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I. Introduction

The scenario is frequently the same: a minority candidate who holds a probationary faculty position at a college or university is denied tenure.[1] Though the institution claims that the denial was based on the candidate's deficiency in one of three important areas,[2] he suspects that, in reality, the denial was based on his minority status.[3] The unsuccessful candidate's recourse, after exhausting internal grievance procedures, is to sue under Title VII of the Civil Rights Act of 1964,[4] which expressly prohibits employment discrimination

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1. *See* Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165 (2d Cir. Feb. 22, 1984); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Scott v. University of Del., 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Green v. Board of Regents of Tex. Tech Univ., 474 F.2d 594 (5th Cir. 1973); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Gilinsky v. Columbia Univ., 488 F. Supp. 1309 (S.D.N.Y. 1980); Cussler v. University of Md., 430 F. Supp. 602 (D. Md. 1977); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976).

2. *See infra* notes 115-23 and accompanying text.

3. *See generally* Vladeck and Young, *Sex Discrimination in Higher Education: It's Not Academic*, 4 WOMEN'S RTS. L. REP. 59 (1978) [hereinafter cited as SEX DISCRIMINATION].

4. 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979). Section 703(a) of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) 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
> (2) 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.

Id. § 2000e - 2(a).

Title VII is enforced and administered by the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e - 5 (1976 & Supp. III 1979) (Title VII, § 706). A Title VII complaint must begin with the filing of a charge with the EEOC. Following a preliminary settlement attempt, the case is investigated, and the EEOC makes a determination as to whether there is reasonable cause to believe that the

based on race, color, religion, sex or national origin.[5] Title VII, which initially excluded educational institutions, was amended by the Equal Employment Opportunity Act of 1972 to include these employers.[6]

In 1973, the Supreme Court in *McDonnell Douglas v. Green*[7] described for the first time[8] a method of analysis to be utilized in Title VII disparate treatment cases.[9] This methodology,[10] which set forth

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charge is true. If the EEOC finds reasonable cause, there is an attempt to conciliate. If unsucessful, the EEOC determines whether or not to litigate the case. Issuance by the EEOC of a right-to-sue notice to the charging party affords him the right to bring suit in federal district court within ninety days of the issuance of the letter. *Id.* § 2000e - 5(f)(1). The remedies available to the charging party include enjoining the proscribed behavior, reinstatement and back pay for no more than two years from the time of the filing of the charge. *Id.* § 2000e - 5(g).

Coverage of Title VII extends to all entities employing fifteen or more employees for at least 20 calendar weeks of the current year and which are engaged in an industry affecting commerce. *Id.* § 2000e(b) (Title VII, § 701).

The act does not cover (1) religious institutions where employment of persons of a particular religion, sex or national origin is a bona fide occupational qualification; (2) members of the Communist Party or (3) aliens; however, it does permit preferential treatment of American Indians. *Id.* § 2000e - 1, - 2(e)(f)(i) (Title VII, § 703).

5. *Id.* § 2000e - 2.

6. *See* Pub. L. No. 92-261 § 8, 86 Stat. 103 (1972). The Act also extended Title VII's protections to employees of the Federal Government. *Id.* § 2000e - 16.

7. 411 U.S. 792 (1973).

8. Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 554 (1982) [hereinafter cited as RELATIVE QUALIFICATIONS].

9. The first major Title VII case dealt with by the Supreme Court was Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs*, however, discussed the analysis of disparate impact cases under Title VII. Disparate impact cases involve employment practices that are facially neutral in the treatment of different groups but that, in fact, fall more harshly on one group than another and cannot be justified by business necessity. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

Disparate treatment occurs when "the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.* Proof of discriminatory intent is critical in these cases whereas it is not required under a disparate impact theory. *Id.*

McDonnell Douglas involved a suit which arose under Title VII. However, the Court's analysis of a disparate treatment claim has also been applied to discrimination cases arising under other federal statutes cited below.

Cases brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), include: Crawford v. Western Elec. Co. Inc., 614 F.2d 1300 (5th Cir. 1980); Scott v. University of Del., 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Flowers v. Crouch - Walker Corp., 552 F.2d 1277 (7th Cir. 1977); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Gilinsky v. Columbia Univ., 488 F. Supp. 1309 (S.D.N.Y. 1980).

Cases brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1981) include: Lee v. Conecuh County Bd. of Educ., 634 F.2d 959 (5th Cir 1981); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979).

the allocations of burdens of pleading and proof[11] in disparate treatment cases, was variously interpreted by the lower courts,[12] thus producing anything but the uniformity that the Supreme Court had anticipated. In several subsequent decisions,[13] the Court attempted to clarify the holding in *McDonnell Douglas*.

The question of which party bears the burden of proving qualification for a particular job, however, remains unclear. The problem arises mainly in white collar and professional level jobs where the use of subjective criteria[14] is critical in determining whether a candidate is the best qualified person for a position. These criteria are particularly relevant in the area of academic employment, where decisions regarding promotion and tenure necessarily involve subjective evaluations of professionalism.[15]

Cases brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 - 34 (1975), include: Lorillard v. Pons, 434 U.S. 575 (1978); Blackwell v. Sun Elec. Corp., 696 F.2d 1176 (6th Cir 1983); Sutton v. Atlantic Richfield, 646 F.2d 407 (9th Cir. 1981); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Schwager v. Sun Oil Co. of Pa., 591 F.2d 58 (10th Cir. 1979).

10. *See infra* notes 27-35 and accompanying text.

11. *See infra* note 37 and accompanying text.

12. *See infra* note 38 and accompanying text.

13. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco v. Waters, 438 U.S. 567 (1978). See *infra* notes 53-58 and accompanying text for a discussion of *Burdine*.

14. Subjective criteria involve elements of judgment and discretion while objective criteria are standards or requirements that are applied to all employees. *See generally*, Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level* 21 WM. & MARY L. REV. 45, 48 (1979) [hereinafter cited as Waintroob].

15. *See* Danzl v. North St. Paul - Maplewood - Oakdale Indep. School, 706 F.2d 813, 816 (8th Cir. 1983) (candidate hired was better qualified due to prior experience as high school principal); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1343 (9th Cir. 1981) (tenure denied due to fact that scholars and administration officials were unenthusiastic about plaintiff's scholarly work), *cert. denied*, 103 S. Ct. 53 (1982); Scott v. University of Del., 601 F.2d 76, 79 (3d Cir.) (inadequate evidence of research activity), *cert. denied*, 444 U.S. 931 (1979); Davis v. Weidner, 596 F.2d 726, 730-31 (7th Cir. 1979) (termination due to over-abundance of foreign language instructors); Powell v. Syracuse Univ., 580 F.2d 1150, 1156 (2d Cir.) (inadequate performance as teacher), *cert. denied* 439 U.S. 984 (1978); Faro v. New York Univ., 502 F.2d 1229, 1231 (2d Cir. 1974) (male professors hired had more substantial teaching and research backgrounds); Green v. Board of Regents of Tex. Tech Univ., 474 F.2d 594, 596 (5th Cir. 1973) (deficiencies in teaching and scholarship); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1160 (D. Mass. 1980) (plaintiff's scholarship was inadequate), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Laborde v. Regents of the Univ. of Cal., 495 F. Supp. 1067, 1069 (C.D. Cal. 1980) (inadequate scholarship), *cert. denied*, 103 S. Ct. 820 (1983);

The subjective nature of the tenure decision, however, is one reason for judicial reluctance to intercede in areas involving academic judgment. This judicial reluctance has made it virtually impossible for a faculty plaintiff to succeed in a Title VII disparate treatment case.[16] Though judicial abstention from challenging an academic decision on the merits is likely to persist, courts may be more willing to challenge a defendant's choice of candidate where there is a clear showing of some kind of procedural error by the institution.[17] Therefore, it is imperative that colleges and universities explicitly detail the procedures employed in tenure decisions. This would afford the plaintiff the opportunity to be granted relief based on the university's failure to apply its own performance standards even-handedly.

This Note explores problems of proving relative qualifications under Title VII. It begins with a discussion of the allocations of burdens of proof and pleading under Title VII and proceeds to address the question of which party must prove relative qualification under the *McDonnell Douglas* formula. Finally, the Note analyzes the role of subjective criteria in the tenure setting.

II. Development of the Standard for Allocating Burdens of Proof

Title VII was enacted to proscribe discrimination based on membership in a protected class.[18] Lower courts handling discrimination claims after the passage of Title VII, however, exhibited some confusion as to the appropriate allocation of burdens of proof.[19] Though the Supreme Court has addressed the problem several times beginning with *McDonnell Douglas v. Green*, the precise burdens to be borne by the parties remain unclear.[20]

Gilinsky v. Columbia Univ., 488 F. Supp. 1309, 1314 (S.D.N.Y. 1980) (another department member hired); Patino v. Dallas Indep. Sch. Dist., 486 F. Supp. 226, 228 (N.D. Tex. 1980) (plaintiff's outside interests caused his teaching skills to suffer); Cussler v. University of Md., 430 F. Supp. 602, 606 (D. Md. 1977) (poor quality of publications and lack of professionally recognized expertise); Peters v. Middlebury College, 409 F. Supp. 857, 860 (D. Vt. 1976) (termination due to plaintiff's inability to adequately teach Renaissance courses).

