centra, 1995; Diamond, 2002; Habecker, 1981; Hamill, 2003; Lee, 1988; Lewis, 1980).

Denial of tenure can take place for probationary faculty employees in two ways: officially after a review or by way of non-renewal of term contract. In such a case, most colleges and universities have grievance procedures that allow for the appeal of the negative decision. Typically, upon receiving a grievance by the denied faculty member, a grievance committee is formed. The committee, which is usually composed of faculty members not of the appellant's department, functions to not only resolve the dispute, but also to determine whether the faculty member was afforded due process. The committee also serves to ensure that the institution did not engage in discriminatory practices in its decision making and to diminish the possibility of civil litigation (Kaplin & Lee, 2006; Leap, 1995b).

It should be noted, the tenure process proceedings and deliberations are conducted in private and, in many cases, the faculty member is not privy to the details of the findings of the external reviewers, the peer review committee, or that of other decision makers. Ergo, in the case of tenure denial, faculty members are not usually told the reasons for the adverse decision (Hendrickson, 1999; LaNoue & Lee, 1987; Wagner, 1991).

In its *Tenure Status of Full-Time Faculty Members by Type of Institution, 2005-6* report, the Department of Education states that 48% of all faculty held the status of tenure at 4-year institutions. In examining the differences in faculty tenure status between public and private institutions, a higher proportion of faculty members have tenure at public institutions versus private institutions (49% and 45%, respectively; National Center for Education Statistics, 2007).

The Role of Academic Freedom

According to the American Association of University Professors, "The 1940 Statement of Principles declares that academic freedom is essential to the purposes of institutions of higher education and should be assured for all faculty members" (McGee & Cook, 2003, p. 79).

Tenure and academic freedom are inextricably linked. Tenure is designed to protect academic freedom. Tenure and academic freedom have been linked since the AAUP set forth its 1940 Statement of Principles on Academic Freedom and Tenure, which explains tenure as the freedom to teach, conduct research, publish results, and speak extramurally. According to Poch (1993), "Academic freedom is one of the most valued components of higher education in the U.S. Upon it rests the active discourse, critical debate, free exchange of ideas, and communication of values that characterize effective scholarship, teaching, and learning" (p. 1). The authors of the 1940 Statement emphasized the belief that the common good depends upon these four components of intellectual freedom.

Contrary to popular belief, historically speaking, academic freedom is grounded "in professional autonomy and collegial self-governance," rather than free speech. The term "academic freedom" refers to the "rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching" (Haskell, 1996, p. 54). The relationship between academic freedom and tenure is based on the requirement that tenured faculty be provided due process for cause, with the exception being termination due to financial exigency. Academic freedom and tenure together are considered to be the cornerstone of academic institutions, for it is where free

and open exchange of information should be allowed without fear of retaliation for unpopular or controversial expressions or utterances so as to advance scholarship for the betterment and common good of society (Haskell, 1996).

Academic freedom as practiced in American institutions of higher education today originated from the medieval European universities in the 12th century when institutions were faith-based and served as the epicenter of education of ministers and clerics. However, it was the quest for truths surrounding controversial ideals that played a great role in the development of academic freedom. The contentious relationship between church and science brought about the freedom to criticize corruption in the church, leading to the development of other religions and individual freedom and liberty and, thus, the basis of academic freedom (Hofstadter, 1955).

America's first institutions of higher education were situated similar to European universities in that many were faith-based and served to educate clerics and ministers. During the 18th century, American institutions of higher education saw the beginning of a lay system of governance. Freedom of thought arose in response to the need for religious freedom for students and tolerance as religious denominations and liberties emerged. These developments played a significant role in the secularization of higher education in America. Consequently, the latter part of the 18th century saw an infusion of law, ethics, and other subjects into the curriculum, which increased the utility of institutions to the public (Hofstadter, 1955).

During the 19th century, faculty governance emerged in American institutions of higher education, and academic freedom began to resemble the academic freedom that we know today. The academic freedom we know today is rooted in Darwinism and the

academic traditions of German universities. Darwinism encouraged the search for truth through intellectual inquiry, while German universities were grounded in the concepts of *Lernfreiheit*, the freedom of students to learn, and, *Lehrfreiheit*, the freedom of teachers to teach (Ancell, 1978; Deering, 1985; Lucas, 1996).

The U.S. Department of Education, National Center for Education Statistics, 2004 National Study of Postsecondary Faculty report shows that 71.5% of all public and private (not-for-profit) degree-granting institutions in the 50 states and the District of Columbia offer a tenure system.

The Courts and Higher Education

One of the first interactions between higher education and the legal system occurred in 1819 in the case of the *Trustees of Dartmouth College v. Woodward* (1819). This case concerned a struggle for control between colonial colleges and government. Specifically, the court addressed the question of who owned Dartmouth College. As it turned out, the court determined that Dartmouth was privately owned, and therefore should be controlled by the board of trustees. The Dartmouth case was the beginning of establishing colleges as either public or private institutions, with public institutions being controlled by the states or private institutions being controlled by private entities. The question of control addressed in the Dartmouth case had and continues to have considerable scope, because how the law is applied to colleges or universities depends on who controls the institution. For example, plaintiffs employed by public institutions may have protections under the Constitution and may exercise the First, Eleventh, and Fourteenth amendments, but private institution plaintiffs do not enjoy constitutional protection, and thus do not have this option (Hendrickson, 1999). The law analyzed in

this study, Title VII of the Civil Rights Act of 1964, applies to both public and private institutions.

Tenure denial claims alleging discrimination form the basis of most lawsuits filed against higher education (Franke, 2001; Poskanzer, 2002). Leap (1995b) posits that faculty, as well as the courts, have focused less on the criteria for tenure and more on the consistency of the application of these criteria by tenure decision makers. Hendrickson (1999) posits tenure denial litigation has been pervasive enough to encourage judicial review of defendant institutions' policies to ensure their fairness. The application of Title VII differs in faculty employment situations from that of other employment situations in other fields. The courts often take into account the uniqueness and idiosyncrasies of the customs and practices of academic freedom and tenure that protect faculty.

While the courts rule on many conflicts involving higher education, one area of struggle has been the application of civil rights laws (including Title VII) to faculty employment decisions by federal courts. Some of the legal issues that pertain to faculty include non-renewal of faculty employment contracts, termination of tenured faculty for cause, questions involving free speech and academic freedom, and denial of tenure. In resolving these disputes, the courts must balance the civil rights of the plaintiff faculty member against the mission, goals, financial situation, and needs of the defendant academic institution. While the courts seek to maintain balance between the plaintiff faculty and the defendant institution, pundits note the courts' propensity to deference toward the institution (Baez & Centra, 1995; Copeland & Murry, Jr., 1996; Kaplin & Lee, 2006; LaNoue & Lee, 1990; Leap, 1995b; Lee, 1988; Wagner, 1991).

For a number of years after Congress' 1972 amendment of Title VII of the Civil Rights Act of 1964, the federal courts seemed reluctant to enforce the statute in the higher education arena. Within 2 years of the passage of the 1972 amendment, the Second Circuit Court of Appeals issued one of the first of many court decisions that illustrated judicial deference toward institutions of higher education. In *Faro v. New York University* (1973/1974) the court ruled in favor of New York University, positing that the courts are ill-equipped to question the subjective and scholarly evaluations that must be made regarding reappointment, promotion, and tenure decisions. The Faro case and its ode to academic deference became precedent setting for later federal court decisions involving faculty, institutions of higher education, and their employment decisions for several years.

Kluger (1986) asserts that federal courts defer to the judgments of institutions of higher education for three reasons: (a) the courts' professed lack of expertise regarding the teaching, research, and service criteria associated with promotion and tenure decisions, (b) the long-term economic and institutional implications of tenure decisions, and (c) the privilege of academic freedom in institutions of higher education.

Shortly after the *Faro* decision, however, the courts began to realize that because of their deferential treatment, academic institutions were "virtually immune to charges of employment bias" (Lee, 1982, p. 285). By the end of the 1970s, the courts' pattern of deferential treatment toward academic institutions began to change. In a shift from its normal pattern, the court in the case of *Sweeney v. Keene State* (1977/1978) found that the defendant institution, Keene State, discriminated against the plaintiff faculty, Sweeney, by not awarding her a promotion. As a result, the court awarded Sweeney back

pay and attorneys' fees. Most important, the court issued an opinion contrary to their deferential tendencies in the past. The court stated, "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" (p. 176). This sentiment was echoed in *Powell v. Syracuse University* (1978).

Other courts issued similar opinions. In 1980, the federal court declared,

> The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status than those which employ persons who work primarily with their hands. (*Kunda v. Muhlenberg College*, 1980, p. 550)

These opinions by the courts suggested that its conventional practice of instinctive judicial deference toward institutions of higher education was ending, at least when it comes to employment discrimination. Consequently, Leap (1995b) asserted that *Sweeney v. Board of Trustees of Keene State College* (1977/1978), *Kunda v. Muhlenberg College* (1978/1980), *Brown v. Trustees of Boston University* (1989), and *Fisher v. Vassar College* (1994/1995/1997) "represent instances in which the federal courts have been willing to question reappointment, promotion, and tenure decisions" (p. 56).

As it turns out, upon examination of other court decisions it is unclear as to whether or not the courts' seemingly abdication of automatic deference to academic institutions as described in the court cases above was a trend or a collective anomaly. Subsequently, Leap (1995b) suggests the latter. He stated that these and similar cases

"appear to represent little more than periodic excursions off the well-beaten, anti-interventionist path" (p. 56).

Title VII and Race and Sex Discrimination in Higher Education

A national Gallup poll on discrimination in the workplace, conducted in conjunction with the 40th anniversary of U.S. Equal Employment Opportunity Commission (EEOC), shows that while much progress has been made in fulfilling the promise of equal opportunity, more remains to be done. The study also shows that Title VII continues to be the most profound employment discrimination law, as the majority of discrimination lawsuits are filed under this law. With regard to race discrimination lawsuits, Blacks as opposed to other minorities are far more likely the plaintiff ("2007-2008 Almanac," 2008).

In a study conducted in 1995, Leap analyzed more than 130 discrimination suits filed between 1972 and 1994 by faculty challenging promotion and tenure denial decisions. A substantial number involved race discrimination or a combination of race and some other type of discrimination. Leap (1995a) concluded that in the absence of strong evidence the courts will side with the institution.

The first race discrimination case appeared in 1969 when Black faculty member Janelle Beauboeuf of Delgado College claimed she was terminated because of her race. Among other things, the plaintiff asked that the defendant be enjoined from terminating her. The courts denied the plaintiff's request (*Beauboeuf v. Delgado College*, 1969/1970; Boisse, 1986). Admittedly, accusations of race discrimination are difficult to prove because of their subtle nature (Kaplin & Lee, 2006). There are some instances, however, where a faculty member is subjected to such egregious racist conduct and behavior that

discrimination cannot be disputed. Such was the case in *Clark v. Claremont University Center* (1992). This case was a landmark case and worthy of mention because of the rarity of the plaintiff's ability to provide specific race-related remarks made by department colleagues, both before and during the tenure review process to support his claim.

While Black faculty members are the plaintiffs in most race discrimination cases (Cantu-Weber, 1999), there is an interesting phenomenon involving reverse discrimination cases. Studies suggest White faculty who file reverse discrimination lawsuits against historically Black colleges and universities are more likely to win their cases than their minority counterparts who file lawsuits based on non-reverse race discrimination against predominantly White institutions (Baez & Centra, 1995; LaNoue, 1981; LaNoue & Lee, 1987).

While not as severely underrepresented as minorities, there is a perception that women in higher education appear to have not been treated as fairly as their male counterparts (Curtis, 2005). For example, a report released by the Massachusetts Institute for Technology stated that female faculty in the sciences were treated less favorably than their male counterparts (Goldberg, 1999).

Moreover, from 1987 to 1998, United Educators (an insurance company dedicated to education clients) handled 64 tenure-denial claims that they defined as "major." Thirty-four, or 53%, of those claims alleged sex discrimination (Franke, 2000). The activity in sex discrimination claims demonstrates that institutions and their administrators have become targets for legal action, in which plaintiffs are requesting among other things attorneys' fees, tenure, and back pay as remedies. According to

Lawrence and Klos (1978), "Rarely has any legislation taken such a marked shift in form and emphasis as the laws applying to sex discrimination and the female worker" (p. 15).

Even before 1972, the applicable year of Title VII of the Civil Rights Act of 1964 to institutions of higher education litigation involving claims of sex discrimination in higher education was prolific when compared to other industries. Employment discrimination against women began receiving public attention in the 1960s (Sandler, 1975).

The addition of "sex" as a protected class under Title VII was considered a breakthrough in equal employment law for women everywhere, especially for women in higher education. Since 1972, the number of women in higher education has increased significantly and so has the number of claims of sex discrimination in higher education. Even though female faculty are taking their employer higher education institutions to court in increasing numbers, as is true of race discrimination plaintiffs, they carry a heavy burden to prove the existence of sex discrimination or establish a *prima facie* case (Abel, 1981).

It was not until the late 1970s that the courts began to legally recognize and define sexual harassment as a form of sex discrimination covered by Title VII. In 1980, the Equal Employment Opportunity Commission issued guidelines that clarified the nature and extent of employers' duties and responsibilities for preventing sexual harassment in the workplace (Vermuelen, 1982). Even though sexual harassment has been recognized by the courts as sex discrimination, this type of sex discrimination is outside of the scope of this study. The complexity and breadth of the topic of sexual harassment warrant a study in and of itself. As evidence of its complexity, even though sexual harassment is a

form of disparate treatment, the courts engage in a different legal analysis for sexual harassment claims (O'Neal, 1992; Sharkey, 2006; Terpstra & Baker, 1992). This is not the case for the types of discrimination discussed in this study (race and sex), which use the same legal analysis. Further, the literature suggests sexual harassment in higher education is a rapidly growing area of study.

In another study, Abel (1981) interviewed 20 female faculty members who filed charges of sex discrimination against colleges and universities. "These women relied on laws and regulations passed during the late sixties and early seventies which promised a significant improvement in the status of women in academia" (p. 506). Abel states that the most significant law for female faculty members is Title VII of the Civil Rights Act of 1964, which is often heralded as one of the first tangible victories of the women's movement. "Many academic women viewed Title VII as a powerful weapon with which to attack institutional sexism, and they began to take advantage of this measure almost immediately" (p. 507). Abel claims that during "the first year after passage of the 1972 amendments, two hundred and fifty cases were filed against educational institutions" (p. 506). Abel further claims, "female faculty women have won only a small proportion of cases decided since Title VII was extended to educational institutions. Furthermore, the condition of women in colleges and universities has not improved since 1972" (p. 507).

The prolific activity of sex discrimination litigation in higher education demonstrates that universities, colleges, and administrators are highly visible targets for legal actions and consequences. Sex discrimination is one of the fastest growing areas of litigation on college campuses (O'Neal, 1992).

Education Litigation Research

This section reports on research most relevant to my study. The amount of empirical research, particularly comprehensive outcomes analyses, concerning faculty litigation involving tenure in the higher education setting has been sparse. The relatively few studies have been limited in several aspects. First, the research usually covers a brief period. Second, much of the existing research is limited to certain geographical areas (i.e., state or regions) of the United States. Third, the research does not cover the same area of focus as my study, that is, lawsuits filed under Title VII of the Civil Rights Act of 1964 (as amended) by faculty in higher education who were denied tenure based on allegations of race and/or sex discrimination.

Again, using Rudestam and Newton's (2001) literature organizing strategy, I organized this section into three parts: from the broadest relevant studies, to the specific most relevant studies. As such, Part I reviews frequencies studies, Part II reviews policy-capturing studies, and Part III reviews higher education litigation studies.

Frequency Studies

My study analyzes frequency of relevant court cases and includes chi-square analyses, which incorporate frequencies. Therefore, it was necessary to review and discuss the literature on frequency studies involving education-related litigation.

J. C. Hogan was the first to analyze and report on the frequency of education-related litigation in a study he conducted in 1975 (Zirkel & Richardson, 1989). His study, which he updated in 1985, analyzed all federal and state court cases reported in various West Digests for the period of 1789–1984. Hogan is considered a pioneer of education-related litigation frequency studies. While he did much in advancing these

types of studies, his, like all studies, had limitations. One *in parti*cular was that the periods studied by Hogan overlapped, which could lead to multi-counting of cases and, as a result, skewing of the data (Hogan, 1985).

