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# Chalk Talk

## CONFIDENTIALITY OF TENURE REVIEW FILES AFTER UNIVERSITY OF PENNSYLVANIA v. EEOC

BRUCE STUCKMAN

A recent Supreme Court case, *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), has addressed the issue of confidentiality of university tenure review documentation in cases of alleged discrimination. This article will discuss this and the extent that tenure review material can be subject to disclosure. The requirements and safeguards of the Civil Rights Act will be discussed as well as specific procedures that the Commission must follow to subpoena information. The purposes of the regulations and their possible effects on the tenure review process will briefly be presented.

In *University of Pennsylvania*, the university denied tenure to a female professor of Asian descent. The professor brought charges with the Equal Employment Opportunity Commission (EEOC) claiming a violation of the Civil Rights Act of 1964. She alleged that her department chairman submitted a negative evaluation letter to the University Personnel Committee with regards to her tenure after she rebuffed his sexual advances. As proof, she alleged that her qualifications were equal or better than that of five male professors who had received more favorable treatment.

The EEOC began an investigation of the professor's charges. As a part of this investigation, the Commission issued a subpoena forcing the disclosure of, among other things, the tenure review file of the female professor and the tenure review files of the five male faculty members named in her charges. The university sought to exclude the portions of these files it deemed to be "confidential peer review information," specifically, 1) confidential peer evaluations, 2) the department chairman's evaluation, 3) documents relating to internal deliberations of the faculty tenure committees and their final report, 4) these portions of the tenure review files for the five male faculty members. They claimed that this information was protected by a common law privilege and the First Amendment right of academic freedom. The Commission brought an action in federal court to force the disclosure of the files.

In a unanimous decision, the Supreme Court concluded that the only requirement for disclosure was a showing of relevance to the claim of

discrimination. The university had no privilege to protect the documents based upon the federal rules of evidence, even though the files to be disclosed contained confidential peer review information. The university also could not claim a privilege to protect the documents based upon First Amendment academic freedom since this was not a case where the acts of the government were based upon the content of the speech to be disclosed, nor were the acts a direct infringement on the right of the university to make determinations on who can teach, based upon academic grounds.

Thus, the Supreme Court has not held that tenure review materials are in the public domain in every instance. A professor has no general *right* to access to his or her tenure review files. The only mode of disclosure authorized by the Court is release to the EEOC based upon an allegation of employment discrimination.

The first requirement for the disclosure of information is that a charge be filed with the EEOC of unlawful employment practices against the university. Such unlawful practices include:

[t]o discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

#### 42 U.S.C. § 2000e-2.

The fact that a faculty member is not happy with being denied tenure is an insufficient basis for a charge filed with the EEOC. There must be an alleged discrimination in the denial of tenure and, to be actionable, the discrimination must be on the basis of race, color, religion, sex or national origin.

The charge can be made by the person who is aggrieved or by a member of the Commission. Notice of this charge must be given to the university within 10 days of the filing of the charge. This notice must contain the date, place, and circumstances of the alleged unlawful employment practice. The EEOC will institute an investigation of the charge to determine whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). The EEOC is given the right to access evidence as follows:

The commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation.

#### 42 U.S.C. § 2000e-8(a).

This right to obtain access to information is conditioned upon three factors:

- 1) a determination that the charge is valid,
- 2) a determination that the information is relevant, and
- 3) a determination that the information is not too indefinite and is not based upon an illegitimate purpose if so contended by the employer

*EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n. 26.

The first part of this test could more appropriately be expressed as a determination that the charge is *not invalid*, since, without evidence from the university, the Commission can only rely upon the information supplied from the aggrieved party or by the member of the Commission who filed the charges. If these charges are facially valid and there is no evidence to dispute their validity, this test will be satisfied.

The second part of this test is relevance. The information sought from the university must relate to the specific charge of discrimination. The courts have been liberal in their interpretation of relevance, however, and allowed access to virtually any material which might cast light on the allegations against the employer. *EEOC v. Shell Oil Co.*, 466 U.S. at 68-69.