16. See *infra* note 124 for a list of cases in which institutional defendants have been successful and in which faculty plaintiffs have achieved procedural victories.

17. *See infra* notes 195-98 and accompanying text.

18. *See supra* note 4 and accompanying text.

19. The *McDonnell Douglas* Court heard the case because "[t]he two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case." 411 U.S. at 801.

20. *See infra* notes 21-57 and 98-107.

A. *McDonnell Douglas v. Green*

McDonnell Douglas v. Green is the seminal case in the area of burdens of proof in disparate treatment cases under Title VII.[21] The case involved a black civil rights activist who was laid off by McDonnell Douglas and later participated in demonstrations against the company. When the company subsequently advertised for qualified personnel, Green applied, but he was rejected based on his allegedly illegal conduct.[22] Green filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found reasonable cause to believe the allegations and made several unsuccessful attempts at conciliation. Upon receipt of a "right-to-sue" notice,[23] Green brought suit in the district court but lost.[24]

On appeal, the court of appeals reversed and remanded, setting forth standards governing the case: (1) Green had made out a prima facie case which raised an inference of discrimination; (2) the company failed to rebut the inference by offering "subjective" reasons—allegedly illegal conduct—for its refusal to rehire Green; and (3) Green should be given an opportunity to demonstrate that the reasons offered were mere pretext to mask discrimination.[25] The Supreme Court granted a writ of certiorari to clarify the standards of proof governing cases of employment discrimination.[26]

The *McDonnell Douglas* Court outlined a three step procedure by which evidence in a private, non-class action suit claiming employment discrimination may be analyzed.[27] The complainant must first establish a prima facie case by showing that (1) he belongs to a racial minority;[28] (2) he applied and was qualified for a job for which the

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21. *See generally* Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980) [hereinafter cited as Mendez]; Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980).

22. *McDonnell Douglas*, 411 U.S. at 796.

23. See *supra* note 4 for a summary of the filing procedures to be followed under Title VII.

24. *See McDonnell Douglas*, 411 U.S. at 794-97.

25. *Id.* at 798.

26. *Id.*

27. *Id.* at 802. Absent a "smoking gun" or direct evidence, this circumstantial evidence test applies.

28. The Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802

employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applications from persons who shared the complainant's qualifications.[29] The Court agreed with the Eighth Circuit that Green had satisfied the requirements of a prima facie case: he was black, he was undisputedly qualified, though qualified he was rejected and the company continued to seek mechanics with Green's qualifications.[30]

If the complainant meets his burden, the second step is that "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[31] The Court decided that the company's stated reason for refusing to rehire Green, that he engaged in illegal conduct, was sufficient to "discharge [the employer's] burden of proof at this stage and to meet [Green's] prima facie case of discrimination."[32]

If the defendant is successful in rebutting the inference raised by the plaintiff's prima facie case, the plaintiff must be given a fair opportunity to show that the defendant's reason for rejecting the plaintiff was actually a pretext masking unlawful discrimination.[33] Considerations relevant to a finding of pretext might include a showing that other employees who engaged in comparable acts were rehired, facts regarding the company's treatment of Green during his prior employment, the company's general policies on civil rights activities, and its practices with respect to minority employment.[34] On remand, Green's showing of pretext was deemed to be insufficient.[35]

Thus, the Court described the basic framework for allocation of burdens in a Title VII case in which disparate treatment is alleged.[36]

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n.13. Although the test was devised for cases involving racial discrimination, it has been extended to cover other classes protected by Title VII. *See, e.g.*, Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980) (age); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (sex); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980) (same); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) (race, color and national origin discrimination).

29. *McDonnell Douglas*, 411 U.S. at 802.

30. *Id.*

31. *Id.*

32. *Id.* at 803.

33. *Id.* at 804.

34. *Id.* at 804-05.

35. *See* Green v. McDonnell Douglas Corp., 528 F.2d 1102 (8th Cir. 1976) (affirming district court finding against Green).

36. The Court did not, however, intend the *McDonnell Douglas* ground rules to be the only way to establish a case of discrimination. Rather, this allocation of burdens of proof and pleading was intended to provide a "sensible, orderly way to

While the order in which evidence must be presented was plainly established, questions remained as to the burden of proof to be borne by each party within a given step. Though the type of qualification that a plaintiff must demonstrate to make out a prima facie case remained unclear,[37] the first element to cause confusion among the

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evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco v. Waters, 438 U.S. 567, 577 (1978). A case of disparate treatment may be made out in other ways. For instance, section 707(a) of the Civil Rights Act of 1964 provides that:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this Title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action . . . .

42 U.S.C. § 2000e - 6 (1976 & Supp. III 1979).

See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) for a discussion of a systemwide pattern or practice of disparate treatment. "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principal that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* at 358. Therefore, plaintiff may make out a prima facie case of discrimination by "demonstrating the existence of a discriminatory hiring pattern and practice." *Id.* at 359 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976)).

37. A Title VII plaintiff bears the initial burden of showing actions by the employer from which one may infer, in the absence of explanation, that such actions were based on a discriminatory motive. *Teamsters*, 431 U.S. at 358. Thus, establishment of a prima facie case creates a presumption of prohibited discrimination because it eliminates the most legitimate reasons for an employer's actions—absolute or relative lack of qualifications and absence of a vacancy in the job sought. *Id.* at 358 n.44. Some courts, however, have required plaintiffs to prove relative qualification as part of their prima facie case. *See infra* notes 92-93 and accompanying text.

Elimination of the above common nondiscriminatory reasons for an employer's action creates a rebuttable inference of discrimination. Courts have referred to both an inference and a presumption of discrimination. *See, e.g.*, United States Postal Service Bd. of Governors v. Aikens, 103 S. Ct. 1478, 1481 (1983) (prima facie case creates rebuttable presumption of discrimination); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (prima facie case raises inference of discrimination); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 (6th Cir. 1983) (prima facie case raises inference of discrimination); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88, 94 (6th Cir. 1982) (elements raise inference of discrimination); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979) (prima facie case raises inference of discrimination). *See generally* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1221-22 (1981) [hereinafter cited as Belton]. According to Belton, a presumption is a rule of law that allows an assumption of a certain factual situation based on proof of other logically related facts. Genuine presumptions serve to shift the burden of production to the party against whom it operates. *Id.* at 1222. An inference "is a deduction warranted by human reason and

lower courts was the extent of the defendant's burden. The lower courts disagreed over whether the Court's statement that the defendant must "articulate" a legitimate nondiscriminatory reason[38] meant a shifting of the burden of persuasion or meant merely a burden of production.[39]

B. Other Efforts to Establish Clear Standards: *Furnco, Sweeney* and *Burdine*

The confusion resulting from *McDonnell Douglas* prompted the Court to reexamine the question of burdens of proof in *Furnco v. Waters*.[40] In *Furnco*, the Court explained that the plaintiff's prima facie case did not serve as proof of discrimination but, rather, it simply raised an inference of discrimination because we "presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[41]

The *Furnco* Court stated that the burden which shifts to the defendant employer in rebutting the inference of discrimination raised by the plaintiff is one of "proving" that its decision was based on nondiscriminatory criteria.[42] The Court's pronouncement succeeded only in reinforcing the initial confusion created by *McDonnell Douglas*, since a burden of proof may encompass the two separate burdens of persuasion and production.[43] Moreover, the *McDonnell*

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experience that the factfinder may make from established facts. The term refers to a process of reasoning from a premise to a conclusion, the end result of which has the directive force of a rule of law—which characterizes a presumption." *Id.*

38. 411 U.S. at 802.

39. Courts ruling that a production of evidence by the defendant was sufficient include: Powell v. Syracuse Univ., 580 F.2d 1150, 1155-56 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Barnes v. St. Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977); Flowers v. Crouch - Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 347-48 (10th Cir. 1975); Gates v. Georgia - Pacific Corp., 492 F.2d 292, 295-96 (9th Cir. 1974); Croker v. Boeing Co., 437 F. Supp. 1138, 1142-43 (E.D. Pa. 1977); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976).

Courts reasoning that the plaintiff's showing of a prima facie case shifts the burden of persuasion to the defendant, thus requiring it to prove by a preponderance of the evidence that it acted pursuant to a legitimate, nondiscriminatory reason include: Williams v. Bell, 587 F.2d 1240, 1245-46 n.45 (D.C. Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); Ostrapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

40. 438 U.S. 567 (1978).