In 1987, Tyack, James, and Benavot attempted to replicate and further Hogan's work. They accomplished this by using a more systematic sampling approach. These early studies called for further studies and sparked an interest in the area of education-related frequency studies. Similar studies soon followed (i.e., M. Imber & D. E. Gayler [1988], *A Statistical Analysis of Trends in Education Related Litigation Since 1960*; M. Imber & G. Thompson [1991], *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category*; and J.K. Underwood & J. Noffke [1990], *Good News: The Litigation Scales Are Tilting in Your Favor*).

The literature suggests frequency litigation studies have been conducted on various, yet specific areas of education, that is, special education, student affairs, and employee matters. Litigation involving employees in the education setting is an area of focus close to that of my study, thus, worthy of discussion. The employee litigation studies discussed in this section are very similar in methodology and approach with their primary area of focus on K-12 grade levels. These studies include Hooker (1988), Imber and Thompson (1991), Underwood and Noffke (1990), and Lupini and Zirkel (2003). They are in the vein of studies discussed by Lee (1990) in that they provide only the outcomes of cases in terms of numbers and percentages.

An exception to traditional frequencies studies was that of Clermont and Eisenberg (1998). Their study was considered advanced because of the novel application of empirical methods to investigate the effect of court forum (state or federal) and the

context of removal of the case from state to federal court. Notwithstanding the novelty of their methodology their findings were similar to that of previous studies conducted by Tyack et al. (1987), Imber and Gayler (1988), Zirkel and Richardson (1989), and Underwood and Noffke (1990).

Subsequently, Clermont and Eisenberg expanded on their 1998 study in 2002 with their study entitled "Litigation Realities." They draw a series of lessons for understanding and using empirical methods to explain legal research. These lessons are intended to be practical and, thus, serve as a guide to new and seasoned practitioners and researchers. Both the 1998 and 2002 studies, however, are limited to the use of the Administrative Office database. The use of the Administrative Office database is considered a limitation because it does not offer the level of specificity needed to distinguish between types of legal claims and their outcomes within broad categories. Further, the conclusions, findings, and recommendations for future study sections are not articulated. For example, in the Litigations Realities study the conclusion section simply states, "Data are good" (p. 30). Thus, those wishing to advance Clermont and Eisenberg's find little guidance from this study.

The literature is replete with frequency studies involving employment litigation in the higher education setting. Conducted primarily in the 1980s, Perry Zirkel's frequency/outcomes studies are well known and widely cited. Zirkel and his co-authors have been innovative in the use of non-traditional methodological approaches to the study of education law (Lee, 1990). In 1982, Zirkel published the "Outcomes Analysis of Court Decisions Concerning Faculty Employment," in which he compiled and categorized the outcomes of reported court decisions concerning higher education faculty

employment litigation over a 5-year period (1976-1980). Zirkel stated that a purpose of his study was to see if "courts are deferential" to higher education institutions. He reports that overall defendant institutions prevailed, 4:1 over plaintiff faculty, which suggests judicial deference. However, as Lee (1990) argues, frequency/outcomes usually do not address the reasons behind the numbers. Therefore, when a factor that may contribute to the outcome of a case is unknown, it is difficult to determine if a court is being deferential or if the plaintiff or defendant did not present a compelling case. Another limitation is the use of cases not definitively decided. For example, if a case opened during the time-period studied, but a final decision was not made until after the end of the period, it was included in the study and Zirkel defaulted the case to the inconclusive category, which may skew the outcomes. This practice of defaulting cases was also used by Clermont and Eisenberg (1998, 2002) resulting in the same limitation.

In their 1989 study on sex discrimination in higher education, Zirkel and Schoenfeld sought to expound on and advance the study of empirical studies as applied to legal research. Similar methodologies regarding the categorization of the case outcomes were used for both the 1982 and 1989 studies. As a result, the practice of defaulting undecided case outcomes to the category of inclusive was carried over from the 1982 study.

The literature is also replete with education litigation frequency/outcomes studies for the primary purpose of addressing the debate as to whether there has been "an explosion" of litigation over time. Most of these studies are limited to education level K-12 and specialized in scope and subject area (i.e., suspension and expulsion cases, torts, negligence, Supreme Court decisions, special education hearings, student rights,

employment actions, and geographical regions). As well, most of these studies covered earlier periods of the 1970s, 1980s, and 1990s, with little having been done since (Imber & Gayler, 1988; Kammerlohr, Henderson, & Rock, 1983; Kuriloff, 1975; Lufler, 1987; Newcomer & Zirkel, 1999; O'Connor Rhen, 1989; Zirkel, 1998).

More recently, Zirkel conducted a study with Lupini (Lupini & Zirkel, 2003). This study remedies some of the concerns with Zirkel's and others' earlier frequency/outcomes analyses. This study is longitudinal, comprehensive in scope (encompasses a variety of activities that educators perform, rather than focus on a specialized subject matter), offers a well-defined classification system, and a multi-category outcome scale that allowed for varied degrees vs. the three outcomes in the past (win-lose-inconclusive scale). This study focuses on level K-12 and not higher education. Even so, Lupini and Zirkel's study is more closely related to my study in terms of methodology and design features than other studies discussed thus far.

While I value the contribution of frequency-only studies/analyses, I share Lee's (1990) opinion of their limitations and utility to plaintiffs or defendants. Nevertheless, frequency studies have been useful as they have served to inform methodology and design features for my study.

Policy Capturing Studies

Even closer in design to my study are what are referred to as "policy capturing" studies. According to Lee (1990), "The advantage of policy capturing research is that it attempts to explain the reason for the outcome, rather than simply reporting the outcome, and identifies factors that contribute to plaintiff success or failure" (p. 525).

Terpstra and Baker (1988, 1992) use policy capturing to study the outcomes of sexual harassment claims and federal court decisions. In 1988, Terpstra and Baker studied decisions/outcomes by the Illinois Department of Human Rights on sexual harassment claims; in 1992, he studied sexual harassment decisions/outcomes of cases filed in federal courts. In both studies, Terpstra and Baker examined the influence of case characteristics, such as severity of the behavior involved and the presence of witnesses on agency or court outcomes involving sexual harassment. Similar to my study, Terpstra and Baker not only determined the frequency of each characteristic/variable in each case they studied, they also analyzed the relationship of the characteristic/variable to determine its level of influence, if any, to the case outcome. Beyond this, Terpstra and Baker go on to offer plaintiff employees and defendant employers insight as to factors they might ponder if considering filing a lawsuit (if plaintiff) or deciding whether to settle out of court (if defendant).

Another policy capturing study was conducted by Olson (2004). In his qualitative study, Olson studied the outcomes of 119 state and federal court cases involving Eleventh Amendment immunity, filed against public K-12s and colleges and universities during the period 1996 through 2002. The purpose of the study was to determine whether trends and patterns were present that could help a school official avoid the loss of Eleventh Amendment immunity. Olson categorized cases by the particular legislation/regulation used by the plaintiff to file a claim of a civil rights violation. The categories included Section 1983, Title VI, Title VII, Title IX, and Section 5 of the Fourteenth Amendment.

Olson (2004) found that the applicability of the Eleventh Amendment to public institutions depended upon the courts' determination as to whether or not a particular

institution or entity was considered an "arm of the state." If an entity was considered an arm of the state, it was immune from litigation under the Eleventh Amendment and could therefore use that immunity as a defense in its litigation. Other findings suggest that public educational institutions are obligated under Title IX to establish grievance procedures and processes; and race discrimination, sex discrimination, and equal pay for equal work are not protected by Eleventh Amendment immunity.

Olson's (2004) study provides useful information to those who do not know the particulars of the Eleventh Amendment immunity and its applicability to public education institutions. The inference of Olson's findings is there is no distinction between the applicability of the Eleventh Amendment to K-12 and higher education.

Higher Education Litigation Studies

Troxel (2000) analyzed and synthesized state and federal court cases in order to determine the probative value of statistical evidence in employment discrimination litigation involving institutions of higher education during the years of 1993–1998. She examined the impact of statistical evidence on the court by reviewing 81 cases utilizing the case brief method to determine trends and patterns from the decisions. The purpose of Troxel's study was to improve collaboration between institutions and their attorneys during the litigation process. Troxel also examined court decisions to formulate strategies that could be used by administrators and attorneys to minimize the risk of future lawsuits. The court cases examined were brought under Title VII, Title IX, the Equal Pay Act, The Age Discrimination in Employment Act, or the Americans with Disabilities Act.

Troxel (2000) organized the court cases into categories of the legal theories of either disparate treatment or disparate impact. "The results indicate that few disparate treatment cases were granted a full trial and that the institutions prevailed in the majority of the proceedings, even when statistical information was presented" (p. 170).

Troxel (2000) concluded that regardless of whether the case was a disparate treatment or a disparate impact case, plaintiffs usually did not survive the initial stage. However, in all cases, the courts did not rely on statistical evidence alone, rather, "a combination of historical, anecdotal, and statistical evidence to examine the facts at issue" (p. 216). Further, when institutions did litigate they were successful in their defenses the majority of the time. This finding is in alignment with assertions made by Hendrickson (1999), Kaplin and Lee (2006), LaNoue and Lee (1987, 1990), Hendrickson and Lee (1983), Leap (1995a, 1995b), Kramer (1982), Hamill (2003), Lupini and Zirkel (2003), Rood (1977), Schoenfeld and Zirkel (1989), Steadman (2005), and Timm (1994).

Troxel (2000) states, however, that a "plaintiff who presents solid statistical evidence based on institutional data, along with corresponding anecdotal evidence of wrongful acts by the employer, has a good chance of surviving summary judgment and may prevail in an employment discrimination case, regardless of the evidence presented by the institution" (p. 227).

Based on her findings, Troxel (2000) formulates several strategies that may be implemented by institution administrators and their attorneys. She suggests that institutions:

1. Provide employment law training to all faculty, staff, and administrators who deal with personnel issues

2. Ensure all staff be provided clear, concise, and written employment-related policies and procedures

3. Ensure that those within the institution conducting personnel transactions consult with general counsel on "major" decisions

4. Conduct regular "legal autops[ies]" of court cases involving their own institutions for patterns and trends

5. Conduct internal audits to ensure legal compliance.

In general, Troxel's recommendations are similar to those suggested by Leap (1995b), Baez and Centra (1995), Hendrickson and Lee (1983), Franke (2000), and Hendrickson (1999).

In another study, Boisse (1986) examines cases filed against public institutions of higher education in federal district courts during 1961–1980. Boisse reviewed 116 district court cases as reported in the Federal Supplement. He found that most activity occurred during the period of 1973 and 1978, which coincides with the applicability of Title VII to higher education. Boisse studied cases involving both tenured and non-tenured faculty who litigated in the areas of "(1) actions involving loyalty oaths or abridgement of freedom of speech, (2) termination, (3) non-retention, and (4) discriminatory or unequal treatment" (p. 59).

Boisse (1986) found that the legal provisions most frequently used by faculty plaintiffs were the First Amendment, Fifth Amendment, and Fourteenth Amendment. However, in the lawsuits that involved employment discrimination claims, plaintiffs utilized Title VII of the Civil Rights Act of 1964. This is consistent with the findings of O'Neal (1992), Hamill (2003), Cantu-Weber (1999), Schoenfeld and Zirkel (1989),

LaNoue and Lee (1987), Kaplin and Lee (2006), LaNoue and Lee (1990), Leap (1995b, 1995), Hendrickson and Lee (1983), and Hendrickson (1999). Of note, however, are the distinctions between Boisse's (1986) study and the others. The cases studied by Boisse are much broader in scope (freedom of speech, termination, non-retention, and discrimination/unequal treatment), whereas others focused on faculty employment-related cases involving only discrimination. Also, Boisse's study was limited to public institutions, where faculty enjoy the protections of the Constitution. Faculties employed by private institutions are not privy to protection by the Constitution (Mawdsley, 2000). As such, the Fourteenth Amendment, which guarantees equal protection, the First Amendment, which guarantees freedom of speech and religion, and the Fifth Amendment, which guarantees due process, are often used by faculty employed by public institutions (lawsuits against public institutions often combine constitutionally based claims with federal statues, such as Title VII) (Mawdsley, 2000).

Boisse's (1986) study also supports the finding that higher education institutions win an overwhelming proportion of lawsuits filed by faculty (Hamill, 2003; Hendrickson & Lee, 1983; Kaplin & Lee, 2006; Kramer, 1982; LaNoue & Lee, 1987, 1990; Leap, 1995b; Lupini & Zirkel, 2003; Rood, 1977; Schoenfeld & Zirkel, 1989; Steadman, 2005; Timm, 1994).

Boisse (1986) reached two major conclusions from his study involving faculty employment decisions: (a) institutions must maintain carefully documented procedures, and (b) these procedures must be strictly adhered. Boisse's conclusions are similar to those suggested by others (Baez & Centra, 1995; Franke, 2000; Hendrickson, 1999; Hendrickson & Lee, 1983; Leap, 1995b).

A more recent study was conducted by Steadman (2005). As part of her study, Steadman analyzed 98 court cases related to tenure and academic freedom in higher education litigated during 1982 through 2003 to determine the role that the federal and state courts of the United States play in defining tenure for higher education faculty. Steadman concluded that absent discrimination, the courts tend to show deference to academic institutions in these types of cases. Many other researchers support this claim. Among them are Kaplin and Lee (2006), Leap (1995b), Hendrickson (1999), Hendrickson and Lee (1983), Hamill (2003), Lupini and Zirkel (2003), Rood (1977), Schoenfeld and Zirkel (1989), Timm (1994), Hendrickson (1990), LaNoue and Lee (1987, 1990), Metzger (1979), Wagner (1991), Baez and Centra (1995), Lee (1988), Copeland and Murry (1996), Franke (1990, 2001), Kramer (1982), Kluger (1986), and Lee (1982). Further, Steadman (2005) concludes, discrimination is very difficult for plaintiff faculty members to prove. This finding is also consistent with the findings of others (Baez & Centra, 1995; Copeland & Murry, 1996; Franke, 1990, 2001; Hamill, 2003; Hendrickson, 1990, 1999; Hendrickson & Lee, 1983; Kaplin & Lee, 2006; Kramer, 1982; Kluger, 1986; LaNoue & Lee, 1987, 1990; Leap, 1995b; Lee, 1982, 1988; Lupini & Zirkel, 2003; Metzger, 1979; Rood, 1977; Schoenfeld & Zirkel, 1989; Timm, 1994; Wagner, 1991).

Steadman asserts that in order to avoid or mitigate lawsuits by faculty, administrators must become knowledgeable about their institution's policies and procedures related to the tenure process, and institutional policies should be followed consistently.

In another study, O'Neal (1992) posits that the issues surrounding sex discrimination are one of the fastest growing areas of litigation on college campuses. The main purpose of O'Neal's (1992) study was to examine and summarize legislative history and case law relevant to Title VII and sex discrimination in higher education. O'Neal's study is in the vein of traditional legal research, and thus similar in methodology to Steadman's (2005) study. As is also true with Steadman's study, O'Neal's (1992) is an expanded version of legal journal articles where authors provide compilations and summaries of legal cases central to a particular topic or time-period (Schimmel, 1996). Therefore, no conclusive findings were set forth in her study.

Robert Hamill's (2003) study called *Federal Tenure Denial Litigation Involving Private Colleges and Universities* is more relevant to my study than any other study reported in this literature review. Hamill's purpose was to review and analyze published federal court decisions made during the period of 1972–2000 involving tenure denial and private colleges and universities. Hamill's study is similar in purpose to Boisse (1986), Clermont and Eisenberg (1998, 2002), Holbrook (1984), Imber and Gayler (1988), Kramer (1982), LaNoue and Lee (1987), Leap (1995a, 1995b), Lupini and Zirkel (2003), O'Neal (1992), Rasnic (1991), Schoenfeld and Zirkel (1989), Steadman (2005), and Timm (1994).