The third part of the test places the burden on the university to challenge the validity of the request. A request for access could be too indefinite if it is of such a sweeping nature and so unrelated to the matter under inquiry as to exceed the Commission's investigatory power. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). A request could be illegitimate if it is an abuse of the Commission's power, *United States v. Powell*, 379 U.S. 48 (1964), or brought for a purpose other than for the enforcement of federal employment discrimination statutes and regulations. As in the first two factors, this is a difficult test to meet.

Note that there is some protection of the confidentiality of the material after it has been received by the EEOC. A Commission employee who makes this information public in any manner is subject to criminal sanctions of a fine of up to \$1000 and up to a year in prison. 42 U.S.C. § 2000e-8(e). However, these sanctions only apply prior to any proceeding that the EEOC may bring against the university. Thus, the information will be held confidential if the charge can be settled informally under the Commission's power of conference, conciliation and persuasion. 42 U.S.C. § 2000e-5(b). If however, the Commission brings a suit against the university, and if the information obtained is used as evidence, then this material will be in the open record and deemed public information, available for all.

A university cannot decide to thwart the disclosure process by destroying tenure review files after a decision is made. The university (as is any employer covered by the Civil Rights Act) is given an affirmative duty to:

- (1) make and keep records relevant to the determinations of whether unlawful employment practices have been or are being committed, [and]
- (2) preserve such records for such periods

42 U.S.C. § 2000e-8(c).

Any refusal or failure to this regulation is actionable by the Commission in United States District Court.

The effect of this ruling is to reveal confidential peer review information to the EEOC in cases where there is a valid charge of employment discrimination based upon an individual's race, color, religion, sex, or national origin and this information is relevant to the charge. If the charge is not settled informally and the EEOC initiates an action against the university, then this information may become part of the public record. As the purpose behind these regulations is considered, this result becomes obvious. The mission of the EEOC includes a mandate,

to enforce all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap.

Ex. Ord. No. 12067 § 1-201.

The disclosure of confidential peer review information is important to this end. If a professor is the victim of unlawful discrimination during the tenure review process, evidence of this discrimination may appear in the confidential evaluations made by the professor's peers, and the deliberations of the various tenure review committees. Also, the records of other candidates for tenure could provide a basis for comparison of the qualifications required for tenure and expose a pattern of discrimination which might not appear explicitly in the other records. In many instances, these sources may be the only "hard" evidence of discrimination available.

The University of Pennsylvania, in the case at issue, maintained that a properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship from the candidate's peers at the host institution as well as from other institutions. They also maintained that confidentiality was necessary to ensure candor. The implication is that the peer will be reluctant to write a negative evaluation if he or she knows that this evaluation can be reviewed by the candidate. This argument was weakened by studies produced by the EEOC which indicate that confidentiality is not the norm in all peer review systems. *University of Penn.*, 493 U.S. at \_\_\_\_, 110 S.Ct. at 588.

In a nonconfidential peer review system, the effects of this decision are negligible. Even in a confidential peer review system, it should be noted that the probability that the information will become part of the public

record and available for the candidate to review is relatively slight, since this would require all the steps for disclosure of the information to the EEOC to be met in addition to the institution of formal proceedings against the university.

The final effect on the peer's evaluation in a confidential system will depend upon the peers. It is assumed that the university would inform peers that even though their evaluations will be kept in strictest confidence, these evaluations could be subject to disclosure to the EEOC and eventually to the public, including the candidate. Some peers may refuse to participate in the evaluation based upon the knowledge that their evaluation could be released to the candidate. This input may be lost to the tenure review process, however, other peers could be sought who would be willing to participate in the process under these conditions.

Other peers might temper their negative statements, in effect providing more positive evaluations than they would normally intend. However, the effect of these "false" positive evaluations could be to some extent cancelled by other peers who may provide more justification for their negative claims based upon the possibility that their statements might be subject to external scrutiny. In effect, these peers would be providing a more convincing negative evaluation due to their additional justification. Also, there will always be peers whose evaluations will be unaffected.

Even in a confidential system, it is not implausible that a university could still make informed decisions as to a candidate's scholarship based upon peer reviews. The tenure review committee can use this knowledge that the peers were informed of the possible lapse in confidentiality in their review procedure when they weigh the evaluations versus the other tenure review documentation.