41. *Id.* at 577 (citing *Teamsters*, 431 U.S. at 358 n.44). See *supra* note 37 on the difference between presumptions and inferences.

42. 438 U.S. at 577.

43. *See generally* Belton, *supra* note 37 at 1216. The burden of production is the obligation to present evidence of sufficient substance to permit the factfinders to act

Douglas requirement of "articulating" appears to be easier to meet than that of "proving" a legitimate, nondiscriminatory reason.[44]

Several months later, the Supreme Court attempted to explain the seeming disparity between *McDonnell Douglas* and *Furnco*. In *Board of Trustees of Keene State College v. Sweeney*,[45] a tenure case, the Court stated that while such words as "articulate," "show" and "prove" might seem to mean the same thing, the correct interpretation was that the defendant need only come forward with enough credible evidence of a legitimate, nondiscriminatory reason to rebut the plaintiff's prima facie showing of disparate treatment.[46] Therefore, the defendant need only clearly state the reasons for the action taken; he is under no obligation to prove a nondiscriminatory intent. In *Sweeney*, the First Circuit had decided in favor of the faculty plaintiff based on the college's failure to disprove the inference raised by the plaintiff's prima facie case.[47] The court of appeals' requirement that the defendant "prove absence of discriminatory motive"[48] was rejected by the Supreme Court, which found that the lower court's treatment imposed a heavier burden on the employer than was warranted.[49]

After *Sweeney*,[50] most of the circuits recognized that the defendant's burden in disparate treatment cases was simply that of articulating a legitimate reason for its actions.[51] However, the Fifth Circuit

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upon it. The burden of persuasion relates to the risk of uncertainty of an element's resolution. If the trier of fact finds the parties in equipoise over a material issue, the party bearing the burden of persuasion will lose. *Id.*

44. "Articulate" is generally defined to mean "to give clear and effective utterance to" or "expressing oneself clearly and effectively enough to gain attention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 124 (1976). "Prove" has been defined to mean "to establish a fact or hypothesis as true by satisfactory and sufficient evidence." BLACK'S LAW DICTIONARY 1102 (5th ed. 1979). Therefore, in order to "articulate" a legitimate, nondiscriminatory reason, the defendant need only clearly state his reasons, not establish the truth of his stated reason.

45. 439 U.S. 24 (1978) (per curiam).

46. *Id.* at 25. The court added that forcing the defendant to prove absence of discriminatory motive would make the third step of the *McDonnell Douglas* analysis entirely superfluous since it would place on the employer at the second stage the burden of showing that the reason for the rejection was not pretext. *Id.* at 24-25 n.1.

47. *See* Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 178-79 (1st Cir. 1978).

48. *Id.* at 177.

49. 439 U.S. at 24-25.

50. That is, that the defendant need only articulate not prove. *Id.*

51. *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980) (defendant need only "bring forth evidence that [it] acted on a neutral basis"); Kunda v. Muhlenberg College, 621 F.2d 532, 543-44 (3d Cir. 1980) (district court had not imposed burden of persuasion on defendant but properly required only articulation of legitimate reason); Loeb v. Textron, Inc., 600 F.2d 1003, 1011 (1st Cir. 1979)

still required the defendant to prove nondiscriminatory motives by a preponderance of the evidence.[52]

Once again, the Supreme Court granted certiorari to attempt to resolve the issue of the extent of the defendant's burden. In *Texas Department of Community Affairs v. Burdine*,[53] the Court finally settled the question, stating that "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[54] To further clarify its position, the Court added that the defendant need only satisfy a burden of production sufficient to rebut the inference of discrimination raised by the prima facie case.[55] While the defendant does not bear a formal burden of persuasion, he must produce enough evidence to convince the trier of fact that the decision was lawful.[56] Evidently, this standard requires more than mere articulation of proper intentions but less than actually proving nondiscriminatory motives.

According to the Court, limiting the defendant's evidentiary burden, as discussed in *Burdine*, would not unduly hinder the plaintiff's case since (1) the defendant's explanation of its legitimate reasons must be clear and reasonably specific; (2) the defendant will normally attempt to prove the factual basis for its explanation; and (3) in a Title VII suit, the plaintiff is aided by access to the EEOC's investigatory files concerning his complaint and by the liberal discovery rules which are generally applicable.[57] After four decisions[58] in eight years, the Court finally concluded that the defendant's burden in disparate treatment cases arising under Title VII is simply to establish a legitimate, nondiscriminatory reason for its actions. These four decisions are not inconsistent; rather, they represent a progression of analyses

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(burden of persuasion remains with plaintiff; defendant need only bear a burden of production or articulation of nondiscriminatory motive); Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979) (defendant's articulated reasons were legitimate).

52. Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1981); Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980). The Eighth Circuit also followed a preponderance of the evidence test in Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655 (8th Cir. 1980), *vacated*, 450 U.S. 972 (1981).

53. 450 U.S. 248 (1981).

54. *Id.* at 257.

55. *Id.* at 258.

56. *Id.* See *infra* note 96 regarding the THAYER or "bursting bubble" theory.

57. *Burdine*, 450 U.S. at 258. *See* Comment, *Civil Rights Defendant's Burden of Proof in Title VII Disparate Treatment Cases*, 21 WASHBURN L.J. 143, 149 (1981).

which resulted in an orderly method for presentation of evidence in a disparate treatment case.[58]

III. Proving Relative Qualification

The *McDonnell Douglas* analysis seems to require a plaintiff to show qualification for a particular job as part of his prima facie case.[59] However, the opinion declined to explain the exact burden to be borne by the plaintiff; that is, whether it is sufficient for a plaintiff to show objective qualification[60] or whether he must show relative qualification[61] at this initial stage. Objective or absolute qualifications are useful at the initial screening stage of the hiring procedure. At the point of the final hiring, however, where the employer must choose from many persons who meet the minimum qualifications, subjective criteria often enter into the analysis.[62]

A. Types of Criteria Considered in Determining Qualification

Generally, qualification for hiring or promotion is judged by objective and subjective criteria.[63] Objective criteria are standards that are automatically applied to all candidates for a particular position.[64] Such criteria, which predominate in lower-level or blue-collar hiring,[65] include easily quantifiable factors such as education, height, weight, seniority, typing skill and absenteeism.[66]

Subjective criteria "involve an element of judgment or discretion on the part of the evaluator."[67] These criteria are intangible and include

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58. *McDonnell Douglas*, 411 U.S. 792; *Furnco*, 438 U.S. 567; *Sweeney*, 439 U.S. 24 and *Burdine*, 450 U.S. 248. *See supra* notes 21-56 and accompanying text.

59. See *supra* notes 21-35 and accompanying text for a discussion of the *McDonnell Douglas* analysis.

60. Objective qualification refers to the "minimum . . . credentials or skills that are announced by an employer as requirements for a particular job." RELATIVE QUALIFICATIONS, *supra* note 8 at 557.

61. Relative qualification refers to the "subjectively-measured qualification of favorable comparison with other applicants." RELATIVE QUALIFICATIONS, *supra* note 8 at 557.

62. RELATIVE QUALIFICATIONS, *supra* note 8 at 557 n.28.

63. *See generally* Waintroob, *supra* note 14; Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973) [hereinafter cited as UPPER LEVEL JOBS]; Note, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976) [hereinafter cited as PROFESSIONAL JOBS].

64. Waintroob, *supra* note 14 at 48.

65. *See infra* note 69 and accompanying text.

66. UPPER LEVEL JOBS, *supra* note 63 at 1630.

67. Waintroob, *supra* note 14 at 48.

such amorphous concepts as leadership, ability to communicate effectively and to take decisive action.[68] Use of subjective criteria in hiring and promotion is generally permissible in white collar and professional contexts but is frowned upon in the area of blue collar employment.[69] Generally, as the level of employment rises,[70] judicial acceptance of subjectivity in employment decisions increases.[71] This may be due to the fact that

> [j]udges are more likely to have personal knowledge of the jobs of plaintiffs in the white collar context, such as airline stewardesses and salesmen, than of the jobs of blue collar plaintiffs. They better appreciate the type of work upper-level plaintiffs perform and recognize the different variables an employer might reasonably consider when searching for personnel to fill these positions.[72]

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68. UPPER LEVEL JOBS, *supra* note 63 at 1630.

69. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), is the leading case on the use of subjective criteria in blue-collar employment situations. *Rowe* took place in a blue-collar context in which a worker could be promoted only upon receipt of the recommendation of his immediate foreman. Thus, the worker's chances for promotion were based on the foreman's subjective evaluation of the worker's ability, merit and capacity. *Id.* at 353.

The *Rowe* court found that defendant General Motors' promotional practices were violative of Title VII in five respects:

> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion . . . .
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices.

Id. at 358-59.