Hamill's (2003) study focuses on a variety of federal statutes and state law claims (i.e., the Age Discrimination in Employment Act, Americans with Disabilities Act, Equal Protection Clause, Executive Order 11246, Pregnancy Discrimination Act, Titles XI, VII, and VI, tort law, and contract law). Hamill employs mainly a qualitative methodological approach to understand better tenure denial litigation. His findings and conclusions

primarily were that there has been an increase in the number of faculty tenure denial lawsuits. Zirkel, in his 1998 study on the volume of higher education litigation, predicted an upward trend in higher education overall. Other researchers who support this finding are Hamill (2003), Cantu-Weber (1999), LaNoue and Lee (1990), Kaplin and Lee (2006), and Leap (1995b). Further, Hamill (2003) posits, most faculty plaintiffs use Title VII as a legal theory. This finding is consistent with O'Neal (1992), Abel (1981), Cantu-Webber (1999), LaNoue and Lee (1987, 1990), Kaplin and Lee (2006), and Schoenfeld and Zirkel (1989). Of those Title VII lawsuits, sex discrimination was alleged most often. As does O'Neal (1992), Hamill (2003) attributes this finding to the growing number of women faculty. He also found, like many others, defendant institutions win in the majority of these type of cases, primarily because of judicial deference to academic institutions (Baez & Centra, 1995; Copeland & Murry, 1996; Franke, 1990, 2001; Hamill, 2003; Hendrickson, 1990, 1999; Hendrickson & Lee, 1983; Kaplin & Lee, 2006; Kluger, 1986; Kramer, 1982; LaNoue & Lee, 1987, 1990; Leap, 1995b; Lee, 1982, 1988; Lupini & Zirkel, 2003; Metzger, 1979; Rood, 1977; Schoenfeld & Zirkel, 1989; Timm, 1994; Wagner, 1991). Additional findings by Hamill (2003) are that the courts provided varied interpretations of the four stages of the *prima facie* case as established in McDonnell Douglas standard, and administrators should be assisted in the "way in which they handle tenure decisions" (p. 133).

While both Hamill's (2003) and my studies analyze federal court outcomes of tenure denial decisions, my study is not limited to private colleges and universities; thus, it is broader in scope. Further, my study includes analyses of more recently decided and published federal court cases.

Summary

A review of the literature revealed that most education-related studies were conducted during the 1980s and 1990s and mainly limited to levels K-12; thus, leaving a void to be filled by updated studies that provide higher education administrators with data upon which to make informed and nondiscriminatory faculty employment decisions. Mayes and Zirkel (2001) contend, "The two most common purposes of education litigation research are (a) to allow disputants to make a more informed assessment of the advisability and pursuing litigation and (b) to allow policymakers to make similarly informed decisions" (p. 350). In keeping with this and Lee's (1990) contention, my study advances frequency and policy-capturing studies involving education and employment litigation in higher education. Rather than simply reporting the number of wins and losses for the plaintiff or defendant, my study determined whether relationships exist between the independent variables (race, sex, Title VII claim, classification of higher education institution, court level, and decision period) and the dependent variable (case outcome). Finally, because my study focuses on Title VII and does not include constitutional claims, it is applicable to both public and private institutions.

CHAPTER THREE

METHODOLOGY

Introduction

This present study analyzes published federal court cases decided during the period 1980–2007 involving Title VII, tenure denial, and higher education. This contributes to understandings of the relationship between federal courts, faculty, and higher education by: analyzing the extent of a statistical association between case and/or plaintiff characteristics and case outcomes; and, substantively examining the interplay between the courts, faculty, and higher education.

To fulfill these purposes, I incorporated the complementary methods espoused by David Schimmel (1996). In the book, *Research That Makes a Difference: Complementary Methods for Examining Legal Issues in Education*, Schimmel asserts,

> The use of complementary methods can help bring research questions into clearer focus and can offer solutions that might not have been considered had a single method been employed. Further, as Gestalt psychology suggests, by applying a variety of complementary techniques, the sum of a researcher's efforts can exceed the whole of its parts. Moreover, each of the different methods of inquiry is particularly well suited to the nature of the questions it seeks to answer. (p. 33)

Schimmel offers complementary research methods for examining legal issues in education. They are

1. Traditional legal research
2. Qualitative method

3. Quantitative method

4. Legal studies from a policy studies perspective.

I employed three of the above-mentioned complementary methods for examining legal issues in higher education: legal research, quantitative method, and qualitative method. To further guide the complementary/mixed-method research model I also employed what is known as the concurrent triangulation strategy method. Creswell (2003) notes six research strategies to serve as a guide in research design. The strategies are sequential explanatory strategy, sequential exploratory strategy, sequential transformative strategy, concurrent triangulation strategy, concurrent nested strategy, and concurrent transformative strategy. The concurrent triangulation strategy can be identified by its use of one data collection phase (in this study, the data collection occurred by way of the legal research method), during which both quantitative and qualitative data are collected simultaneously. The triangulation strategy is used "to confirm, cross-validate, or corroborate findings within a single study . . . result[ing] in well-validated and substantiated findings" (Creswell, 2003, p. 217). The data collected during the analyses phase of this study were integrated during the interpretation phase of the study.

The concurrent triangulation strategy is the best approach for my study because its advantages best served the purposes of my study. For example, the use of the triangulation strategy allows the researcher to address different types of questions by the method most appropriate. Further, triangulation best suited this study because in addition to simply reporting the case outcome, it allowed for the identification of factors that contributed to the plaintiff's and defendant's success or failure (Lee, 1990). Utilizing the

triangulation strategy allows the researcher to offer explanations that might not have been considered had a single method been utilized. As such, in this study some research questions are answered by way of the quantitative method and some by way of the qualitative method with the support of the legal research approach. In this study there was one data collection phase (as is characteristic of the concurrent triangulation method). This one data sample of federal court cases was analyzed in two distinct phases in order to support both the qualitative and quantitative sections of my study. Below is a discussion of each of the three research methods that were utilized in my study.

Traditional Legal Research

The traditional legal research asks, "What is the law?" and identifies the various legal sources (such as statutes, cases, and law journals) a researcher would use to answer this question. Systematic inquiry in the law can be described as a form of historical-legal research that is neither qualitative nor quantitative. It is a systematic investigation involving the interpretation and explanation of the law. As it attempts to make sense of the evolving reality known as the law, legal research employs a time line that looks to the past, present, and future for a variety of purposes. "By placing a legal dispute in perspective, researchers in education law hope not only to inform policymakers and practitioners about the meaning and status of the law, but also seek to raise questions for future research" (Schimmel, 1996, p. 35). Legal research requires researchers to look to the past to locate authority that will govern the disposition of the question under investigation. This is so because the American legal system is grounded in the principle of precedent—the notion that an authoritative ruling of the highest court in a given jurisdiction is binding on lower courts within its purview.

Legal research texts divide all legal sources into primary authority and secondary authority. Primary authority is the law itself. Primary authority is neither commentary on the law, nor descriptions of the law—it *is* the law. Primary authorities include court decisions, statutes, and regulations that form legal doctrine (Berringer & Edinger, 1999). The main primary authorities utilized in my study were the federal statute, Title VII of the Civil Rights Act of 1964 (as amended) (42 U.S.C., Section 2000e-2[e]), and published federal court cases involving employment discrimination based on race and/or sex (excluding sexual harassment) involving faculty tenure denial decisions in higher education institutions. These federal court cases were definitively decided during 1980 through 2007.

Secondary authorities include works that are not law but discuss law and can be found in law reviews, treatises, texts, legal encyclopedias, and journal articles.

Westlaw's computer-assisted database was used to identify and retrieve the relevant court cases. Westlaw's computer-assisted database is a major on-line legal research service that provides access to West's vast collection of statutes, court cases, case law materials, public records, and other legal resources. The Westlaw database contains approximately 10% more court decisions than are published in print (Lupini & Zirkel, 2003); as well, it provides a comprehensive key number system that classifies legal subject matter by particular key numbers within broad topics. To cull the data I used Westlaw's key numbering system. The contextual key numbers are 78k1107, 78k1129, 78k1134, 78k1135, 78k1138, 78k1139, 78k1164, and 81k8.1(2).

The culling process resulted in 204 federal court cases. Each case was further perused to ensure subject relevancy. For example, that the case was a sex versus a sexual

harassment case or, that the discrimination claim was filed under Title VII as opposed to some other law. The cases were then scrutinized to ensure they fell within the limitations specified in the study. Further, the cases were shepardized to ensure no duplication of cases and that each was terminated during the period studied. This filtering process resulted in 96 federal court cases identified for the purposes of this study.

Quantitative Method

Quantitative methods address the questions, Who? What? Where? How many? How much? Further, quantitative methods examine associations, relationships, and cause-effect between variables. Moreover, quantitative methodology allows for a review of actions previously taken, an examination of the status of a condition or topic, and/or for the exploration of associations between issues. Quantitative methods also explore potential causal-comparative relationships and are useful in determining cause-effect relationships between the issues related to education law. The key elements of quantitative methodology are (a) the conceptualization of the problem, (b) the research design, (c) the issues of internal and external validity, (d) the appropriateness of the statistical test used, and (e) the level of significance and corresponding errors that must be avoided (Schimmel, 1996).

Conceptualization of the Problem

In tenure denial lawsuits, administrators may be interested in knowing whether the plaintiff's sex or race played a part in the legal case outcome, whether where the case was decided (court level) played a role in the outcome, and whether an institution's status as a private or public institution might have been an influence on the outcome of the case.

An administrator will find such information helpful as decisions are made about how to best address and respond to potential or effected lawsuits.

Research Design

To explore the possibility of relationships between independent variables (race, sex, Title VII claim, classification of higher education institution, court level, and decision period) and the dependent variable (case outcome) a series of chi-square analyses test of independence were conducted. Steinberg (2007) asserts, "The goal of a . . . chi-square is to determine whether or not the first variable is related to—or independent of—the second variable" (p. 351). Chi-square tests the statistical significance of the difference in frequencies in two or more different nominal categories. Being that the data gathered for my study was nominal (categorical), the chi-square test of independence was determined to be the best statistical tool to ascertain whether a relationship existed between the plaintiff/case characteristics and the case outcomes. For tables with small expected counts or where 25% of the table cells have expected counts of less than 5, Fisher's Exact Test was used. When this condition is met SPSS automatically calculates the Fisher's exact value.

Note that the chi-square analysis does not indicate the direction or strength of the relationship, only whether or not there is a statistically significant relationship between the variables. The direction of the relationship can be ascertained by interpreting the column percentages or counts in the table. The magnitude of the relationship can be analyzed by using the Cramer's V measurement (David & Sutton, 2004). As such, the Cramer's V measurement was utilized in this study to analyze the magnitude of the relationship between the independent variables and the dependent variable. The

guidelines used to determine the magnitude of the relationship are in accord with Steinberg (2007), who suggests the following scale: small magnitude, up to .25; medium magnitude = .25 to .40; and large magnitude = .40 or more.

Descriptive statistics were used to describe basic patterns of the data in the study. This information was reported by way of counts and percentages. Further, the independent variables were coded in accord with the purposes of this study. When coding for plaintiff's characteristics (i.e., sex and race) the context of the discrimination claim was considered. For example, the sex of the plaintiff was coded only for sex discrimination claims, and the race of the plaintiff was coded only for race discrimination claims. The reason for this coding approach was the mention of the sex and/or race of the plaintiff was only consistently provided in the case given their claim. For example, the race of the plaintiff was consistently mentioned in the case if it was a race discrimination claim. The plaintiff's race and/or sex are only relevant given the type of discrimination claim.

The quantitative section of this study addressed an over-arching question and a sub-set of questions. They were these: Despite ubiquitous judicial deference toward institutions of higher education by the courts, might certain case and/or plaintiff characteristics still influence the outcome of cases? More specifically,

1. Is there a relationship between the plaintiff's sex (female, male) and the case outcomes within sex discrimination cases?

2. Is there a relationship between the plaintiff's race (minority, non-minority) and the case outcomes within race discrimination cases?

3. Is there a relationship between the Title VII claim (race discrimination, sex discrimination, race and sex discrimination) and the case outcome?

4. Is there a relationship between court level (United States District Courts, United States Court of Appeals, United States Supreme Court) and the case outcome?

5. Is there a relationship between the institution's classification (private, public) and the case outcome?

6. Is there a relationship between the three decision periods (1980s, 1990s, and 2000s) and the case outcome?

The target population for this study consisted of all federal court cases involving faculty employed at institutions of higher education, denied tenure, and filed lawsuits under Title VII of the Civil Rights Act of 1964, alleging race and/or sex discrimination. The sample population consisted of all published federal court cases involving faculty employed at institutions of higher education, denied tenure, and filed lawsuits under Title VII of the Civil Rights Act of 1964, alleging race, and/or sex discrimination as recorded and published on Westlaw's computer-assisted database. Culling of the database resulted in the initial review of 204 cases. These cases were perused and scrutinized for study relevancy. The result was 96 cases identified for the purposes of this study.

Level of Significance

The chi-square analysis was used to determine a relationship between variables at $< .05$ level of significance. Even so, the exact p value is reported for the relevant findings. The Statistical Package for the Social Sciences (SPSS), a software package recognized for its use in statistical analysis in the social sciences, including education, was used to analyze and summarize these data.

Internal/External Validity

The chi-square is in the non-parametric category of statistics. "There are only categorical classifications (nominal data) and frequency counts for each category. Without scores, there can be no means. And without means, there can be no deviation scores, variances, or standard deviations. There are, that is, no population parameters" (Steinberg, 2007, p. 342). Fittingly, the data collected for this study are not in score form, but rather in categories and frequencies; thus, there are no population parameters for this study, ergo, no compromise of validity.

Further, a legal research method known as "shepardizing" was used to ensure that only those federal court cases where a final decision was rendered were included in the final sample. A court may criticize or even overrule an already-decided case. As such, Shepardizing is a legal research process where Shepard's Federal Citators are used to verify the progress and status of a case. Once a case has been decided and documented in publications, Shepard's will continue to list it and other cases that may refer to the ruling made in that case. Shepardizing was also used to ensure that there was no double counting of cases. This process will reduce the otherwise inevitable imprecision in education litigation sampling. Given these processes and use of the same primary and secondary authorities the results of this study are consistent and dependable.

Researcher bias was controlled because of the inherent character of historical documents, which in this study were federal court cases. The integrity of these historical documents cannot be manipulated by the researcher, thus allowing for practical elimination of researcher bias. My study did not involve direct human contact for the purposes of a true scientific experiment, resulting in no need to control for such factors as

the Hawthorne Effect. Despite these limitations, I feel that my study was sound and provided fodder for further exploration, examination, and research.

Qualitative Method

Qualitative methods explore why and how society, through its courts and legislatures, creates specific laws and the effects of these laws on the institution of higher education. Rudestam and Newton (1999) point out that there is a great variety in qualitative approaches. These approaches all rest on three assumptions: (a) qualitative methods seek to understand phenomena in their entirety in order to develop a complete understanding of a person, program, or situation, (b) the researcher does not impose much of an organizing structure or make assumptions about the interrelationships among the data prior to making the observations, and (c) it is a discovery-oriented approach in the natural environment. It is standard practice for qualitative researchers to use such data collection methods such as document analysis to investigate a group or event.

Purposively, I employed the historical, descriptive qualitative research method, which included the content analysis approach of the cases in this study. *In parti*cular, for the purposes of this study the content analyses process entailed these steps:

1. Determining the coding system to be used for variables, concepts, trends, and themes
2. Perusing each case: identifying similar phrases, terminology, variables, concepts, trends, and themes
3. Sorting and sifting through cases in accordance with emerging concepts, trends, and themes
4. Isolating concepts, trends, and themes

5. Discerning generalizations abut the data

6. Formulating constructs.

Steps in this process were repeated as often as necessary as concepts, trends, and themes emerged and evolved.

Variables were entered into a database using SPSS software. Additionally, a database was set up using Excel to capture concepts, themes, reflections, and comments. The Excel database was merged with the SPSS database. This database was modified and customized to model the instrument, Litigation Documentation Form (LDF). The LDF, used in earlier studies (Kuriloff, 1975; Newcomer et al., 1998; O'Connor Rhen, 1989; Tarola, 1991), was developed for collecting court case information for education-related litigation. For my study, the LDF was used to collect plaintiff and defendant demographic information, content information, and case outcome information. The LDF was modified for the purposes of this study and may be found in the appendices as Appendix B.

According to Creswell (2003), "Qualitative research is emergent rather than tightly prefigured. Several aspects emerge during a qualitative study. The research questions may change and be refined as the inquirer learns what to ask. . . . These aspects of an unfolding research model make it difficult to prefigure qualitative research tightly at the proposal or early research stage" (p. 182). Keeping in accord with these qualitative method standards, I kept open the possibility of further refinement of the data categories and research questions.

Garnering such revelatory information for my study required a secondary in-depth analysis of case law and the cases collected for this study. (The first analysis was

conducted during the quantitative phase.) As a result, I perused and analyzed the relevant case law involved in this study to cull the information necessary to address the following questions:

1. In what discriminatory behavior or conduct do plaintiff faculty allege defendant institutions engage in Title VII and tenure denial lawsuits?

2. What has been the courts' response to plaintiffs' allegations (found in research question number 1, above) and other factors in deciding Title VII cases?

3. What remedies do courts award to prevailing parties in Title VII tenure cases?

A descriptive narrative approach was used to relay findings, conclusions, and implications. Legal research methodology was incorporated to buttress findings, conclusions, and implications with specific examples from the court cases.

Reliability and Validity

Using the LDF will ensure reliability of the coding of the court cases. Earlier studies (Kuriloff, 1975; Newcomer et al., 1998; O'Connor Rhen, 1989; Tarola, 1991) provided evidence of inter-rater reliability and content validity. The combination of the nature of the data set (historical documents/court cases), method of coding, and use of the LDF will validate the dependability and consistency of the outcome of results of this study. The LDF, which was modified for the purposes of this study, is presented in the appendices as Appendix B.

When discussing validity of qualitative research methods, Schimmel (1996) offers this assertion by Yin (2002), "Complex social phenomena are studied and relevant behaviors cannot be manipulated" (p. 16). Such is the case with my study. The phenomena I studied (relationship between higher education and the legal environment)

by way of actual court cases entails "behaviors/outcomes [that] cannot be manipulated," because these historical data's federal court outcomes have not only been decided previous to my culling and analyses processes, but decided by experts (judges) no less. As such, the data set used in my study does not allow for manipulation on my part and, further, lends itself to dependability and consistency of the results of the study.

Summary

In keeping with Schimmel (1996) and Creswell (2003) the research methodologies used in this study served different purposes while being complementary. For example, the legal research methodology served to elucidate and explain the relevant law, Title VII of the Civil Rights Act of 1964 (as presented in chapter 2). As well, legal research was used to identify and interpret the federal court cases relevant to this study. However, the legal research did not serve to address specific research questions. Rather, the data collected, analyzed, and examined as a result of the legal research served to provide the information and perspective necessary to answer the research questions. In other words, the legal research provided the framework for this study.

As such, quantitative methodology was employed to describe the data, analyze associations between the independent and dependent variables, and address pertinent research questions. In addition, qualitative methodology was utilized to examine trends and patterns in the data and address pertinent research questions.

The findings are reported in the quantitative and qualitative sections of chapter 4.

CHAPTER FOUR

FINDINGS

Introduction

This present study analyzed published federal court cases decided during the period 1980–2007 involving Title VII, tenure denial, and higher education. This will contribute to understandings of the relationship between federal courts, faculty, and higher education by: analyzing the extent of a statistical association between case and/or plaintiff characteristics and case outcomes; and, isolating those institutional factors and practices that plaintiffs focus on in bringing lawsuits and those that the courts consider most relevant in deciding cases. Understanding this information can help institutions maximize fairness and minimize their liability exposure when designing tenure processes and making tenure decisions.

The quantitative section of this study involved the use of descriptive and nonparametric test of independence analyses. Descriptive statistics were calculated for all variables of interest. These variables, which were categorical, were summarized using counts and percentages. They are presented in Tables 1 through 4. The focus here is on patterns suggested by the percentages. Data that address the research questions are summarized in Table 5 and detailed in Tables 6 through 11. Significance and coefficient values are reported utilizing chi-square and Cramer's V statistics. The chi-square analysis was utilized to determine whether one categorical variable (i.e., plaintiff's

claims, decision period, higher education institution's classification, and court level) was related or independent to another (the case outcome) at $p<.05$ significance level. For tables with small expected counts or where 25% of the table cells have expected counts of less than 5, Fisher's Exact Test was used. The Cramer's V measurement was utilized to determine the magnitude of the relationship between variables (Steinberg, 2007).

The qualitative section of this study required the use of the content analysis approach of the case law and federal court cases collected for this study so as to cull and analyze the information necessary to address relevant research questions. The content analyses process entailed: determining the coding system; perusing cases to identify concepts, trends, and themes; sorting cases in accord with emerging trends and themes; isolating trends and themes; discerning generalizations about data; and formulating constructs. The legal research approach was utilized to buttress findings with specific examples from the cases.

This chapter is divided into three sections: (a) Legal Analyses, (b) Quantitative Analyses, (c) Qualitative Analyses, and (d) Summary. The findings and conclusions are discussed further in chapter 5.

Legal Research Analyses

The legal research method was used to identify, retrieve, analyze, and interpret the data. For instance, Westlaw's computer-assisted database was examined to identify and retrieve the relevant court cases. This examination process resulted in 204 federal court cases. Westlaw's database provides detailed information about each court case required for this study. As such, each case was then analyzed to ensure subject

relevancy. For example, that the case was a sex discrimination case versus a sexual harassment case or, that the discrimination claim was filed under the applicable law, Title VII, as opposed to some other law. Further, a legal analysis process known as shepardizing was conducted to ensure that no cases were duplicated and that each was terminated during the period studied. These analyses resulted in 96 federal court cases identified for the purposes of this study. The 96 cases are listed in the appendices section as Appendix A.

Legal research did not serve to address specific research questions in this study. Rather, in addition to the examination and analytic processes described above, legal research served to provide the information and perspective necessary to answer the quantitative and qualitative research questions. As such, quantitative methodology was employed to describe the data, analyze associations between the independent and dependent variables, and address the pertinent research questions. Moreover, qualitative methodology was utilized to examine trends and patterns in the data and address pertinent research questions. In addition, legal research resulted in the identification and incorporation of examples from the federal court cases to buttress the qualitative findings in this study.

The quantitative and qualitative findings are presented below.

Quantitative Analyses

Plaintiff Characteristics

The independent variables were coded in accord with the purposes of this study. When coding for plaintiff's characteristics (i.e., sex or race) the context of the

discrimination claim was considered. For example, the sex of the plaintiff was coded only for sex discrimination claims, and the race of the plaintiff was coded only for race discrimination claims. The reason for this coding approach was the mention of the sex and/or race of the plaintiff was consistent with their claim. For example, the race of the plaintiff was only mentioned consistently in the case if it was a race discrimination claim, etc.

As shown in Table 1, of those plaintiffs claiming sex discrimination, 92% were female, while minorities made 85% of race discrimination claims.

Table 1

Plaintiff's Sex and Race

Characteristic		*n*	%
Plaintiff's sex			
	Female	57	92
	Male	5	8
Total		62	100
Plaintiff's race			
	Minority	45	85
	Non-Minority	8	15
Total		53	100

Case Characteristics

The 96 federal court cases analyzed for this study were based on Title VII of the Civil Rights Act of 1964 (as amended) claims of race and/or sex discrimination against

institutions of higher education that were terminated during the years 1980 through 2007 involving faculty tenure denial decisions. As presented in Table 2, of the 96 cases, 35% (*N*=34) were race discrimination claims, 45% (*N*=43) were sex discrimination claims, and 20% (*N*=19) were combination race and sex discrimination claims. These claims also included eight reverse race discrimination claims and five reverse sex discrimination claims.

All cases involved in this study were coded into three periods based on the year they were terminated by the courts. The three periods were the 1980s, 1990s, and 2000s. As shown in Table 3, the distribution of the cases over these periods was 33% (*N*=32) during the 1980s, 34% (*N*=33) during the 1990s, and 32% (*N*=31) during the 2000s.

Table 2

Plaintiff's Title VII Claim

Discrimination claim	*N*	%
Race	34	35
Sex	43	45
Race and sex	19	20
Total	96	100

As displayed in Table 4, the majority of cases involved faculty employed by public institutions (58%, *N*=56), while 42% (*N*=40) of the cases involved faculty employed by private institutions. Further, 59% (*N*=57) of all cases were decided in the U.S. Courts of Appeal and 41% (*N*=39) in the U.S. District Court. No cases included in this study terminated in the U.S. Supreme Court. Further still, defendant institutions prevailed in 82% of the cases.

Table 3

Case Distribution by Decision Period—1980s, 1990s, and 2000s

Decision period	*N*	%
1980s	32	33
1990s	33	34
2000 - 2007	31	32
Total	96	100

Table 4

Institution Classification, Court Level, and Case Outcomes

Characteristic		*N*	%
Institution classification			
	Private	40	42
	Public	56	58
Total		96	100
Court level			
	U.S. Court of Appeals	57	59
	U.S. District Court	39	41
Total		96	100
Outcome of cases			
	Defendant	79	82
	Plaintiff	17	18
Total		96	100

The Statistics—Relationships

Despite the omnipresence of judicial deference toward institutions of higher education by the courts (Kaplin & Lee, 2006), might certain plaintiff and/or case characteristics still influence the outcome of cases? This over-arching question was addressed by answering the research questions below.

More specifically,

1. Is there a relationship between the plaintiff's sex (female, male) and the case outcomes within sex discrimination cases?

2. Is there a relationship between the plaintiff's race (minority, non-minority) and the case outcomes within race discrimination cases?

3. Is there a relationship between the Title VII claim (race discrimination, sex discrimination, race and sex discrimination) and the case outcome?

4. Is there a relationship between court level (United States District Courts, United States Court of Appeals, United States Supreme Court) and the case outcome?

5. Is there a relationship between the institution's classification (private, public) and the case outcome?

6. Is there a relationship between the decision periods (1980s, 1990s, and 2000s) and the case outcome?

Listed in Table 5 is a summary of the results of the statistical analyses conducted in order to address the above six research questions. The data presented in Table 5 show the outcome of the chi-square (or Fisher's exact test) and Cramer's V analyses. Specifically, Table 5 lists the variables for which independence from the outcome variable were analyzed at $p<.05$ level of significance. In addition, the table reports the

degrees of freedom, the chi-square value, and *p* value. The Cramer's V measurement was utilized to analyze the magnitude of the relationship between the independent variables and the dependent variable. The guidelines used to determine the magnitude of the relationship are in accord with Steinberg (2007), who suggests the following scale: small magnitude, up to .25; medium magnitude = .25 to .40; and large magnitude = .40 or more.

Other data presented were considered of practical significance. These data were determined to be those findings that were not of statistical significance, but may lend to the understanding of the statistical data; and/or be helpful to practitioners such as higher education administrators in their decision making.

The data presented in Tables 6 through 13 comport with the statistical and practical findings and are discussed respectively within research questions 1 through 6, below.

Research Question No. 1

Is there a relationship between the plaintiff's sex and the case outcomes within sex discrimination cases? Since 50% (2) of the cells had an expected frequency of less than 5, the appropriate test was the Fisher's exact test. This test showed there was no statistically significant relationship between plaintiff's sex and case outcomes (n=62, p=1.000). Thus, the percentage of plaintiffs with a favorable outcome did not differ by sex. The Cramer's V supports this with an association value of .007 (see Table 5).

Table 5

Relationship Between the Independent Variables and Case Outcomes

Independent variable	*df*	Chi-square/ Fisher's exact[a] (2-sided)	Cramer's V	Probability value (p)[b]
Plaintiff's sex	1	0.003[a]	.007	1.000
Plaintiff's race	1	0.430[a]	.090	.512
Title VII claim (race, sex, race & sex)	2	1.814	.137	.404
Court level	1	7.689	.283	.006
Higher education institution's class	1	0.002	.005	.964
Decision period (1980s, 1990s, 2000s)	2	6.106	.252	.047

[a]Fisher's exact test (FET) was used.
[b]At $p<.05$ significance level.

The pattern in the data supports this finding. For example, as presented in Table 6, of the 62 sex discrimination cases, 92% (n=57) were filed by female plaintiffs and 8% (n=5) were filed by male plaintiffs. However, within plaintiffs' sex category the proportion of cases won by females or males was similar, with 21% (n=12) of the cases decided in favor of females and 20% (n=1) in favor of men. This finding indicates that male plaintiffs win reverse sex discrimination cases at a proportion similar to that of female plaintiffs in sex discrimination cases. Overall, defendant institutions won 79% (n=49) of sex discrimination cases.

Research Question No. 2

Is there a relationship between the plaintiff's race and the case outcomes within race discrimination cases? Since 25% of the cells had an expected frequency of less than

Table 6

Sex Discrimination, Plaintiff's Sex, and Case Outcomes

		Court outcome in favor of		
Plaintiff's sex	Value description	Defendant	Plaintiff	Total
Female	*N*	45	12	57
	% within plaintiff's sex	79%	21%	100%
	% of total cases (*n*=62)	73%	19%	92%
Male	*N*	4	1	5
	% within plaintiff's sex	80%	20%	100%
	% of total cases (*n*=62)	6%	2%	8%
Total	*N*	49	13	62
	% of total cases (*n*=62)	79%	21%	100%

Note. FET (*n*=62, *p*=1.000).

5, the appropriate test was the Fisher's exact test. This test showed there was no statistically significant relationship between plaintiff's race and the outcome of the case (*n*=53, *p*=.512). Thus, the percentage of cases with a favorable outcome for plaintiffs did not differ by race. The Cramer's V supports this with an association value of .090 (see Table 5).

While this study did not find statistically significant relationships between plaintiffs' race and case outcomes, the data suggested a related finding. The data indicated that plaintiffs who filed reverse race discrimination cases won a greater proportion of those cases than their nonminority counterparts. For example, of the 53

race discrimination cases, 85% involved minorities who won 16% of their cases, while non-minorities won 25%. Overall, defendant institutions won 83% (n=44) of race discrimination cases (see Table 7).

Table 7

Race Discrimination, Plaintiff's Race, and Case Outcomes

		Court outcome in favor of		
Plaintiff's race	Value description	Defendant	Plaintiff	Total
Minority	*N*	38	7	45
	% within plaintiff's race	84%	16%	100%
	% of total cases (n=53)	72%	13%	85%
Non-minority	*N*	6	2	8
	% within plaintiff's race	75%	25%	100%
	% of total cases (n=53)	11%	4%	15%
Total	*N*	44	9	53
	% of total cases (n=53)	83%	17%	100%

Note. FET (n=53, p=.512).

Research Question No. 3

Is there a relationship between the Title VII claim (race discrimination, sex discrimination, race and sex discrimination) and the case outcome? A chi-square test of independence was conducted to analyze the relationship between plaintiff's Title VII claim and case outcomes. The relationship between these variables was not significant, X^2 (2, N=96) = 1.814, p=.404. Thus, the percentage of cases with a favorable outcome for plaintiffs did not differ by Title VII Claim. The Cramer's V supports this with an association value of .137 (see Table 5).

Table 8

Plaintiff's Title VII Claim and Case Outcomes

Plaintiff's Title VII claim	Value description	Court outcome in favor of Defendant	Plaintiff	Total
Race discrimination	*N*	30	4	34
	% within Title VII claim	88%	12%	100%
	% of total Cases (*n*=96)	31%	4%	35%
Sex discrimination	*N*	35	8	43
	% within Title VII claim	81%	19%	100%
	% of total cases (*n*=96)	37%	8%	45%
Race and sex discrimination	*N*	14	5	19
	% within Title VII claim	74%	26%	100%
	% of total cases (*n*=96)	15%	5%	20%
Total	*N*	79	17	96
	% of total cases (*n*=96)	82%	18%	100%

Note. X^2 (2, *N*=96) = 1.814, *p*=.404.