70. See generally PROFESSIONAL JOBS, *supra* note 63 at 168-69 for a discussion of the three major job classifications: blue collar, white collar and professional employment, as classified by the U.S. Department of Labor in its DICTIONARY OF OCCUPATIONAL TITLES (PROFESSIONAL JOBS cites to the 3d ed. 1965, which has been superseded by the 4th ed. 1977).

For example, the blue collar class includes jobs which have been categorized by the Department of Labor as "service," "machine trades," "benchwork," "structural" and "miscellaneous" categories such as truck drivers. PROFESSIONAL JOBS at 169; DICTIONARY OF OCCUPATIONAL TITLES at xxxvii-xli. White-collar employees are engaged in managerial and technical occupations such as bank officers, wage analysts and sales personnel. PROFESSIONAL JOBS at 169, DICTIONARY OF OCCUPATIONAL TITLES at xxxvi-xxxvii. The "professional class" includes teachers, university professors, engineers, attorneys and physicians. PROFESSIONAL JOBS at 169; DICTIONARY OF OCCUPATIONAL TITLES at xxxvi.

71. Waintroob, *supra* note 14, at 50.

72. PROFESSIONAL JOBS, *supra* note 63, at 186.

Relative qualification is the principle by which one candidate must show that he was as qualified or better qualified than the party selected.[73] The question of whether one candidate is better qualified than another may be difficult to resolve in upper-level and professional employment contexts where subjective criteria necessarily enter into the employment decision. Establishing qualifications is an employer's prerogative, but an employer may not judge employee qualification by wholly subjective standards and then claim lack of qualification when its promotion process is challenged as discriminatory.[74]

B. Which Party Bears the Burden of Proving Relative Qualification

In *McDonnell Douglas*, the employer did not dispute its employee's basic qualification for the job.[75] Therefore, the Court expressly declined to address the question.[76] This omission opened the door for the variety of lower court interpretations that resulted. For example, without a Supreme Court precedent, the Fifth Circuit, in *East v. Romine, Inc.*,[77] declared that the defendant, in rebutting plaintiff's prima facie case, must prove by objective evidence that the person hired or promoted was more qualified than the plaintiff.[78] This would be accomplished by the introduction of comparative evidence of each applicant's credentials.[79] In *Romine*, the court decided that the plaintiff was "presumptively qualified on the basis of an application which showed a long history of welding work."[80] Since welding skill is an objective criterion, the court required the defendant to show that the candidate selected was objectively rather than subjectively better qualified to work as a welder.[81]

Four years later, the Fifth Circuit applied the *Romine* standard in *Burdine*.[82] On certiorari, however, the Supreme Court criticized the Fifth Circuit's requirement that the defendant bear the burden of

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73. *See* RELATIVE QUALIFICATIONS, *supra* note 8, at 557; see also *supra* notes 60-61 for definitions of objective and subjective qualifications.

74. *Rowe*, 457 F.2d at 358.

75. *See McDonnell Douglas*, 411 U.S. at 802; *supra* note 30 and accompanying text.

76. 411 U.S. at 802 n.14.

77. 518 F.2d 332 (5th Cir. 1975), *overruled*, 647 F.2d 513 (5th Cir. 1981).

78. *Id.* at 339-40.

79. *Id.*

80. *Id.* at 338.

81. *Id.* at 340. The defendant was unable to show that the candidate chosen was objectively better qualified.

82. 608 F.2d 563, 567 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1981). See *supra* notes 53-56 and accompanying text for a discussion of *Burdine*.

proof of relative qualification.[83] The Court noted that Title VII does not demand that an employer give preferential treatment to minorities or women.[84] The Act was not intended to encroach on the traditional prerogatives of management,[85] nor does it require an employer to restructure his hiring practices to maximize the number of minorities and women hired.[86] Rather, an employer "has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[87] The fact that a court believes that the employer misjudged the qualifications of the candidates does not expose the employer to liability under Title VII.[88]

The *Burdine* Court's statements that the "burden of establishing a prima facie case of disparate treatment is not onerous"[89] and that the defendant need not prove by objective evidence that the party hired was more qualified than the plaintiff[90] clearly express the Court's preference that the plaintiff should bear the burden of proof. Despite the relative clarity of the opinion, it engendered considerable confusion in the lower courts concerning what "qualified" meant and who bore the burden of showing superior qualification.[91]

Evidence of qualification has been considered by different courts at various stages of the three step analysis. Some courts insist that a plaintiff prove as part of his prima facie case that he was the most qualified candidate for the job or that he was at least as qualified as the party actually selected.[92] This task may be readily accomplished in

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83. 450 U.S. 248, 258-59 (1981).

84. *Id.* at 259; *see* 42 U.S.C. § 2000e - 2(j) (1976 & Supp. III 1979). *Accord* United Steelworkers of America v. Weber, 443 U.S. 193, 205-06 (1979) (Title VII does not require employer to engage in voluntary affirmative action plan to correct racial imbalance in its workforce).

85. *Weber*, 443 U.S. at 207; *see Burdine*, 450 U.S. at 259.

86. *Burdine*, 450 U.S. at 259 (citing *Furnco*, 438 U.S at 577-78 (1978)).

87. *Id.*

88. *Id. See* Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) (Title VII does not require that candidate whom court considers most qualified be awarded a particular position; it requires only that choice of candidate not be discriminatory); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (while employer's judgment may seem erroneous to outsiders, relevant inquiry is simply whether articulated reason was pretext for illegal discrimination; reason need not be such that judge or jurors would approve).

89. 450 U.S. at 253.

90. *Id.* at 258. *See supra* notes 82-88 and accompanying text.

91. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1298 (2d ed. 1983) [hereinafter cited as SCHLEI & GROSSMAN].

92. *See, e.g.*, Adams v. Reed, 567 F.2d 1283, 1286-87 (5th Cir. 1978) (plaintiff ranked only fourth or fifth in five candidate field; being "highly qualified" was insufficient); Olson v. Philco - Ford, 531 F.2d 474, 478 (10th Cir. 1976) (prima facie case requires more than proof that qualified man was chosen over qualified woman).

a lower-level employment context where the criteria involved in the selection process are purely objective. However, in upper-level and professional employment, where qualification is determined by objective and subjective criteria, this approach is inappropriate. The plaintiff would be forced to proffer all of his evidence at step one, thus defeating the purposes of the *McDonnell Douglas* three step scheme.[93]

Other courts only require that the plaintiff show minimum qualifications to make out a prima facie case, and that the defendant, in articulating a legitimate, nondiscriminatory reason for its action, show that the candidate selected was better qualified than the plaintiff.[94] Thus, some courts require that relative qualification be demonstrated as part of the defendant's burden of production. This approach is far more acceptable in cases involving upper-level and professional jobs, where subjective factors are of prime consideration.[95] Carrying the *McDonnell Douglas* analysis to its logical conclusion, one could argue that the intent of the Court was simply to have the plaintiff show that, according to quantifiable factors which could be compared among the candidates, he was qualified to be considered for the job.

Finally, other courts have decided that after the plaintiff and defendant have met their initial burdens, the presumption of discrimination drops from the case,[96] and the plaintiff, who at all times bears the burden of persuasion, must convince the trier of fact that he was at least as qualified as the party selected.[97] This theory supports the view

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93. See *supra* notes 63-74 and accompanying text for a discussion of the types of criteria involved in employment decisions.

94. *See, e.g.*, Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344-45 (9th Cir. 1981) (for prima facie case plaintiff need only show minimum qualifications, and relative qualification should be established by employer at step two), *cert. denied*, 103 S. Ct. 53 (1982); Davis v. Weidner, 596 F.2d 726, 730 (7th Cir. 1979) (plaintiff need not show relative qualification as part of prima facie case); Rich v. Martin Marietta Corp., 522 F.2d 333, 347-48 (10th Cir. 1975) (relative qualification is not part of plaintiff's prima facie case).

95. *See supra* notes 67-74 and accompanying text.

96. According to the THAYER or "bursting bubble" theory, the only effect of a presumption is to shift the burden of production with respect to the fact presumed. If the evidence is produced by the defendant, the presumption is spent and disappears. *See* THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336 (1898); MCCORMICK, EVIDENCE 821 (2d ed. 1972). *Accord* 9 WIGMORE, EVIDENCE § 2491(2); MODEL CODE OF EVIDENCE, Rule 704(2) (1942). For a discussion of the role presumptions play in discrimination cases, see generally Mendez, *supra* note 21; Belton, *supra* note 37, at 1205.

97. *See* SCHLIE & GROSSMAN, *supra* note 91:

> Pretext may be proven by showing that a discriminatory motive dominated the articulated reason or by undermining the credibility of the employer's articulated reasons. There are three types of evidence which a

that only objective evidence should be considered in the prima facie case. At stage three, the presumption would drop out, the plaintiff would offer evidence of pretext and the court would resolve the question of fact. Here, the plaintiff would rebut the defendant's claim of lesser qualification with a showing of superior qualification.

C. *United States Postal Service v. Aikens*

In 1983, the Supreme Court was confronted with the question of which party bears the burden of proving better qualifications in an employment discrimination case. *United States Postal Service v. Aikens*[98] involved a black Postal Service employee who filed suit under Title VII claiming that the Postal Service had discriminated in refusing to promote him.[99] Aikens showed that the Postal Service pursued a policy of consistently promoting white persons rather than blacks. He had a commendable personnel record and more seniority and supervisory experience than any of the white persons promoted above him. Moreover, Aikens was working toward a doctorate while none of the twelve whites promoted over him had any college education.[100]

The district court entered judgment for the Postal Service on the ground that Aikens had failed to show as part of his prima facie case that he was "as qualified or more qualified" than those who were promoted.[101] The court of appeals reversed, stating that proof of relative qualification is not part of the plaintiff's prima facie case.[102] The Supreme Court vacated the court of appeals decision and remanded for reconsideration in light of the *Burdine* holding that the plaintiff's burden in making out a prima facie case is not onerous.[103]

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plaintiff may use in attempting to show a pretext: (1) direct evidence of discrimination; (2) comparative evidence; and (3) statistics.

Id. at 1314.

The most common method of proving pretext is the introduction of comparative evidence. That is, the plaintiff attempts to show that in a factually similar situation persons in one group were treated more favorably than those in another, *see, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-83 (1976) (more favorable treatment accorded black employee in reverse discrimination case) or by showing that the employer departed from its normal policies. *See, e.g.*, Harris v. Richards Mfg. Co., 511 F. Supp. 1193, 1204-05 (W.D. Tenn. 1981) (employer's stated reasons for transfer were not consistent with company policy). *See also* SCHLEI & GROSSMAN *supra* note 91, at 1314-15.

98. 103 S. Ct. 1478 (1983).

99. *Id.* at 1480-81.

100. *Id.*

101. *Id.* at 1481.

102. 642 F.2d 514, 519 (D.C. Cir. 1980).

On remand, the court of appeals, consistent with *Burdine*, reaffirmed its earlier holding.[104]

Unfortunately, when the Supreme Court reviewed *Aikens* for a second time, it skirted the crucial issue of which party bears the burden of proving better qualifications. Instead, the Court noted that it was surprising at this level of review, after a full trial on the merits, to address the question of whether the plaintiff made out a prima facie case.[105] Rather, the Court stated, the factual inquiry should be " 'whether the defendant intentionally discriminated against the plaintiff.' "[106] In essence, the Court was saying that the plaintiff was not required to prove better qualification as part of his prima facie case; nor was the defendant required to prove plaintiff's lack of qualification or the better qualifications of the party chosen as part of his showing of a legitimate reason for his action. Instead, after the plaintiff presented his prima facie evidence and the defendant met his burden of production, the presumption of discrimination "drops from the case"[107] and the inquiry is strictly whether the plaintiff sustains his burden of persuasion.

IV. Proof of Qualification in the Tenure Setting

A. Criteria Involved in Tenure Decisions

The decision to grant or deny tenure is based largely on subjective criteria,[108] as are the decisions to grant promotions in most professional level employment situations.[109] However, unlike an ordinary teaching position, which is terminable at the end of the academic year, or other professional employment which is terminable at will,[110] a grant of tenure involves a commitment by the institution for the life of the professor.[111] In *Lieberman v. Gant*,[112] the court quoted a

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103. 453 U.S. 902 (1981).
104. 665 F.2d 1057, 1058-59 (D.C. Cir. 1981) (per curiam).
105. 103 S. Ct. at 1481.
106. *Id.* at 1482 (quoting *Burdine*, 450 U.S. at 253).
107. *Id.* (quoting *Burdine*, 450 U.S. at 255 n.10). *See supra* note 96 and accompanying text.
108. *See supra* notes 67-71 and accompanying text.
109. *See supra* notes 67-71 and accompanying text.
110. The employment-at-will rule provides that "employment relationships . . . may be terminated by either party at any time with or without notice or cause." DeGiuseppe, *The Effect of the Employment-At-Will Rule On Employee Rights To Job Security And Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 2 (1981).
111. Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980).
112. *Id.*

University of Connecticut official who, in a memorandum to a faculty committee instructing it to take special care in tenure decisions, explained:

> "*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."[113]

In consideration of the extent of the university's commitment to a tenured professor, objective criteria are insufficient to gauge qualification for tenure. The use of subjective criteria in tenure decisions is not only justified by the time and money invested by the institution in a tenured professor, but also by the intangible and unquantifiable nature of an academic's responsibilities to the university community. Procedures for granting tenure vary among institutions.[114] Universities generally reach the decision to grant or deny tenure after considering three major areas of qualification: (1) teaching ability, (2) quality of research and scholarly publications and (3) service to the university community.[115] Since these factors are qualitative as well as quantita-

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113. *Id.* (quoting Wilson, Vice President of the University of Connecticut) (emphasis in original).

114. *Compare*, Lynn v. Regents of the Univ. of Cal. 656 F.2d 1337, 1340 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982) (there are several independent levels of review in tenure-decision process: (i) department of which candidate is a member, (ii) dean of school to which department belongs, (iii) ad hoc review committee, (iv) Budget Committe of Academic Senate, (v) Office of Academic Affairs and final decision by the Chancellor); *with* Kunda v. Muhlenberg College, 621 F.2d 532, 535 (3d Cir. 1980) (department head initiates tenure process with a written recommendation to Dean; Dean forwards recommendation to Faculty Personnel and Policies Committee, which reviews it and makes and submits own recommendation to President of the College; recommendations are reviewed by President, who then makes own recommendations to Board of Trustees Committee on Education Policies and Faculty Affairs; Committee reports to the full Board of Trustees, which is vested with the power to grant tenure).
(tenure based on evaluation of teaching, research and public service), *cert. denied*, 103 S. Ct. 53 (1982); Lieberman v. Gant, 630 F.2d 60, 65-66 (2d Cir. 1980) (qualification determined by evaluation of teaching, scholarship and contributions to university); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1380 (5th Cir. 1980) (three categories to be considered are teaching, research and service); Scott v. University of Del., 601 F.2d 76, 79 (3d Cir.), *cert. denied*,, 444 U.S. 931 (1979) (criteria include teaching, scholarly activity and service to department, university and community); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 172 n.3 (1st Cir.) (teaching, service and scholarship must be evaluated), *vacated and remanded*, 439 U.S. 24 (1978); Green v. Board of Regents of Tex. Tech Univ., 474 F.2d 594, 595 (5th Cir. 1973) (necessary qualifications are teaching prowess, scholarship and service); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148,

tive, the exact criteria for granting tenure vary from institution to institution. Moreover, the weight assigned to each of the three criteria will vary depending on the needs of a particular department within a university at a given time.[116] For example, a department may feel that it has been lacking in the area of research and publication, and therefore, may weigh this factor more heavily than another department in the school. Neither Title VII nor the Civil Rights Act require that procedures be uniform among departments.[117] Additional minor considerations that are factored into tenure decisions include the institution's financial health and staffing needs, "consistency of the faculty member's educational philosophy with that of the department and the institution," and his compatibility with other members of the department.[118]

Generally, satisfying the criterion of service to the university is not difficult. Only rarely is deficiency in this area a major reason for denial of tenure.[119] Deficiency in teaching skills is infrequently found

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1159 (D. Mass. 1980) (scholarship, teaching and service), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Johnson v. University of Pittsburgh; 435 F. Supp. 1328, 1340 (W.D. Pa. 1977) (considerations include teaching, research, professional stature and service); Huang v. College of the Holy Cross; 436 F. Supp. 639, 642 (D. Mass. 1977) (tenure decisions involve considerations of teaching, scholarship and service to college); Cussler v. University of Md., 430 F. Supp. 602, 604 (D. Md. 1977) (criteria include teaching, service and publications; "[l]ong years of service are, alone, insufficient to warrant promotion"); Peters v. Middlebury College, 409 F. Supp. 857, 858 (D. Vt. 1976) (criteria include contribution to the college community and professional competence which is measured by teaching skill); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 160 (D. Mass. 1975) (qualification determined by considerations of intellect, scholarship, teaching and service).

116. JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21 at 476. *Compare*, Huang v. College of the Holy Cross, 436 F. Supp. 639, 642 n.4 (D. Mass. 1977) (small liberal arts college emphasized teaching excellence) *with* Cussler v. University of Md., 430 F. Supp. 602, 604-06 (D. Md. 1977) (desire to improve Sociology Department fostered emphasis on calibre of scholarly research).

117. Scott v. University of Del., 455 F. Supp. 1102, 1122 (D. Del. 1978), *modified*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). *See* Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165, 170 (2d Cir. Feb. 22, 1984) ("denial of tenure by an English department simply cannot be compared with a grant of tenure in the physics or history departments").

118. JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21 at 476-78. *See* Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165, 168 (2d Cir. Feb. 22, 1984) (tenure decisions involve consideration of the "particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well known scholars and up-and-coming faculty").

119. *See, e.g.*, Huang v. College of the Holy Cross, 436 F. Supp. 639, 647 (D. Mass. 1977) (reservations regarding quality of plaintiff's service to the university were held in good faith). However, it should be noted that in *Huang*, this factor alone was insufficient. The college also found serious fault with plaintiff's teaching ability, *id.* at 646, and that his educational philosophy, as reflected by his "Five-Year Plan," was not consistent with that of his department *Id.* at 645-46.

to be the key in denying tenure.[120] However, in *Johnson v. University of Pittsburgh*,[121] the plaintiff's teaching was totally unacceptable to faculty and students alike.[122] In the typical case, the university finds the quality of the plaintiff's scholarship or research to be deficient.[123]

Institutions have been overwhelmingly successful in defending against discrimination suits.[124] Various theories have been offered to

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120. *See* Powell v. Syracuse Univ., 580 F.2d 1150, 1156 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (plaintiff's teaching performance was unacceptable); Huang v. College of the Holy Cross, 436 F. Supp. 639, 646 (D. Mass. 1977) (plaintiff's teaching was only adequate); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1343 (W.D. Pa. 1977) (plaintiff's teaching was unacceptable); Peters v. Middlebury College, 409 F. Supp. 857, 860 (D. Vt. 1976) (failure to satisfactorily teach the courses for which she was recruited). See *supra* note 99 and accompanying text for discussion of *Huang*.

121. 435 F. Supp. 1328 (W.D. Pa. 1977).

122. In *Johnson*, the student dissatisfaction rose to such a degree that during one lecture "10 or 12 other students . . . stood up and began to shout obscenities in the middle of the lecture and then complete chaos broke out . . . . In fact, the abuse and the language was so extreme that I had never seen anything like it in a classroom." *Id.* at 1336-37 (*quoting* from deposition of Dr. Glew, a faculty observer).

123. *See* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344 (9th Cir. 1981) (deficient scholarship is valid reason for denial of tenure), *cert. denied*, 103 S. Ct. 53 (1982); Lieberman v. Gant 630 F.2d 60, 65 (2d Cir. 1980) (inadequate scholarship); Scott v. University of Del., 601 F.2d 76, 79 (3d Cir.), *cert. denied*, 444 U. S. 931 (1979) (research activity was inadequate); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1160 (D. Mass. 1980) (quantity and style of publications deficient), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Laborde v. Regents of Univ. of Cal., 495 F. Supp. 1067, 1069 (C.D. Cal. 1980) (failure to produce new scholarly material), *cert. denied*, 103 S. Ct. 820 (1983); Cussler v. University of Md., 430 F. Supp. 602, 606-07 (D. Md. 1977) (poor quality publications since last promotion).

124. *See, e.g.*, Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165, 171-72 (2d Cir. Feb. 22, 1984); Lieberman v. Gant, 630 F.2d 60, 70 (2d Cir. 1980); Manning v. Trustees of Tufts College, 613 F.2d 1200, 1204 (1st Cir. 1980); Davis v. Weidner, 596 F.2d 726, 733 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150, 1157 (2d Cir.), *cert. denied*, 439 U.S. 904 (1978); Sime v. Trustees of Cal. State Univs. & Colleges, 526 F.2d 1112, 1115 (9th Cir. 1975); Faro v. New York Univ., 502 F.2d 1229, 1233 (2d Cir. 1974); Poddar v. Youngstown State Univ., 480 F.2d 192, 195 (6th Cir. 1973); Green v. Board of Regents of Tex. Tech Univ., 474 F.2d 594, 596 (5th Cir. 1973); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1161 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Laborde v. Regents of Univ. of Cal., 495 F. Supp. 1067, 1073 (C.D. Cal. 1980), *cert. denied*, 103 S. Ct. 820 (1983); Gilinsky v. Columbia Univ., 488 F. Supp. 1309, 1317 (S.D.N.Y. 1980); Cap v. Lehigh Univ., 450 F. Supp. 460, 468 (E.D. Pa. 1978); Presseisen v. Swarthmore College, 442 F. Supp. 593, 628 (E.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978); Citron v. Jackson State Univ., 456 F. Supp. 3, 17 (S.D. Miss. 1977), *aff'd mem.*, 577 F.2d 1132 (5th Cir. 1978); Morpurgo v. United States, 437 F. Supp. 1135, 1138 (S.D.N.Y. 1977), *aff'd mem.*, 580 F.2d 1045 (2d Cir.), *cert. denied*, 439 U.S. 1000 (1978); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1372 (W.D. Pa. 1977); Huang v. College of the Holy Cross, 436 F. Supp. 639, 656 (D. Mass. 1977); Cussler v. University of Md., 430 F.

explain the consistent success of university defendants. The first is that the federal judiciary is unsympathetic to sex discrimination cases, particularly in the academic context.[125] Another theory is that the judiciary is reluctant to scrutinize the meritocracy surrounding the academic process,[126] which is "extremely narrow and excludes large portions of the available qualified pool of job candidates."[127] The reason may be that hiring or granting tenure only through prestige appointments attracts other prestige candidates who attract better students who, in turn, join the academic world through the "old boy network."[128] Appointing women to tenured positions does not achieve these results, not because women have low prestige, but "because they

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Supp. 602, 609 (D. Md. 1977); Jawa v. Fayettesville State Univ., 426 F. Supp. 218, 230 (E.D.N.C. 1976); Peters v. Middlebury College, 409 F. Supp. 857, 869 (D. Vt. 1976); Labat v. Board of Higher Educ., 401 F. Supp. 753, 757 (S.D.N.Y. 1975).

Plaintiffs' successes have largely been procedural. *See, e.g.*, Felton v. Trustees of the Cal. State Univs. and Colleges, 708 F.2d 1507, 1510 (9th Cir. 1983) (remanded for reconsideration with proper standard of proof for defendant); Gray v. Board of Higher Educ., 692 F.2d 901, 908-09 (2d Cir. 1982) (plaintiff permitted discovery of two college tenure committee members on his unsuccessful applications for promotion and reappointment with tenure); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1348 (9th Cir. 1981) (remanded to allow plaintiff access to her tenure file in order to show pretext), *cert. denied*, 103 S. Ct. 53 (1982); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384-85 (5th Cir. 1980) (improper burden of proof placed on plaintiff at trial); Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1110 (7th Cir. 1979) (summary judgment for defendant reversed); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (same); Weise v. Syracuse Univ., 522 F.2d 397, 413 (2d Cir. 1975) (same); Al-Hamdani v. State Univ. of N.Y., 438 F. Supp. 299, 303 (W.D.N.Y. 1977) (plaintiff withstood motion for summary judgment); O'Connell v. Teachers College, 63 F.R.D. 638 (S.D.N.Y. 1974) (same).

125. *See* SEX DISCRIMINATION, *supra* note 3 at 63-64. The author contends that there is a general insensitivity of the judiciary to academic sex discrimination cases. *Id.* For instance, in Faro v. New York Univ., 502 F.2d 1229, 1231 (2d Cir. 1974), the judge stated that the plaintiff "envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice." *Id.* The trial judge in Cussler v. University of Md., 430 F. Supp. 602 (D. Md. 1977) was quoted as saying in court before the jury that the suit did not belong in court and that sex-bias laws perhaps should not be on the books. *Id.* at 604 (*quoting* Diamondback, Apr. 19, 1977 at 4, col. 4 (daily student newspaper, College Park Campus, Univ. of Md.)).

See also JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21 at 491. This article discusses a more subliminal type of discrimination. It suggests that the academicians attacked by the plaintiff share with the judge the status of membership in "intellectual professions" and that, therefore, a judge may empathize with the scholarly decisionmakers. *Id. See also supra* note 72 and accompanying text (judges have more understanding of the workings of upper-level and professional employment).

126. *See* SEX DISCRIMINATION, *supra* note 3 at 65.

127. *Id.*

128. *Id.*

are outside the prestige system entirely and for this reason are of no use to a department in future recruitment."[129]

One authority has suggested that the low percentage of reported cases in which plaintiffs have obtained final relief results from the fact that educational institutions are more susceptible to settlement attempts in Title VII suits than are other employers.[130] Although this suggestion seems meritorious, it is impossible to substantiate since academic institutions are reluctant to discuss their settled Title VII cases.[131]

The most convincing line of inquiry, however, is that the subjective nature of the tenure decision-making process makes it particularly difficult for a plaintiff to prove "disparate treatment" under Title VII.[132] This result occurs because the defendant can easily show qualitative differences in such subjective areas as experience, teaching ability and scholarship between the plaintiff and the party selected.[133] The subjective nature of the decision has fostered the continuing judicial "hands-off" policy to review of tenure cases.[134]

B. The History of Judicial Non-Intervention

1. *The Early Cases*

Prior to the 1972 amendment[135] to Title VII, educational institutions were exempt from scrutiny under the Act.[136] Even after the Act

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129. *Id.* (quoting L. LEWIS, SCALING THE IVORY TOWER 123-24 (1975)).