However, while the chi-square statistic showed no statistical significance, patterns in the data suggest other findings. For example, as Table 8 shows, of the 96 cases studied, race discrimination cases comprised 35% (*n*=34), sex discrimination cases comprised 45% (*n*=43), and combination race/sex discrimination cases comprised 20% (*n*=19). Further, race discrimination plaintiffs won 12% of their cases (4 of 34), sex discrimination plaintiffs won 19% of their cases (8 of 43), and race/sex discrimination plaintiffs won 26% of their cases (5 of 19). As such, plaintiffs were more successful when they claimed both race and sex discrimination as opposed to one or the other type of discrimination. Further still, Table 9 illustrates that of those cases won by plaintiffs (*n*=17), sex-only discrimination plaintiffs' win-proportion was 47%, race and sex

discrimination plaintiffs' win-proportion was 29%, and race-only plaintiffs' win-proportion was 24%.

Table 9

Prevailing Plaintiffs, Title VII Claim, and Case Outcomes

Title VII claim	*n*	%
Race discrimination	4	24
Sex discrimination	8	47
Race & sex discrimination	5	29
Total	17	100

Research Question No. 4

Is there a relationship between court level (United States District Courts, United States Court of Appeals, United States Supreme Court) and the case outcome? The analyses applicable to this question included only court levels of the U.S. Court of Appeals and the U.S. District Court as no cases in this study were terminated in the U.S. Supreme Court. A chi-square test of independence was conducted to analyze the relationship between court level and case outcomes. The relationship between these variables was significant, X^2 (1, N=96) = 7.689, p=.006. Thus, the percentage of plaintiffs with a favorable outcome did differ by court level. The Cramer's V supports this with an association value of .283 (see Table 5).

The pattern in the data also supports this finding. For example, as presented in Table 10, the data suggest plaintiffs were more likely to be successful at the U.S. District Court level than at the U.S. Court of Appeals level. For example, plaintiffs won 31% of

cases at the U.S. District court level versus 9% at the U.S. Court of Appeals level. In other words, plaintiffs were more likely to lose on appeal.

Table 10

Court Level and Case Outcomes

Court level	Value description	Court outcome in favor of Defendant	Plaintiff	Total
U.S. Court of Appeals	*N*	52	5	57
	% within court level	91%	9%	100%
	% of total cases (*N*=96)	54%	5%	59%
U.S. District Court	*N*	27	12	39
	% within court level	69%	31%	100%
	% of total cases (*N*=96)	28%	13%	41%
Total	*N*	79	17	96
	% of total cases (*N*=96)	82%	18%	100%

Note. X^2 (1, *N*=96) = 7.689, *p*=.006.

Research Question No. 5

Is there a relationship between the institution's classification (private, public) and the case outcome? A chi-square test of independence was conducted to analyze the relationship between the institution's classification and case outcomes. The relationship between these variables was not significant, X^2 (1, *N*=96) = .002, *p*=.964. Thus, the percentage of plaintiffs with a favorable outcome did not differ by the institution's classification. The Cramer's V supports this with an association value of .005 (see Table 5).

The patterns in the data also support this finding. For example, as shown in Table 11, faculty at public institutions filed a larger proportion of the 96 cases studied at 58%.

However, plaintiffs were equally successful regardless of their institution's classification, each winning 18% of the cases within their categories.

Table 11

Institution Classification and Case Outcomes

Institution classification	Value description	Court outcome in favor of Defendant	Plaintiff	Total
Private	*N*	33	7	40
	% within institution type	82%	18%	100%
	% of total cases (*N*=96)	34%	7%	42%
Public	*N*	46	10	56
	% within institution type	82%	18%	100%
	% of total cases (*N*=96)	48%	10%	58%
Total	*N*	79	17	96
	% of total cases (*N*=96)	82%	18%	100%

Note. X^2 (1, *N*=96) = .002, *p*=.964.

Research Question No. 6

Is there a relationship between the decision periods (1980s, 1990s, and 2000s) and the case outcome? A chi-square test of independence was conducted to analyze the relationship between the decision periods and case outcomes. The relationship between these variables was significant, X^2 (2, *N*=96) = 6.106, *p*=.047. Thus, the percentage of plaintiffs with a favorable outcome did differ by decision period. The Cramer's V supports this with an association value of .252 (see Table 5).

The pattern in the data also supports this finding. As Table 12 illustrates, plaintiffs whose cases were decided during the 1980s were more than likely to have a case decided in their favor than those plaintiffs whose cases were decided during the

1990s and 2000s. For example, within the decision period the courts decided in favor of plaintiffs more often during the 1980s (31%), as opposed to the 1990s (12%) and 2000s (10%). In addition, as illustrated in Table 13, 1980s plaintiffs won a larger proportion of the 17 cases won by all plaintiffs in this study (59%).

Table 12

Decision Period and Case Outcomes

		Court outcome in favor of		
Decision period	Value description	Defendant	Plaintiff	Total
1980s	*N*	22	10	32
	% within decision period	69%	31%	100%
	% of total (*N*=96)	23%	10%	33%
1990s	*N*	29	4	33
	% within decision period	88%	12%	100%
	% of total (*N*=96)	30%	4%	34%
2000s	*N*	28	3	31
	% within decision period	90%	10%	100%
	% of total (*N*=96)	29%	3%	32%
Total	*N*	79	17	96
	% of total (*N*=96)	82%	18%	100%

Note. X^2 (2, *N*=96) = 6.106, *p*=.047.

Table 13

Prevailing Plaintiffs, Decision Period, and Case Outcomes

Decision period	*n*	%
1980s	10	59
1990s	4	23
2000 - 2007	3	18
Total	17	100

Qualitative Analyses

For the qualitative analysis, I report findings from a content analysis approach of the federal court cases involved in this study. This resulted in the identification of several trends and themes relevant to the research questions. As is typical of qualitative methods, this section addresses relevant questions mainly by way of summarizing narratives. These narratives include the reporting of main thematic results and examples to illustrate the most common themes. Further, legal research methods are incorporated to buttress the findings of this study with specific examples from the court cases. The research questions addressed were these:

7. In what discriminatory behavior or conduct do plaintiff faculty allege defendant institutions engage in Title VII and tenure denial lawsuits?

8. What has been the courts' response to plaintiffs' allegations (found in Research Question No. 7) and other factors in deciding Title VII lawsuits involving tenure denial?

9. What remedies do courts award to prevailing parties in Title VII and tenure denial lawsuits?

These questions are addressed below.

Research Question No. 7

In what discriminatory behavior or conduct do plaintiff faculty allege defendant institutions engage in Title VII and tenure denial lawsuits? For the purposes of this study, the data were inferred from the allegations and evidence discussed in the cases involved in this study. Most plaintiffs made more than one allegation. As such the *N* in Table 14 does not total 96, nor does the total percentage total 100%. The analyses

revealed certain tendencies of plaintiffs' allegations/evidence. These tendencies are ordered into 11 categories and presented in Table 14. This table provides a display of the categories as well as an example of actual allegations/evidence presented by plaintiffs concerning the discriminatory conduct or behavior by their institutions.

The data suggest procedural irregularities include departures from customs, practices, processes, or procedures during the tenure review process. Plaintiffs made this allegation most often (42%). Also, plaintiffs claimed that, unlike peers not of their race or sex, additional evidence or repeated reviews of certain elements of the tenure review process were required to prove plaintiff met tenure criteria (34%). Further, 30% of plaintiffs asserted that they were held to a higher or different standard, for example, by being required to publish more articles, have higher teacher evaluations, etc., than peers not of plaintiff's race and/or sex. Twenty-eight percent (28%) of plaintiffs said that their adverse tenure decisions were due to the institution retaliating against them for invoking their rights or supporting those of others. Plaintiffs also claimed that they were subjected to harassing or offensive remarks or comments by their administrators, colleagues, or peers (27%).

The data also suggest that plaintiffs claimed discriminatory behavior or conduct infected or tainted their tenure review process resulting in an adverse decision (27%). Further, 26% of plaintiffs asserted they were subjected to a hostile or harassing work environment where they felt threatened or intimidated. Also, plaintiffs said that peers not of plaintiff's race or sex were granted tenure even though they were less or equally as qualified as plaintiff (25%). Plaintiffs also alleged that a pattern of discrimination by their institutions lessened their chances for tenure (and, therefore, led to their adverse

Table 14

Plaintiff's Allegations/Evidence of Institution's Discriminatory Behavior/Conduct

Plaintiff's (faculty) reason/circumstance	Example of defendant's (institution's) alleged discriminatory action/conduct
Procedural irregularities (42%, *n*=37)	Departed from tenure review procedures in the tenure committee selection process (*McFadden v. State University of New York*, 2002).
Unfair/unjust scrutiny of work/performance (34%, *n*=30)	Requested additional student evaluations of plaintiff's teaching ability/ performance (*Brousard-Norcross v. Augustana College*, 1991).
Plaintiff held to a different/higher standard (30%, n=27)	Held women to a lesser standard than men in tenure reviews (*Kyrstek v. University of Southern Mississippi*, 1999).
Retaliation against plaintiff (28%, *n*=25)	For invoking a grievance procedure/appeal process (*Negussey v. Syracuse University*, 1997).
Negative/offensive remarks/ comments made by others (27%, *n*=24)	Colleagues and an administrator made ethnic comments and jokes about plaintiff (*Falcon v. Trustees of the State Colleges in Colorado*, 2000).
Discriminatory behavior/conduct by others infected/influenced the tenure review process (27%, *n*=24)	Individuals involved in various stages of plaintiff's tenure review process were biased against her (*Schneider v. Northwestern University*, 1996).
Harassment/ hostile environment (26%, *n*=23)	Was "physically threatened" by the dean "who allegedly had a history of intimidating female employees who reported to him" (*Atkinson v. Lafayette College*, 2003, p. 2).
Less/equally qualified person of a majority race/sex granted tenure (25%, *n*=22)	University granted tenure to a non-Hispanic colleague who "had less meritorious scholarship than he" (*Lopez v. University of Illinois*, 2004, p. 621).
Institution has a pattern of discrimination (21%, *n*=19)	The university "maintained a pattern and practice of discriminating against women in hiring and granting tenure" (*Hirsch v. Columbia University*, 2003, p. 378).
Prior positive evaluations inconsistent with adverse tenure decision (17%, *n*=15)	Plaintiff received "favorable evaluations" from her dean in each of the four years preceding her tenure review (*Hooker v. Tufts University*, 1983).
Not advised or counseled on tenure criteria, customs, procedures, practices (11%, *n*=10)	"Never counseled [plaintiff] that the failure to obtain a masters degree would preclude her from being considered for tenure" (*Kunda v. Muhlenberg*, 1980, p. 540).

tenure decision) (21%). In addition, plaintiffs contended that they received positive evaluations during their probationary period inconsistent with their adverse tenure decision (17%). Eleven percent (11%) of plaintiffs said that they were not counseled, advised, or informed of criteria, customs, practices, policies, procedures related to tenure review.

The data suggest that plaintiffs believe the aforementioned conduct or actions by the institution were based on their race and/or sex, thus discriminatory, and ergo led to their being denied tenure.

Research Question No. 8

What has been the courts' response to plaintiffs' allegations (found in Research Question No. 7) and other factors in deciding Title VII lawsuits involving tenure denial? The data suggest that, in general, courts operate under the principle of deference with regard to tenure decisions. In most of the cases in this study the courts discussed the principle of deference or an anti-interventionist stance. Further, in about an eighth of the cases in this study, courts expressed a desire to balance the intent and purpose of Title VII to "eradicat[e] employment discrimination" with "great respect for the [institution's] professional judgment" regarding tenure (*Pyo v. Stockton*, 1985, p. 1281).

Despite the common practice of judicial deference toward higher education institutions with regard to tenure decisions, the courts must respond to the specific allegations and evidence presented by plaintiffs. The courts' general responses to plaintiffs' allegations/evidence, as presented in Research Question No. 7, are presented in Table 15.

The analysis of the cases involved in this study also revealed the courts' stance on several other issues relative to the tenure review process. Namely, they are ambiguous policies/practices, collegiality, infected/tainted tenure review processes, and peer review processes. The courts' prevailing responses to these issues are presented below.

Courts' Response to Other Issues of Tenure

Ambiguous Policies/Practices: The data suggest that courts place great weight on faculty handbook and tenure review guidelines and policies and, thus, tend to frown upon ambiguous policies and practices (*Carton v. Trustees of Tufts College*, 1981/1982). When resolving conflicts such as those involving procedural irregularities, courts will generally look to see if a university has conformed to its charter, policy, or practice. If this information is ambiguous, courts will turn to an outside source such as the AAUP to fill in the gaps. In this study, courts referred to the faculty handbook and policies in 59% of the cases. The customs and practices of the AAUP and other external sources were mentioned in 11% of the cases. Further, with regard to policies the court stated, "Evidence of the employer's general policy and practice . . . may be relevant to whether discrimination occurred in the particular case at hand" (*Timper v. University of Wisconsin*, 1981, p. 384).

Collegiality: The courts have made it clear that absent discrimination, consideration of collegiality in higher education employment decisions is valid as long as institutions exercise the same caution against misuse of collegiality that they apply to any other subjective evaluation (*Carton v. Trustees of Tufts College*, 1981/1982). Further, in

Table 15

Courts' Response to Plaintiffs' Allegations/Evidence of Discriminatory Behavior/Conduct

Plaintiff's allegation	Court's response	Case example
Procedural Irregularities (42%, *n*=37); Prior Positive Evaluations Inconsistent With Adverse Tenure Decision (17%, *n*=15)	Will limit its review to whether the adverse tenure decision was based on a prohibited factor. However, frown upon procedural irregularities, ambiguous policies, and inconsistent practices.	"Departures from procedural regularity during the tenure review process can raise a question as to the good faith of the process, where the departure may reasonably affect the decision" (*Weinstock v. Columbia University*, 2000, p. 45).
Unfair/Unjust Scrutiny of Work/Performance (34%, n=30); Held to a Different or Higher Standard (30%, n=27); Less/Equally Qualified Person of a Majority Race/Sex Granted Tenure (25%, *n*=22)	Absent proof of discrimination will not question the soundness or merit of the institution's tenure decision.	"Triers of fact cannot hope to master the academic field sufficiently to review the merits of such view and resolve the difference of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within the universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited" (*Zahorik v. Cornell University*, 1984, p. 85).
Negative/Offensive Remarks/Comments (27%, *n*=24); Discriminatory Behavior/Conduct by Others Infected/Influenced the Tenure Review Process (27%, *n*=24); Harassment/ Hostile Environment (26%, *n*=23); Not Advised or Counseled on Tenure Criteria, Customs, Procedures, Practices (11%, *n*=10)	Plaintiff must show nexus or causal connection between the comments/remarks/actions/ behavior and the tenure denial decision.	The *Falcon v. Trustees of the State Colleges in Colorado* (2000) court said, "Plaintiff offers various comments and jokes by other HGP faculty members. . . . Plaintiff has failed to show, however, that these isolated comments are related to defendant's decision to deny her tenure application. The plaintiff must still show some nexus between the statements and the defendant's decision" (p. 14).
Institution Has a Pattern of Discrimination (21%, *n*=19)	Plaintiff must show that tenure requirements disproportionately, adversely affected a protected group.	The [plaintiff must prove that the "tenure requirements [per se] resulted in a disproportionate failure for [protected group] applicants" (*Carpenter v. University of Wisconsin,* 1984, p. 914).
Retaliation Against Plaintiff (28%, *n*=25)	Retaliation claims may be brought under Title VII; however, involves different and sometimes separate procedures and proceedings that were outside the scope of this study.	N/A

Namenwirth v. University of Wisconsin (1985), the court said, "The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem—the decision-maker is also the source of the qualifications—there may be no solution; winning the esteem of one's colleague is just an essential part of securing tenure" (p. 1243).

Infected/Tainted Tenure Process: The data suggest that a tenure review process could be influenced either positively or negatively. However, in order to prove discrimination plaintiff must provide evidence from which an inference may be drawn that the alleged discriminatory actions infecting/tainting the process were relied upon by the tenure decision makers; or, can be attributed directly to a decision maker. In support of this finding are these statements by the courts:

1. The *Schneider v. Northwestern University* (1996) court stated, "Selection of committee members who were personally biased, either in favor of or against, a tenure candidate could affect the result" (p. 1352). Further,

2. "In discrimination cases based on the denial of tenure, plaintiff need not show that plaintiff was discriminated against at every stage of the evaluation process. It plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision" (*Hayne v. Rutgers University*, 1989, p. 23). And,

3. In *Cuenca v. University of Kansas* (2003) the court said, "In general, statements by a non-decisionmaker cannot be used to establish that an employment decision was tainted by discriminatory animus. An exception arises when the record

contains evidence from which a reasonable inference may be drawn that a decision maker adopted or relied upon the allegedly discriminatory statement in reaching its decision" (p. 788).