130. *See* JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21 at 483 n.48. The settled cases include: Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd mem.*, 614 F.2d 1295 (5th Cir. 1980); Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974).

131. Unanswered letters to Deans of Faculty Affairs at several colleges and universities corroborate this theory.

132. *See* JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21 at 492.

133. *Id.* at 494.

134. *See infra* notes 135-68 and accompanying text.

135. *See supra* note 5. Originally, Title VII exempted all educational institutions with respect to faculty employment practices. *See* 42 U.S.C. § 2000e - 1 (1970) (current version at 42 U.S.C. 2000e (1976)). There is no legislative history which indicates the rationale for the exemption of educational institutions from the act. The House Report encouraging the 1972 amendment stated:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.

H.R. Rep. No. 238, 92d Cong., 2d Sess. (1970), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS pp. 2137, 2155.

was amended, however, federal courts continued to follow a "hands-off" policy in the area of university employment. For example, in *Green v. Board of Regents of Texas Tech*,[137] which was decided the year after the amendment, the court of appeals affirmed the pre-amendment holding of the district court.[138] The lower court had held that faculty evaluations "are necessarily judgmental and the Court will not substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field."[139] The court further held that decisions of this nature "are not justiciable in the absence of abuse of discretion, capricious action or discrimination of

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> Further, the legislative history notes that when women
> have been hired into educational institutions, particularly in institutions of higher education, [they] have been relegated to positions of lesser standing than their male counterparts. In a study . . . it was found that the primary factors determining the hiring of male faculty members were prestige and compatability, but that women were generally considered to be outside of the prestige system altogether.

Id. Most of the university discrimination cases involve alleged sex discrimination. *See* Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165 (2d Cir. Feb. 22, 1984); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1978); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Green v. Board of Regents of Tex. Tech Univ., 474 F.2d 594 (5th Cir. 1973); Laborde v. Regents of the Univ. of Cal., 495 F. Supp. 1067 (C.D. Cal. 1980), *cert. denied*, 103 S. Ct. 820 (1983); Gilinsky v. Columbia Univ., 488 F. Supp. 1309 (S.D.N.Y. 1980); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977); Cussler v. University of Md. 430 F. Supp. 602 (D. Md. 1977); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).

But see Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir 1980) (alleged race discrimination); Scott v. University of Del., 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (same); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980) (alleged discrimination based on race and national origin), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Huang v College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) (alleged discrimination based on race, national origin and color).

136. *See* 42 U.S.C. § 2000e - 1 (1970) (current version at 42 U.S.C. 2000e (1976)); *see, e.g.*, Green v. Board of Regents of Tex. Tech Univ., 335 F. Supp. 249, 251 (N.D. Tex. 1971) (academic judgments are not justiciable in absence of abuse of discretion); Lewis v. Chicago State College, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969) ("[t]he judiciary is not the appropriate forum for decisions involving academic rank"). *See also* SEX DISCRIMINATION, *supra* note 3, at 62 (unsympathetic attitude of pre-Title VII courts not remedied by passage of the Act).

137. 474 F.2d 594, 594 (5th Cir. 1973).

138. *See* 474 F.2d 594 (5th Cir. 1973), *aff'g* 335 F. Supp. 249 (N.D. Tex. 1971).

139. 335 F. Supp. at 250.

such a nature as to constitute a violation or deprivation of constitutional rights."[140]

2. Faro v. New York University

The first case of university employment discrimination brought under Title VII was *Faro v. New York University*.[141] In *Faro*, the defendant institution was alleged to have discriminated against the plaintiff by failing to consider her for a tenured position.[142] In deciding the case, the Second Circuit did not even acknowledge the formula established by the Court in *McDonnell Douglas* in the previous year.[143] Rather, the court concluded, without any discussion of Title VII that "no violation of any provision of Title VII was involved . . . ."[144]

Despite the clearly established *McDonnell Douglas* precedent and statutory authorization,[145] the lower courts were content to follow the established tradition of non-intervention in university cases. Indeed, the *Faro* court stated that university level educational and faculty appointments are least suited for federal court supervision.[146] The court specifically acknowledged that judgments regarding faculty members "require a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position available and, of great importance, the personality of the candidate."[147] In essence, the court said that subjective considerations are crucial in tenure cases and that the court may not substitute its judgment for that of the committee within the university charged with making the decision.[148]

3. *The* McDonnell Douglas *Era*

For years after the *Faro* decision, the lower courts accepted its reasoning and proceeded on the theory that they should apply only

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140. *Id.* at 251 (citing Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969)).

141. 502 F.2d 1229 (2d Cir. 1974).

142. *Id.* at 1230.

143. See *supra* notes 27-35 and accompanying text for discussion of the *McDonnell Douglas* formula.

144. *Faro*, 502 F.2d at 1233.

145. *See* Pub. L. No. 92-261, § 8, 86 Stat. 103, 106 (1972).

146. 502 F.2d at 1231-32.

147. *Id.* at 1232. See PROFESSIONAL JOBS, *supra* note 63 at 203-05 for a discussion of *Faro*.

148. *Faro*, 502 F.2d at 1232.

minimal scrutiny to cases arising in an academic employment setting.[149] In spite of their unwillingness to abandon the traditional noninterference role, the courts did begin to recognize that the *McDonnell Douglas* analysis [150] was applicable in the university context.[151]

In *Cussler v. University of Maryland*,[152] the court explained the *McDonnell Douglas* allocation of burdens but declined to apply it to the plaintiff. Instead, the court adopted an "even if" attitude toward the plaintiff's offer of proof.[153] The court focused on what it considered to be legitimate reasons for plaintiff's non-promotion and concluded that "defendant denied plaintiff's promotion on the basis of legitimate reasons that were not a pretext for sex discrimination."[154] Holding that there was no discrimination, the court referred to its agreement with the general judicial reluctance to intercede in matters of academic judgment.[155]

Similarly, in *Huang v. College of the Holy Cross*,[156] the court perfunctorily stated the requirements for making out a prima facie

149. *See, e.g.*, Stebbins v. Weaver, 537 F.2d 939, 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Huang-College of the Holy Cross, 436 F. Supp. 639, 653 (D. Mass. 1977); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); Cussler v. University of Md., 430 F. Supp. 602, 605-06 (D. Md. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass. 1975).

150. *See supra* notes 27-30 and accompanying text.

151. *See, e.g.*, Zahorik v. Cornell Univ., 84 Fair Empl. Prac. Cas. (BNA) 165, 169 (2d Cir. Feb. 22, 1984); Felton v. Trustees of Cal. State Univs. and Colleges, 708 F.2d 1507, 1509 (9th Cir. 1983); Gray v. Board of Higher Educ., City of New York, 692 F.2d 901, 905 (2d Cir. 1982); Lamphere v. Brown Univ., 685 F.2d 743, 748 (1st Cir. 1982); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1340 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Lieberman v. Gant, 630 F.2d 60, 62-63 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 539 (3d Cir. 1980); Manning v. Trustees of Tufts College, 613 F.2d 1200, 1202 (1st Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1382, (5th Cir. 1980); Scott v. University of Del., 601 F.2d 76, 80 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Davis v. Weidner, 596 F.2d 726, 729-30 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1152-53 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981); Gilinsky v. Columbia Univ., 488 F. Supp. 1309, 1313 (S.D.N.Y. 1980); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1352 (W.D. Pa. 1977); Huang v. College of the Holy Cross, 436 F. Supp. 639, 653 (D. Mass. 1977); Cussler v. University of Md., 430 F. Supp. 602, 605 (D. Md. 1977); Peters v. Middlebury College, 409 F. Supp. 857, 866 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 n.5 (D. Mass. 1975).

152. 430 F. Supp. 602 (D. Md. 1977).

153. *Id.* at 606.