Peer Review Process: The data suggest that the courts have respect for and place great weight on the tenure reviews of a tenure candidate's peers (regardless of whether the outcome of their review is in favor of or not in favor of tenure for the plaintiff). The courts' response is best exemplified in the following cases and statements:

1. In *Kunda v. Muhlenberg* (1980), the court stated it "relied on the memorandum of Kunda's department chairman and the testimony of senior members of her department and the faculty of the college that Kunda satisfied all of the requirements for promotion and tenure as set forth in the Faculty Handbook" (p. 544).

2. In addition, the *Brousard-Norcross v. Augustana College* (1991) court said, "Peer judgments as to departmental needs, collegial relationships, and individual merit may not be discounted without evidence that they are façade for discrimination" (p. 976).

Ironically, the emphasis and respect the courts have for the peer review process may also subject it to close scrutiny for discrimination by the courts. For example, the court in *Namenwirth v. University of Wisconsin* (1985) also cautioned, "Faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars" (p. 1243).

This study also analyzed the court's response to Title VII and tenure denial within the judicial process and procedures frameworks. The findings emerged into the theme of proving discrimination under the McDonnell Douglas theory and are discussed below.

Proving Discrimination

The data suggest that discrimination is difficult to prove in tenure cases under Title VII. Indeed, the courts acknowledged this in *Kawatra v. Medgar Evers College* (1988) where the court stated, "A plaintiff faces an uphill battle in [his] efforts to prove discrimination . . . in the refusal to grant tenure" (p. 5). In addition, in *Zahorik v. Cornell University* (1984), the court stated, "Indeed, the context and nature of tenure decisions rarely benefit Title VII plaintiffs seeking to prove that a particular tenure decision was influenced by . . . race" (p. 93). This study further indicates that if an institution's reason for their adverse tenure decision is plausible (even if based on poor judgment or business decision), it will not be questioned by the courts (*Lee v. University of Colorado,* 2008).

Additionally, the data indicate that the McDonnell Douglas standard is that most often used to prove discrimination under Title VII. This standard was employed in 95% of the cases involved in this study. Further, analysis revealed the steps within the McDonnell Douglas framework where plaintiffs in this study failed in proving their adverse tenure decisions were based on discrimination. Table 16 presents the outcome of this analysis.

The data suggest that most Title VII tenure denial cases come to rest on the third step of the McDonnell Douglas theory: proving defendant's proffered reason was a pretext for discrimination. Of the 56 cases that included extensive discussions on the proceedings involving the McDonnell Douglas theory, 71% (n=40) of plaintiffs failed this step. Regarding the interpretation and application of the third step of the McDonnell Douglas standard, most courts were of an opinion similar to that of the *Larebo v. Clemson University* (1999) court. This court stated, "When considering whether a

decision to deny tenure was based on an unlawful reason, a plaintiff's evidence of pretext must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously or manifestly unsupported" (p. 1016).

The data further suggest that proving qualification for tenure is also difficult. (This particular burden for the plaintiff falls under step one of the second of four prongs of the McDonnell Douglas theory. Step one is referred to as *prima facie*.) In addition, the data indicate the courts vary in their interpretation of what is required of a plaintiff to

Table 16

Where Plaintiffs Fail in the McDonnell Douglas Theory/Judicial Process

Process	*n*	%
Proving plaintiff was qualified for tenure (*prima facie* element)	14	25
Other steps in *prima facie*	2	4
Proving defendant's proffered reason was pretextual	40	71

prove that she was qualified for tenure. As such, the courts seem to adjudicate under one of three thresholds of proving tenure qualification. Table 17 presents these thresholds.

Research Question No. 9

What remedies do courts award to prevailing parties in Title VII and tenure denial lawsuits? Remedies were awarded in seven cases in this study as presented in Table 18. Plaintiffs were awarded monetary damages in six of the seven cases. The awards granted to plaintiffs in six cases include monetary awards ranging from $15,000 - $511,019 for various combinations of compensatory damages, punitive damages,

attorney's fees, backpay, and benefits. In addition, one plaintiff's institution was enjoined from further sex discrimination. Further, two plaintiffs were granted promotions and tenure. (One plaintiff's tenure was conditioned upon her completing the terminal degree required in her field.) Further still, in one case, a defendant institution was awarded court costs of $3,039.

Table 17

Judicial Thresholds for Proving Qualified for Tenure

Threshold	Case best exemplified
1. A candidate must show something more than "mere qualification," rather, the department must believe that the candidate has a certain amount of promise.	*Sun v. The Board of Trustees of the University of Illinois* (1994, p. 815)
2. In order for a candidate to demonstrate he or she is qualified to be tenured she must show that a significant portion of the departmental faculty, referrants, or other scholars in the particular field held a favorable view on the question as to whether plaintiff is qualified.	*McFadden v. State University of New York* (2002)
3. A candidate need only show that he was in the "middle of the group" of candidates granted and denied tenure.	*Banerjee v. Board of Trustees of Smith College* (1981, p. 63)

As Table 18 illustrates, of the 6 cases won by plaintiff faculty, 67% (n=4) were sex discrimination cases. Further, of the 2 race discrimination cases, one was a reverse race discrimination claim.

Summary

For the purposes of this study I conducted legal, quantitative, and qualitative analyses of 96 federal court cases. These cases are listed in the appendices section as Appendix A.

Table 18

Remedies Awarded

Award recipient	Discrimination type	Plaintiff's race	Plaintiff's sex	Decision year	Remedy awarded
Institution	Sex	N/A	Female	1992	$3,039 court costs (*Lever v. Northwestern*, 1988.1992)
Faculty 1	Sex	N/A	Female	1986	$75,000 compensatory damages (*Goulianos v. Ramapo Coll.*, 1986)
Faculty 2	Race	Non-minority	N/A	1983	$122,180 attorney's fees and expenses (*Planells v. Howard Univ.*, 1983)
Faculty 3	Sex	N/A	Female	1988	$278,000 compensatory and punitive damages *Gutzwiller v. Fenik*, 1986/1988)
Faculty 4	Race	Minority	N/A	1999	$511,019 back pay and benefits *Nagarajan v. Tenn. St. Univ.*, 1999)
Faculty 5	Sex	N/A	Female	1989	$15,000 punitive damages; enjoinment from further sex discrimination; promotion to associate professor; tenure (*Brown v. Trustees of Boston Univ.*, 1989)
Faculty 6	Sex	N/A	Female	1980	Backpay (amount not disclosed); reinstatement; promotion to assistant professor; tenure (conditional upon completion of master's degree) (*Kunda v. Muhlenberg*, 1980)

The quantitative analyses involved statistics (chi-square or Fisher's exact and Cramer's V) applied to determine if statistically significant relationships existed between the independent variables (plaintiff's sex, plaintiff's race, Title VII claim, court level, institution's classification, and case termination period) and the dependent variable (case outcome). The statistics suggest a relationship between court level (U.S. District Court and U.S. Court of Appeals) and case outcome (X^2 (1, N=96) = 7.689, p=.006). Thus, the percentage of cases with a favorable outcome for plaintiffs did differ by court level. The data indicated that plaintiffs were more than likely to win at the U.S. District court level and lose on appeal. The magnitude of the association is .283.

Further, the statistics suggest a relationship between the decision periods (1980s, 1990s, and 2000s) and case outcome (X^2 (2, N=96) = 6.106, p=.047). The magnitude of the association is .252. Thus, the percentage of cases with a favorable outcome for plaintiffs differed by the period in which the case was decided. The data indicated that plaintiffs won more cases during the 1980s as opposed to plaintiffs during the 1990s and 2000s.

However, there was no finding of a relationship between the independent variables of plaintiff's sex, plaintiff's race, Title VII claim, and institution's classification and the dependent variable of case outcomes.

Additionally, this study revealed several findings of practical significance. They were:

1. The proportion of cases won by sex and reverse sex discrimination plaintiffs was similar. Twenty-one percent (21%) of cases were decided in favor of females and 20% were decided in favor of males.

2. The proportion of cases won by race and reverse race discrimination plaintiffs was not similar. Non-minorities won a greater proportion of their cases (25%) than minorities (16%).

3. Plaintiffs were more successful when they claimed both race and sex discrimination (26%) as opposed to sex-only claims (19%) and race-only claims (12%).

4. Plaintiffs at pubic institutions filed a greater proportion of cases (58%). However, public and private plaintiffs were equally successful (18%).

5. Within the decision periods courts decided in favor of plaintiffs more often during the 1980s (31%). Plaintiffs in the 1990s won 12% of cases, and plaintiffs in the 2000s won 10% of cases filed during that period. Further, plaintiffs in the 1980s won a greater proportion of all cases (59%).

6. More cases were decided in favor of plaintiffs at the U.S. District Court level (31%) than the U.S. Appeals Court level (8%).

In addition, the content analyses conducted of the cases included in this study resulted in the emergence of tendencies and themes surrounding the qualitative research questions. Specifically, the plaintiffs' allegations/evidence of discriminatory behavior/ conduct on the part of defendant institutions tended toward 11 categories. (Plaintiffs usually made more than one allegation.) They consisted of the following:

1. Procedural irregularities (42%)

2. Unfair/unjust scrutiny of work/performance (34%)

3. Held to a different/higher standard than peers (30%)

4. Retaliation (28%)

5. Negative/offensive remarks/comments made by others (27%)

6. Discriminatory behavior/conduct by others infected/influenced the tenure review process (27%)

7. Harassment/hostile environment (26%)

8. Less/equally qualified peer of a majority race/sex granted tenure (25%)

9. Institution has a pattern of discrimination (21%)

10. Prior positive evaluations were inconsistent with adverse decision (17%)

11. Not advised or counseled on tenure criteria, customs, procedures, or practices (11%).

It is inferred that plaintiffs believed these factors or circumstances were inclusive of discriminatory behavior or conduct by the defendant institution due to plaintiff's race and/or sex, and as such led to plaintiff being denied tenure.

The courts' responses to plaintiffs' allegations/evidence were:

1. Procedural irregularities; prior positive evaluations inconsistent with adverse tenure decision: Court will limit its review to whether the adverse tenure decision was based on a prohibited factor. However, in general, courts frown upon procedural irregularities, ambiguous policies, and inconsistent practices.

2. Unfair/unjust scrutiny of work/performance; held to a different or higher standard; less/equally qualified person of a majority race/sex granted tenure: Absent proof of discrimination courts will not question the soundness or merit of the institution's tenure decision.

3. Negative/offensive remarks/comments; harassment/hostile environment; discriminatory behavior/conduct by others infected/influenced the tenure review process; not advised or counseled on tenure criteria, customs, procedures, practices: Plaintiff must show nexus or causal connection between the comments/remarks/actions/behavior and the tenure denial decision.

4. Institution has a pattern of discrimination: Plaintiff must show that tenure requirements disproportionately, adversely affect a protected group.

5. Retaliation: While claims of retaliation may be brought under Title VII, the complexities of this type proceeding was outside the scope of this study.

The courts' responses to plaintiffs' allegations and other issues relative to tenure were these:

1. Courts place great weight on faculty handbooks in resolving tenure review conflicts and, as such, frown upon ambiguous tenure policies.

2. Collegiality may be considered a valid tenure review criteria as long as it does not serve as a pretext for discrimination.

3. Infected/tainted tenure process: Plaintiff must provide evidence from which an inference may be drawn that the alleged discriminatory actions infecting/tainting the process were relied upon by the tenure decision makers; or, can be attributed directly to a decision maker.

4. Courts place great weight on the peer review process. However, this process should not be used as a subterfuge for discrimination.

Additionally, this study indicates the courts' response to Title VII and tenure denial within the judicial process and procedures framework rested upon the plaintiffs'

ability to prove discrimination under the McDonnell Douglas theory. In general, courts intimate that proving discrimination in tenure cases is difficult for Title VII plaintiffs. Specifically, the data in this study indicate that when it came to proving discrimination, the majority of plaintiffs (71%) failed to prove that the defendant's proffered reason for the defendant's adverse tenure decision was a pretext for discrimination. Or, plaintiffs failed to prove they are qualified for tenure in 25% of the cases involved in this study. In either situation, the results of these failures were that plaintiffs did not prevail in their lawsuits.

When interpreting and applying the standards within which a plaintiff must prove tenure qualifications, the courts appeared to operate under one of three thresholds. A plaintiff must show: not only "mere qualification," but, "promise" as well; or, that a significant number of peers or other scholars held a favorable opinion of plaintiff's qualifications; or, that he/she was in the "middle of the group" of candidates granted and denied tenure.

Of those plaintiffs who prevail, the data suggest that remedies involving tenure denial lawsuits can range from compensatory/punitive damages to tenure (or, a combination). Monetary remedies awarded plaintiffs in this study ranged from $15,000 - $511,019 in compensatory/punitive damages. In addition, two plaintiffs were awarded tenure. Further, in one case, a defendant institution was awarded $3,039 in court costs.

CHAPTER FIVE

DISCUSSION OF FINDINGS, CONCLUSIONS, AND SUGGESTIONS FOR FUTURE RESEARCH

This chapter is organized into four sections. I will first discuss the findings of this study in light of the literature and the cases involved. Second, I will discuss the conclusions. Third, I will provide suggestions for future research, and last, I will offer suggestions to institutions on how they may diminish, mitigate, or avoid tenure denial lawsuits.

Discussion of Findings

This study involved the statistical and content analyses of 96 published federal court cases filed by faculty in higher education who were denied tenure based on sex and/or race discrimination under Title VII of the Civil Rights Act of 1964 (as amended). These cases terminated in the courts during the years 1980 through 2007. The claims composition of these cases were 45% sex discrimination claims (including five reverse sex discrimination claims), 35% race discrimination claims (including eight reverse race discrimination claims), and 20% combination race and sex discrimination claims. The majority of the claims were sex discrimination claims. This finding is in keeping with that of the United Educators' study referenced by Franke (2000), where the majority (53%) of tenure denial claims studied during 1987–1998 was based on sex

discrimination. As well, it supports O'Neal's (1992) contention that among litigation activity, sex discrimination is the most prolific on college campuses.

Defendant institutions prevailed in 82% of all cases in this study. As suggested by the data, very few plaintiffs prevail in their Title VII tenure denial lawsuits. This finding is consistent with a study of discrimination lawsuits brought between 1972 and 1986 by faculty denied tenure that found that plaintiffs won on the merits only about 20% of the time (LaNoue & Lee, 1987).

Statistical and Practical Findings

The literature is replete with studies and discussions on judicial deference toward higher education institutions. Even so, an overarching question in this study was: Given the ubiquitous principle of deference, are there certain characteristics that might impact the outcome of a case? Statistical analyses conducted for the purposes of this study suggested that, for the most part, plaintiff/case characteristics (independent variables) do not appear to have an impact on case outcomes (dependent variables). Specifically, there was no statistically significant relationship between plaintiff's characteristics (race or sex), case characteristics (claim of race discrimination, sex discrimination, or race and sex discrimination), higher education classification (public or private), and case outcomes. In other words, the findings indicated that neither plaintiff's race nor sex influenced the outcomes of the cases involved in this study. As well, case outcomes were not influenced by whether the case was a race discrimination claim, sex discrimination claim, or a combination; or whether the defendant institution was private or public.

However, the data suggested two exceptions. One exception was the statistics that suggested a statistically significant relationship between the decision period (1980s,

1990s, and 2000s) and case outcome. This relationship may be attributed to the finding in this study that during the 1980s plaintiffs were more successful than 1990s or 2000s plaintiffs. Overall, 1980s plaintiffs won 59% of all cases won by plaintiffs in this study. This relationship finding between decision period and case outcome is supported by Frost (1991) and Leap (1995b) who asserted that the 1980s were a period during which the courts appeared to depart from the doctrine of judicial deference toward institutions of higher education. However, Leap (1995b) further asserted that courts' rulings during the 1980s were only a temporary departure from the norm. My study was consistent with this postulation as well. It suggested a downward trend of fewer cases won by plaintiff during the 1990s and 2000s. Specifically, within their respective decision periods 1980s plaintiffs won 31% of cases, 1990s plaintiffs won 12%, and 2000 plaintiffs won 10%.

The other exception was the statistics that suggested a statistically significant relationship between court levels and case outcomes. It is posited that the relationship between court levels and case outcomes may be attributed to another of this study's findings that plaintiffs have a higher success rate at the U.S. District Court level. For example, the data suggested plaintiffs have a better chance of winning at the U.S. District Court level as opposed to the U.S. Appeals Court level. In other words, plaintiffs were more likely to lose on appeal. For example, plaintiffs won only 8% of cases in the U.S. Court of Appeals. In contrast, plaintiffs won 31% of cases at the U.S. District Court level.

Further examination of the findings of the statistically significant relationships between court level and case outcomes and decision period and case outcomes was outside the scope of this study. As such, future research is warranted and suggested.

While this study did not find statistically significant relationships between plaintiffs' sex or race and case outcomes, the data suggested related practical findings of interest. The data indicated that plaintiffs who filed reverse race discrimination cases won a greater proportion of those cases than their nonminority counterparts. For example, of the 53 race discrimination cases, 85% involved minorities who won 16% of their cases, while non-minorities won 25%. This finding is similar to those of Baez and Centra (1995), LaNoue (1981), and LaNoue and Lee (1987) that indicate White faculty who file discrimination lawsuits against historically Black colleges and universities are more likely to prevail than their minority peers who file similar lawsuits against predominantly White institutions. Further, analysis and examination of the extent, if any, and nature of a relationship between reverse race discrimination claims and case outcomes were outside the scope of this study. As such, they are worthy of future research.

Unique to this study was the finding that when it comes to reverse sex discrimination cases, female and male plaintiffs won in similar percentages: 21% for females who filed sex discrimination claims and 20% for males who filed reverse sex discrimination claims. As well, this study indicated that plaintiffs who claimed combination race and sex discrimination were more successful than those who claimed race-only or sex-only discrimination. Race and sex discrimination plaintiffs won 26% of cases, while sex-only plaintiffs won 19% and race-only plaintiffs won 12% of their cases.

Furthermore, even though this study showed no statistically significant relationship between an institution's status as private or public and case outcomes, there was another finding unique to this study: While plaintiffs at public institutions filed a

greater proportion of the cases involved in this study (58%), their success was equal to their peers at private institutions: both won 18% of their cases. This finding also provides fodder for future research.

Plaintiffs' Allegations and the Courts' Response

The results of the analyses conducted for this study suggested that faculty who were denied tenure based their Title VII sex and race lawsuits on a variety and number of allegations and evidence. In keeping with the traditions of legal and qualitative research approaches, and because the literature is scarce in this specific area of my study, I discuss the findings of this topic below, buttressed with examples from the cases involved in this study.

Forty-two percent (42%) of plaintiffs accused defendants of procedural irregularities. This category included such conduct as omitting materials from plaintiff's tenure file (*Elghanmi v. Franklin College*, 2000); not following procedures regarding the selection of members of plaintiff's tenure review committee (*McFadden v. State University of New York*, 2002); "solicitation of a secret outside reader" whom plaintiff had previously objected (*Manning v. Trustees of Tufts College*, 1980, p. 1203); and granting tenure to plaintiff's peer who did not possess a policy-dictated terminal degree (*Cooper v. St. Cloud State University*, 2000). This study indicated courts frown upon procedural irregularities. However, absent proof of discrimination the courts will not question the soundness of a tenure decision and will limit its inquiry to the question at hand. For example, in *Manning v. Trustees of Tufts College* (1980), even though plaintiff did not sustain her burden of proving discrimination, the court expressed its concern with the procedures that led to the denial of plaintiff's tenure application.

The courts have also responded to a related issue: ambiguous tenure policies and procedures. This study indicated that courts also frown upon this practice. Case in point, the court said, "The purpose of policy regarding tenure should be to avoid problems, not to create them" (*Carton v. Trustees of Tufts College*, 1981, p. 10). Further, when resolving tenure disputes the courts place great weight on defendants' policies and procedures as outlined in their faculty handbooks (*Carton v. Trustees of Tufts College*, 1981/1982). The data in this study suggested that courts referred to a college/university's faculty handbook and/or other written guidelines in 59% of the cases. If the courts found handbooks or guidelines too ambiguous, they referred to an outside source such as the AAUP in 11% of the cases.

Regardless of the nature or condition of a defendant's policies, procedures, or guidelines, 11% of plaintiffs claimed they were not advised or counseled on tenure criteria, customs, procedures, or practices. For example, the plaintiff in *Johnson v. Michigan State University* (1982) claimed she "was never given any goals, guidance, objectives or directions as to what she should do to obtain tenure" (p. 430). The data indicated the courts' stance on this type of allegation is plaintiffs' must show a causal connection between the allegation and the adverse tenure decision. For example, in the case of *Kunda v. Muhlenberg* (1980) plaintiff proved that her college did not counsel her, as it did her male peers, on the necessary requirement of a terminal degree in order to be granted tenure and that this disparity in treatment led to her being denied tenure.

Plaintiffs involved in the cases studied also alleged they were subjected to unfair/unjust scrutiny of their work/performance (34%) or held to a different or higher standard (30%) than their peers. One plaintiff stated, "One of the main problems women

in my profession have is that they are frequently put under a microscope, in a way that men often are not" (*Brown v. Trustees of Boston University*, 1989, p. 344). Another alleged the defendant "used a higher standard to test [his] scholarship than had previously been used" (*Banerjee v. Trustees of Smith College*, 1981, p. 62). This study indicated that when it comes to these issues the courts will usually remain focused on the question at hand and not the soundness or merit of the adverse tenure decision. This stance is best captured in *Zahorik v. Cornell University* (1984) where the court stated, "Triers of fact cannot hope to master the academic field sufficiently to review the merits of such view and resolve the difference of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within the universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited" (p. 85).

Further, 28% of plaintiffs claimed their adverse tenure decisions were in retaliation for, for example: Participating in activities in support of faculty and staff of color (*Tademe v. St. Cloud State University*, 2003); associating with a male colleague who had earlier filed a sex discrimination claim against the university (*Hedrich v. The Board of Regents of the University of Wisconsin*, 2000/2001); or, efforts to improve the status of women at the university (*Lieberman v. Gant*, 1979/1980). Although claims of retaliation may be made under Title VII, they involve different and sometimes separate procedures and proceedings by the courts. As such, the courts' stance on retaliation was outside of the scope of this study. However, it is worthy of future research.

Plaintiffs further alleged they were subjected to negative/offensive remarks/comments (27%) or a hostile or harassing environment (26%). In the case of

Sawicki v. Morgan State University (2006) plaintiff said that her tenure review committee was "composed of members . . . hostile to her as a white woman" (p. 278). In another case plaintiff alleged that an administrator "made knowingly false and defamatory statements" concerning her qualifications as a scholar (*Sunshine v. Long Island University*, 1994, p. 27). When it comes to negative/offensive remarks/comments (also known as "stray remarks") the courts' response has been that a plaintiff must show nexus or causal connection between the comments/remarks/treatment and tenure denial (*Kyrstek v. University of Southern Mississippi*, 1999).

Further, 27% of plaintiffs alleged discriminatory conduct infected/tainted their tenure review. In the case of *Rosado v. Virginia University* (1996), plaintiff said that a member of her tenure review committee "sabotaged" her chances for tenure because he "harbored [unrequited] romantic and sexual feelings" for her (p. 934). The court's response to this type of allegation has been similar to that regarding stray remarks: Plaintiffs must show nexus or causal connection between the discriminatory conduct and the negative tenure decision in order to prove that the conduct tainted the tenure review process (*Cuenca v. University of Kansas*, 2003).

Twenty-five percent (25%) of plaintiffs said that peers less or equally qualified and of majority sex or race were granted tenure. Case in point, plaintiff Reid said she "was denied tenure even though she was more qualified than males and non-minorities who have been granted tenure" (*Reid v. University of Michigan*, 1985, p. 324). This study indicated that the courts' response to this issue is similar to their response to plaintiffs' allegations of being held to different standards or subjected to scrutiny. The

courts will defer to the judgments of defendants on who is qualified and who is not qualified for tenure (*Zahorik v. Cornell University,* 1984).

Further still, 21% said that their institutions perpetuated a pattern or history of discrimination. For example, one plaintiff said, "Defendants have not hired a single Black applicant tenure track position at the School of Nursing since 1986" (*Davis v. City of University of New York*, 1996, p. 2). This type of allegation indicates a claim of disparate impact. According to the court, in order to prevail under the disparate impact theory, plaintiffs must show that the "tenure requirements [per se] resulted in a disproportionate failure for [protected] applicants" (*Carpenter v. University of Wisconsin*, 1984, p. 914). In response to plaintiff's showing, defendant must show the "job relatedness" of the criteria in question. The plaintiff must then show that there is alternative criteria that could be adopted by the defendant that would not have an adverse impact on applicants. "Such a showing would be evidence that the employer was using its tests merely as a pretext for discrimination" (*Carpenter v. University of Wisconsin*, 1984, p. 914).

Plaintiffs also claimed that the probationary evaluations they received prior to their tenure review were positive and, thus, inconsistent with the adverse tenure decision (17%). For instance, Byrne said that her "annual reviews were positive and there was nothing to indicate that [I] would be denied tenure" (*Byrne v. Washington State University*, 2007, p. 2). This study indicated that these allegations may be due to a defendant's ambiguous policies or procedures, procedural irregularities, or plaintiff not being counseled on tenure criteria. In any event, given this type of allegation the court

will "limit its judicial review to whether the tenure decision was based on a prohibited factor" (*Brousard-Norcross v. Augustana College*, 1991, p. 976).

It is postulated that the negative impact of an adverse tenure decision may be the overall reason for litigation by faculty in higher education. Case in point, Greenberg (1998) posits, "When you've been denied tenure, it's hard to avoid both the suspicion that someone has wronged you and the desire to vindicate yourself" (p. 30). In addition, Curkovic (2000) intimates that much is at stake for faculty who are denied tenure. Not only do these faculty lose their job altogether, they also may suffer a stigma of being unworthy. This reputation could negatively affect their future employment in academia. Curkovic (2000) further postulates that the negative impact of an adverse tenure decision is one reason for the increase in litigation in higher education.

The Courts' Response to Proving Discrimination in Tenure Lawsuits

The content analyses conducted for the purposes of this study resulted in the emergence of a theme related to the courts' response to proving discrimination in Title VII tenure denial lawsuits.

The McDonnell Douglas standard is a typical judicial procedure in Title VII cases under which plaintiffs must prove discrimination (Hamill, 2003; Kaplin & Lee, 2006; Leap, 1995b; Troxel, 2000). As an example, 95% of the cases in this study involved the disparate treatment theory, ergo the McDonnell Douglas standard. The McDonnell Douglas standard is a burden-shifting procedure of the order in which plaintiffs and defendants present evidence and information to the court. It involves the following:

1. Plaintiff must establish *prima facie*, by

a. establishing that she belongs to a class protected by the statute

b. showing that she was a candidate for tenure

c. showing that she was qualified for tenure under institution's standards, practices or customs

d. showing that despite her qualifications, she was denied tenure.

2. Defendant must then proffer a nondiscriminatory reason for the adverse tenure denial decision.

3. Plaintiff must prove that defendant's proffered reason is a pretext for discrimination (*Hooker v. Tufts University*, 1983).

The analyses conducted for this study indicated that discrimination is difficult to prove under the McDonnell Douglas standard. Case in point, 25% of plaintiffs in this study failed to establish *prima facie* by showing that they were qualified for the tenure denied (step 1.c.). Further, this study found that the courts operated under one of three thresholds when it came to a plaintiff proving tenure qualifications. The thresholds are: A plaintiff must show: (a) not just "mere qualification," but, "promise" as well, or, (b) that a significant number of peers or other scholars held a favorable opinion of plaintiff's qualifications, or, (c) that he/she was in the "middle of the group" of candidates both granted and denied tenure.

If plaintiffs managed to overcome step 1 (or, establish *prima facie*) of the McDonnell Douglas standard, the defendant institution had to provide the court with a reason for its adverse tenure decision. The burden then shifted to the plaintiff to prove that defendant's proffered reason was actually a pretext for discrimination. In order to

prove pretext the court has stated, "The plaintiff meets this burden by demonstrating: (1) that the given reason has no basis in fact; (2) that the given reason is not the actual reason; or (3) that the given reason is insufficient to explain the defendant's unfavorable treatment of the plaintiff. Importantly, however, a plaintiff must show not only that the given reason is false, but also that discrimination was the real reason" (*Javetz v. Grand Valley State*, 1995, p. 1187). The data suggested that 71% of plaintiffs in this study failed this step (step 3).

The courts' stance on Title VII, tenure, and proving pretext is best exemplified in the case of *Lee v. University of Colorado* (2008). The court stated,

> Under the McDonnell Douglas framework, in evaluating pretext evidence, the relevant inquiry is not whether the employer's reasons were wise, fair or correct; it is whether the employer honestly believed its reasons and acted in good faith upon them. Thus, a court must consider the facts as they appeared to the person making the decision, and a court will not second-guess the employer's decision even if it seems in hindsight that the action taken constituted a poor business judgment. The reason for this rule is plain: our role is to prevent intentional discriminatory hiring practices. (p. 3)

Further, this study revealed that even if a plaintiff successfully established pretext, the courts did not see this as an automatic decision in plaintiff's favor. Rather, this factor "may enter into the calculus for determining [the] conclusion [of discrimination]" (*Jiminez v. Mary Washington College*, 1995, p. 369).

In most cases, the defendant institution's legal response to the type of cases involved in this study was to request summary judgment. Defendants usually based this request on the premise that plaintiff cannot carry the required initial burden of proving discrimination. This initial burden as applied to this study means to establish *prima facie* and/or pretext. Summary judgment involves a request that the case not be taken to trial and that the court rules in favor of the defendant because there is no material issue of fact.

Summary judgment was granted to defendants by the courts in 75% of the cases involved in this study.

The overall outcome of cases involved in this study was that 82% were won by defendant institutions.

Remedies

The purposes of court-ordered remedies in employment discrimination lawsuits involving tenure "is to discourage discriminatory behavior by peer review committees, department heads, deans, and other college officials . . . [and to provide] the victim of discrimination . . . [with] sufficient relief from or compensation for the discriminatory acts" (Leap, 1995b, p. 180). Remedies awarded in this study are discussed in light of the literature and cases involved.

Remedies were awarded in 7 cases involved in this study. Monetary remedies ranged from $3, 039 to $511,019. Court costs were awarded to a defendant institution in one case ($3,039). The awardees in the other cases were plaintiffs. Damages awarded to plaintiffs ranged from $15,000–$511,019. In addition, other remedies awarded to plaintiffs in this study included enjoinment of the institution from further sex discrimination, reinstatement, promotion, and tenure. In one case, even though the plaintiff won, no remedy was awarded by the court because "there was no showing of entitlement to punitive damages where plaintiff availed himself of extensive grievance process that considered his complaint of unlawful discrimination" (*Elghanmi v. Franklin*, 2000, p. 1).

The data suggested that back pay and/or reinstatement will only be granted if the court determines that, but for discrimination, the plaintiff would be granted tenure. Such

was the case in *Kunda v. Muhlenberg* (1980) in which the court granted relief "in an attempt to place plaintiff in the financial position she should have been 'but for' the unlawful discrimination which occurred when she was denied promotion and tenure" (p. 532). The data further suggested that while the awarding of compensatory damages, punitive damages, and even attorney's fees as remedies are not uncommon in higher education employment discrimination litigation, awards of tenure are rare.

This study indicated the awarding of tenure has been considered appropriate if the courts determined that, given the circumstances of the case and the founded basis of discrimination, there were no other alternatives to make the plaintiff whole but to award her tenure, as was the determination in *Brown v. Trustees of Boston University* (1989). This case represents the first time a federal appellate court examined and unconditionally approved tenure for a faculty plaintiff (Brown was also awarded compensatory damages totaling $215,000). The court stated that court-awarded tenure should be "provided in only the most exceptional cases, [and] only when the court is convinced that a plaintiff's reinstatement to her former faculty position could not receive fair consideration . . . of her tenure application" (*Gutzwiller v. Fenik*, 1988, p. 1319). However, further indicated by this study is when the courts felt that the plaintiff would receive a fair reevaluation it ordered the institution to do so and did not itself award the faculty member tenure (*Pyo v. Stockton State College*, 1985).

Regardless of the outcome of a tenure denial lawsuit, the costs of defending against claims of discrimination can be financially substantial. For example, Cornell University spent more than $2.5 million defending against a claim of sex discrimination in the case of *Zahorik v. Cornell University* (1984). This does not include the $250,000

settlement Cornell eventually agreed to pay (Association of University Women Educational Foundation, 2004). According to Abel (1981), most cases are dropped at a relatively early stage or settled out of court. LaNoue and Lee (1990) concur. For example, in a study conducted by the American Association of University Women Educational Foundation Legal Advocacy Fund (AAUWEFLAF, 2004), of the 19 cases involved, 7 were settled out of court. The AAUWEFLAF attributes an institution's willingness to settle out of court to its desire to avoid unwanted publicity and legal costs. Additionally, for institutions the loss in potential fundraising due to the negative publicity surrounding allegations of discrimination may be significant (Goonen & Blechman, 1999; LaNoue & Lee, 1987, 1990; Poskanzer, 2002). As such, my study should be kept in perspective as the published cases involved represent a portion of aggrieved faculty complaints or lawsuits.

For faculty, the financial burden of litigation can be significant. Some have had to either drop their cases or make sacrifices to fund the litigation over a number of years. LaNoue and Lee (1987) found faculty plaintiffs involved in their study incurred court costs ranging from "a few thousand" to "actual legal fees of over $2,000,000."

The data for my study further indicated that there are intangible costs of litigation such as the vast amount of time that lawsuits consume. For example, the case of *Lever v. Northwestern University* (1988/1992) was terminated 13 years after the incident occurred that compelled the filing of the lawsuit. Further, *Fisher v. Vassar* (1994/1995/1997) was terminated almost 10 years after Fisher filed a complaint with the New York Division of Human Rights. In support of this finding one researcher said, "To prepare the case, both sides must spend countless hours combing paper and electronic records for relevant

material, drafting answers to formal written questions, and rehearsing and giving deposition testimony" (Franke, 2000, p. B6).

Further, the literature suggested litigation may take an emotional toll on those involved, academic departments may be splintered, and institutions might encounter negative publicity and morale problems (Goonen & Blechman, 1999). Further, institutions might experience strained public relations, loss of productivity of faculty involved in litigation as defendants or witnesses, and divisiveness on campus (LaNoue & Lee, 1990). As well, "some institutions find that faculty peer committees and academic administrators become reluctant to make negative employment recommendations for fear of sustaining another lawsuit" (LaNoue & Lee, 1990, p. 3). Further still, discrimination litigation might bring public embarrassment to the institutions if certain information of wrong doings is revealed during trial. These revelations might negatively impact community support and student recruitment. According to Poskanzer (2002), institutions seldom welcome this type of publicity and, as a result, would prefer not to go to court.

For the faculty plaintiff, a trial might bring to light his or her purported deficiencies. In addition, relationships with peers and colleagues might become strained and prospects for future jobs in academia may be impaired (Franke, 2000; LaNoue & Lee, 1987; Poskanzer, 2002).

Whether or not plaintiff faculty or defendant institutions feel litigation is worth its tangible and intangible costs depends upon the motivation for the lawsuit. For those plaintiffs who want to expose injustice, or, who feel that the negative tenure decision will derail their career in academia, they might feel there is no other choice but to file a

lawsuit in order to save their career (LaNoue & Lee, 1987; Poskanzer, 2002). For defendants, it may be a matter of defending their reputation.

Conclusions

The analyses conducted for the purposes of this study led to the conclusions discussed in this section. As a result of these analyses the following conclusions were drawn:

1. Plaintiffs tend to present numerous and varied allegations/evidence of discrimination in their lawsuits. Allegations/evidence tends to center around the themes of procedural irregularities, ambiguous policies, disparate treatments, and hostile environments.

2. Courts' general response to plaintiffs' allegations/evidence is that, absent proof that the adverse tenure decision was based on a prohibited factor, the courts will not question or scrutinize the soundness or merit of an institution's decision. As well, plaintiffs must show nexus or causal connection between their allegation/evidence and the tenure decision. Regardless of the outcome of a case, the courts do frown upon procedural irregularities, ambiguous policies, disparate treatment, and egregious misconduct and as such may admonish an institution for engaging in such.

3. Most plaintiffs lose their lawsuits because they either fail to show they were qualified for tenure or that the defendant's proffered reason for denying them tenure was a pretext for discrimination. If the defendant's proffered reason for tenure denial seems plausible (but not necessarily good judgment) the courts will not question it, demonstrating that the burden of proof under the McDonnell Douglas theory is much easier for institutions than for faculty.

4. Plaintiffs tend to be more successful when they claim both race and sex discrimination.

5. Case outcomes appear to be influenced by court level. This may be attributed to plaintiff's higher success rate at the U.S. District court level as opposed to the U.S. Appeals court level. In other words, plaintiffs are more likely to lose on appeal.

6. Case outcomes are not influenced by plaintiff's race or sex. However, regarding reverse discrimination lawsuits, White plaintiffs who file reverse race discrimination lawsuits against historically Black colleges and universities are more likely to prevail than their minority peers who file similar lawsuits against predominantly White higher education institutions. Further, male reverse sex discrimination plaintiffs appear to win lawsuits at a similar percentage as female sex discrimination plaintiffs.

7. The courts, during the 1980s, appear to have held a moratorium on their standard practice of judicial deference as more plaintiffs during that period prevailed at a much higher rate than plaintiffs during the 1990s and 2000s. However, since the 1980s the courts' pendulum of deference toward higher education seems to have swung back in the direction of and in keeping with their standard practice of deference.

8. Regardless of who wins or loses a Title VII lawsuit based on tenure denial, the costs can be substantial for both the faculty and institution. Both sides experience tangible (i.e., compensatory/punitive damages, back pay, court costs, attorney's fees, promotion, tenure, etc.) and intangible (i.e., time, damaged reputation, public embarrassment, decreased productivity, morale, etc.) costs.

9. Institutions should realize any adverse tenure decision may result in a lawsuit.

Further conclusions are also discussed in the context of recommendations and are presented in the Recommendations for Higher Education Administrators and Decision Makers section of this chapter.

Suggestions for Future Research

Suggestions for future research are derived from statistical and serendipitous findings from this study that were outside its scope. These findings provide fodder worthy of further analysis and examination. As such this research will advance the studies of tenure, Title VII, and the courts.

It is suggested that future research analyzes and compares the findings of a relationship between judicial venues (i.e., federal, state) and case outcomes. Moreover, an examination of the outcomes of court decisions by the 12 federal regional circuit courts involving Title VII and tenure decisions may provide additional insight.

It is also suggested that cases involving reverse race discrimination, tenure, and Title VII be examined further. Another area of future research may be an in-depth analysis and comparison of the relationship between specific time periods and case outcomes.

Research that analyzes case outcomes of Title VII litigation in higher education (involving tenure) compared to Title VII litigation involving employment discrimination in the corporate arena is also suggested.

Further, it is suggested that research examines faculty tenure denial cases that are settled out of court and/or the impact of arbitration on tenure cases.

suspicion of discrimination and to ensure that committee members' recommendations are sound, fair, and nondiscriminatory.

5. Advise all tenure-track faculty of university-level and departmental-level tenure policies, criteria, requirements, and review procedures early in their career.

6. Evaluate tenure-track faculty regularly during the probationary period so as to inform them of progress toward requirements. Document all evaluations.

7. Maintain and retain all probationary evaluations and tenure review files. Be sure to include all appropriate review materials.

8. Encourage sensitive and professional interaction during the terminal year between the unsuccessful candidate and his/her colleagues.

Awareness and Professional Development:

9. Ensure that all decision makers involved in the tenure review process (including grievance/appeals committee members) are knowledgeable of all tenure policies and review procedures.

10. Ensure that all decision makers, grievance/appeals committees, and search committees are familiar with employment discrimination laws, including retaliation.

11. Provide professional development opportunities for all faculty on the topics of discriminatory harassment, sexual harassment, cultural competency, retaliation, and conducting effective employment searches.

Colleges and universities may not see the need to review and possibly change their tenure review criteria, processes, and practices because of their overwhelming success in the courts. Although judicial deference toward higher education institutions is well documented, institutions have still lost important decisions resulting in "significant

financial, organizational, and political impacts" (LaNoue & Lee, 1990, p. 1). This suggests that it would be in the best interests of higher education institutions to be proactive in designing, assessing, revising (if necessary), and communicating its employment practices.

In 1973, W.O. Schultz II stated that faculty and administrators should be forewarned and carefully review institutional procedures, especially those that deal with appointment, termination, and non-renewal. Thirty plus years later, higher education administrators should still heed Schultz's warning. Adopting the above recommendations can assist universities in doing so.

Closing

This study involving federal court case outcomes analyses is unique in its comprehensiveness. It brings together legal, quantitative, and qualitative methodologies to analyze litigation within the realm of higher education. Contributing further to its uniqueness is the application of this combination of methodologies to litigation involving discrimination and tenure.

Despite their overwhelming litigation success, it is important that higher education administrators and decision makers become more knowledgeable of the relationship between their faculty, institution, and the courts as there are tangible and intangible costs associated with discrimination lawsuits regardless of the case outcome. Furthermore, as the *Pyo v. Stockton State College* (1985) court stated, "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . . Discrimination in educational institutions is especially critical. . . . To permit discrimination here, more than in any other area, would

tend to promote misconceptions leading to future patterns of discrimination" (p. 1281) As a result, there exists a need to continuously review, analyze, and update research in this area.

The case law and cases involved in this study provide a rich source of information about the interplay between the courts, faculty, and higher education institutions regarding discrimination lawsuits involving Title VII and tenure. Thus, this study provides insight as to how faculty tenure denial lawsuits may be understood so that they can also be diminished, mitigated, or avoided.

APPENDICES

APPENDIX A

STUDY CASE LIST

STUDY CASE LIST

Al-Khazraji v. St. Francis College, 523 F.Supp. 386 (W.D. Pa. 1981), *rev'd* 784 F.2d 505 (3d Cir. Pa. 1986).

Aquilino v. Univ. of Kan., 83 F.Supp. 2d 1248 (D. Kan. 2000).

Atkinson v. Lafayette College, No. CIV.A. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. July 24, 2003), *aff'd* 460 F.3d 447 (3d Cir. Pa. 2006).

Babbar v. Ebadi, 36 F.Supp. 2d 1269 (D.Kan. 1998).

Banerjee v. Board of Tr. Smith College, 495 F.Supp. 1148 (D. Mass. 1980), *aff'd* 648 F.2d 61 (1st Cir. 1981), *cert. denied* 454 U.S. 1098 (1981).

Batra v. Pace Univ., No. 90 CIV. 4315(DAB), 1998 WL 684621 (S.D.N.Y. September 29, 1998), *aff'd* 182 F.3d 898 (2d Cir. N.Y. 1999).

Brousard-Norcross v. Augustana College, 935 F.2d 974 (8th Cir. S.D. 1991).

Brown v. Tr. of Boston Univ., 674 F.Supp. 393 (D. Mass. 1989), *aff'd in part, vacated in part*, 891 F.2d 337 (1st Cir. Mass. 1989), *cert. denied* 496 U.S. 937 (1990).

Byerly v. Ithaca College, 290 F.Supp. 2d 301 (N.D.N.Y. 2003), *aff'd* 113 Fed. Appx. 418 (2d Cir. N.Y. 2004).

Byrne v. Wash. St. Univ., No. CV-03-246-RHW, 2007 U.S. Dist. LEXIS 65412 (E.D. Wash. September 5, 2007.

Carpenter v. Board of Regents Univ. of Wis., 529 F.Supp. 525 (W.D. Wis. 1982), *aff'd* 728 F.2d 911 (7th Cir. Wis. 1984).

Carter v. Dela. St. Univ., No. 99-642 GMS, 2002 U.S. Dist. LEXIS 3116 (D. Dela. February 27, 2002), *aff'd* 65 Fed. Appx. 397, 2003 U.S. App. LEXIS 7219 (3d Cir. Dela. 2003).

Carton v. Tr. of Tufts College, No. 74-3099-MC, 1981 WL 128 (D. Mass. February 20, 1981), *aff'd* 685 F.2d 421 (1st Cir. Mass. 1982).

Chambers v. Ind. St. Univ., No. TH 98-8 CM/H, 2000 WL 33309741 (S.D. Ind. March 8, 2000).

Clinger v. New Mexico Highlands Univ., 215 F.3d 1162 (10th Cir. N.M. 2000), *cert. denied* 513 U.S. 1145 (2000).

Cooper v. St. Cloud St. Univ., 226 F.3d 964 (8th Cir. Minn. 2000).

Cuenca v. Univ. of Kan., 265 F.Supp. 2d 1191 (D. Kan. 2003), *aff'd* 101 Fed. Appx. 782 (10th Cir. Kan. 2003), *cert. denied* 543 U.S. 1089 (2005).

Davis v. City Univ. of N.Y., No. 94 CIV. 7277 (SHS), 1996 WL 243256, at*8 (S.D.N.Y. May 9, 1996).

Day v. Cleveland St. Univ., 57 F.3d 1069 (6th Cir. Ohio 1995).

Dobbs-Weinstein v. Vanderbilt Univ., 1 F.Supp. 2d 783 (M.D. Tenn 1998), *aff'd* 185 F.3d 542 (6th Cir. Tenn. 1999).

Edelman v. Lynchburg College, 66 F.Supp. 2d 777 (W.D. Va. 1999), *aff'd* 300 F.3d 400 (4th Cir. Va. 2002).

Elghanmi v. Franklin College, No. IP 99-879-C-H/G, 2000 U.S. Dist. LEXIS 166667 (S.D. Ind. October 2, 2000).

Fabunmi v. Univ. of Maryland, 172 F.3d 862 (4th Cir. Md. 1999).

Falcon v. Tr. of the State Colleges in Colo., 216 F.3d 1087 (10th Cir. Colo. 2000).

Faulkner-King v. Univ. of Ill., 757 F.Supp. 951 (C.D. Ill. 1991), *aff'd* 951 F.2d 352 (7th Cir. Ill. 1992).

Fields v. Clark Univ., No. 80-1011-5, 1986 U.S. Dist. LEXIS 28162 (D. Mass. March 14, 1986), *aff'd* 966 F.2d 49 (1st Cir. Mass. 1992).

Fisher v. Vassar College, 852 F.Supp. 1193 (S.D.N.Y. 1994), *aff'd in part, rev'd in part, vacated in part* 66 F.3d 379 (2d. Cir. N.Y. 1995), *cert. denied* 522 U.S. 1075 (1998).

Goyal v. University of Minnesota, No. COV03-5484(JNE/FLE), (D. Minn. July 22, 2005).

Gresham v. Memphis St., 62 F.3d 1417 (6th Cir. Tenn. 1995).

Goulianos v. Ramapo College, No. 82-3129, 1986 U.S. Dist. LEXIS 23141 (D.N.J. July 8, 1986).

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APPENDIX B

LITIGATION DOCUMENT FORM

LITIGATION DOCUMENT FORM				
	Case Identification Numbers			
Case Information	1	2	3	4
Plaintiff's Race				
Plaintiff's Sex				
Title VII Claim				
Legal Theory				
Court Level				
Decision Yr.				
Institution's Category				
Case Outcome				
Remedy				
Summary Judgment				
Defendant's Decision Reason				
Did Plaintiff Estab. PF				
Where Plaintiff's Failed PF				
Plaintiff's Alleg/Evid. #1				
Plaintiff's Alleg/Evid. #2				
Plaintiff's Alleg/Evid. #3				
Plaintiff's Alleg/Evid. #4				
Plaintiff's Alleg/Evid. #5				
Court's View #1				
Court's View #2				
Court's View #3				
Court's View #4				
Court's View #5				
Comment(s)				

Note: Modified to suit the purposes of this study.

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