154. *Id.*

155. *Id.* at 605-06. The court further rationalized its holding by referring to campus unrest sparked by the invasion of Cambodia and discord between the faculty and the administration. *Id.*

156. 436 F. Supp. 639 (D. Mass. 1977).

case as enunciated by the *McDonnell Douglas* Court.[157] However, instead of adhering to the test, the court devised a different prima facie analysis for the tenure context. The plaintiff was required to show: (1) that he belonged to a racial minority, (2) that the procedure followed by the college in his case was irregular, (3) that according to the college's standards he was as qualified as others who were granted tenure, and (4) that he was a candidate for tenure, and despite his qualifications, tenure was denied.[158] Application of this test would require a plaintiff, as part of his prima facie case, to prove that he was better qualified than others promoted. Moreover, the court failed to apply its own test. It proceeded instead to the second step of the analysis and explained why defendant's articulated reasons for dismissal—deficient teaching and service—were legitimate and nondiscriminatory.[159] As in *Cussler*, the plaintiff was not afforded the opportunity to show pretext. Instead, the court stated that plaintiff had a fair opportunity, presumably as part of his prima facie case, to prove pretext but failed to do so.[160] The *Huang* court prefaced its analysis with a statement that since tenure decisions involve difficult qualitative judgments, the university's decision must be accorded great deference.[161]

The legitimacy of tenure discrimination claims under Title VII was finally recognized by the Second Circuit in *Powell v. Syracuse University*.[162] The *Powell* court recognized that the judicial anti-interventionist policy had "been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964."[163] The court realized that its obligation, as expressed by the circuit court in *Sweeney v. Board of Trustees of Keene State College*,[164] was to provide a forum for litigation of university discrimination claims arising under Title VII as readily as for other Title VII suits.[165] The *Powell* court decided that its task was "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior."[166] Although *Powell* marked a turning-point in the willingness of the

157. *Id.* at 653.
158. *Id.*
159. *Id.* at 653-54.
160. *Id.* at 656.
161. *Id.* at 653.
162. 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).
163. *Id.* at 1153.
164. 569 F.2d 169, 176-77 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1978).
165. *Powell*, 580 F.2d at 1154.
166. *Id.*

courts to review academic decisions,[167] it did not resolve the problems which result from the subjective nature of tenure decisions.

C. Proof of Qualification in Tenure Cases

The underlying issue in a tenure case is qualification; a correlative question is at what stage of the analysis should evidence of subjective qualification be introduced. Determinations of qualification for tenure necessarily involve consideration of subjective criteria.[168] The question of the function of showing better qualification or lack thereof in the tenure context remains unsettled though some guidance has been provided by the *McDonnell Douglas/Furnco/Sweeney/Burdine* progression.[169]

Before *Burdine*,[170] some courts held that the plaintiff had to show that he was qualified to be granted tenure in order to make out a prima facie case.[171] In *Lieberman v. Gant*,[172] decided the year before *Burdine*, the court stated that the "candidate for tenure does not make out the elements needed for a prima facie case merely by showing qualifications for continuation as an untenured faculty member; indeed to hold that he did would be in effect to negate the requirements beyond minimally satisfactory performance properly entering into the tenure decision."[173]

However, courts considering tenure cases after *Burdine* have generally adhered to its holding that the plaintiff's burden of establishing a prima facie case of disparate treatment is not onerous,[174] and that, therefore, only objective qualification need be considered as part of the prima facie case.[175] In the university setting, objective qualifica-

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167. Cases referring to the language in *Powell* include Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 n.3 (9th Cir. 1981) (Congress gave federal courts responsibility to resolve claims of discrimination in universities), *cert. denied*, 103 S. Ct. 53 (1982); Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3d Cir. 1980) (Court cannot shirk responsibility imposed on it by Congress to resolve claims of academic discrimination); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir. 1980) (fear of undue intervention in university affairs cannot be permitted to undercut intent of Title VII).

168. *See supra* notes 108-13 and accompanying text.

169. See *supra* notes 27-58 and accompanying text for discussion of the four-case progression.

170. 450 U.S. 248 (1981). *See supra* notes 82-91 and accompanying text.

171. *See infra* notes 172-73 and accompanying text.

172. 630 F.2d 60 (2d Cir. 1980).

173. *Id.* at 64; *accord* Labat v. Board of Educ. of the City of New York, 401 F. Supp. 753, 756-57 (S.D.N.Y. 1975).

174. 450 U.S. at 253.

175. *See infra* notes 178-80 and accompanying text.

tions would include, for example, the number of years on the faculty, the number of scholarly publications,[176] membership in honor societies and participation on committees.[177] The court in *Lynn v. Regents of the University of California*[178] recognized, for example, that only objective qualifications should be considered in a plaintiff's prima facie case.[179] These qualifications would include the level of education of the faculty member, years of teaching experience both overall and at the particular institution, and the publication of scholarly materials.[180] Consideration of relative qualification at the first stage of the case would collapse the *McDonnell Douglas* scheme since it would require plaintiff to prove his claim at the outset of the case.

Adherence to the *Burdine* minimum qualification standard is critical to ensure a triable issue in the tenure setting. Since the fundamental question in any disparate treatment claim is motive,[181] to dismiss the case at the first step of the *McDonnell Douglas* analysis because the plaintiff failed to show better qualification than the party selected completely avoids the question of motive. Since the criteria considered in tenure decisions are highly subjective, forcing the plaintiff to reveal the extent of his qualification at step one would permit the defendant to tailor his step two rebuttal to counter the plaintiff's claim in step one. For example, a plaintiff might, as part of his prima facie case, show scholarly qualifications equivalent to those of the party chosen. The defendant could simply claim, in the second step, that the emphasis of the department at the time the plaintiff was considered for tenure was on strengthening the teaching abilities of its faculty, and further that in its view, the plaintiff's teaching abilities were unsatisfactory. Even this degree of proof would not be required. It would be sufficient, at least for most courts, for the defendant to show that the plaintiff's teaching fell short of excellence.[182] Given that the judiciary is reluctant to substitute its judgment for that of the academicians, a contrived reason could be accepted as legitimate. Moreover, if the

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176. Number of publications is an objective criterion while quality of scholarship, as discussed *supra* notes 115-23, is a subjective criterion.

177. Participation on committees or involvement in university affairs is an objective criterion while the value of the contribution, as discussed *supra* notes 115-23, is a subjective consideration.

178. 656 F.2d 1337 (9th Cir. 1981).

179. *Id.* at 1344.

180. *Id.* at 1345 n.8. But see *supra* notes 115-23 and accompanying text for discussion of subjective criteria used in tenure decisions.

181. *See* RELATIVE QUALIFICATIONS, *supra* note 8.

182. *See supra* notes 120-22 and accompanying text.

plaintiff is required to show relative qualification at step one, it would be insignificant to introduce pretext at step three since the pretext evidence would have been exposed as part of the prima facie case.[183]

Adherence to a minimal scrutiny test at step one would implement the congressional intent of the amendment. Title VII was extended to include employees of academic institutions because Congress recognized the ease with which discrimination could be disguised in an academic setting.[184] The House Report on the amendment declared that "[d]iscrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment."[185] Evidence of sex discrimination in academia was described as "truly appalling,"[186] "gross"[187] and "blatant."[188] Actually, employment decisions which are so fully based on subjective criteria are perhaps the most suspect since they are easily manipulated and are not subject to careful scrutiny. The employees whose careers are decided on the basis of subjective factors are those who most require Title VII's protections. To require faculty plaintiffs to prove at the outset that they were qualified according to a particular department's criteria would return them to their pre-Amendment position of having no recourse against a university in the event of discrimination.

Refusal to grant tenure will necessarily involve a deficiency in one of the three subjective categories of teaching ability, research and scholarship, and service to the community.[189] Since the employer bases his decision on an evaluation of these criteria, the proper place for their introduction is in the defendant's "articulation" of valid reasons. Generally, defendants in tenure cases have been able to introduce evidence regarding these subjective factors as part of their rebuttals at step two.[190] Based on deficiencies in one of the three criteria, universities have claimed lack of qualification as their "legitimate non-discriminatory reason" for denying tenure.[191]

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183. See *supra* notes 168-81 and accompanying text for discussion of relative qualification as part of the *McDonnell Douglas* formula.

184. Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175 (1st Cir. 1978).

185. H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2155.

186. 117 Cong. Rec. 3247 (1971) (remarks of Sen. Bayh).

187. 118 Cong. Rec. 1992 (1972) (remarks of Sen. Williams).

188. *Id.*

189. *See supra* notes 114-24 and accompanying text.

190. *See supra* notes 174-80 and accompanying text.

191. *See supra* notes 119-23 and accompanying text.

It is difficult for the plaintiff to defeat the defendant's step two articulation of non-qualification.[192] The problem of proof of pretext is exacerbated by the willingness of the judiciary to follow a non-interventionist policy in tenure decisions. Therefore, in the university context, the *McDonnell Douglas* procedure has been perfunctorily applied but the result seems to be predetermined. Unless a defendant openly admits to discrimination, the plaintiff must resort to statistics, individual comparisons with faculty members who were selected for tenure positions, expert testimony and the testimony of the parties themselves.[193] The difficulty is that even a reliable statistical showing may not be probative of the motives of the department in the plaintiff's case, and motive is vital in a disparate treatment case.[194]

A faculty plaintiff's showing of pretext in a disparate treatment suit against an academic institution may be most persuasive where the plaintiff demonstrates that the procedures for granting tenure which were detailed in the faculty handbook were not strictly followed. For example, the court in *EEOC v. Tufts Institution of Learning*[195] emphasized the traditional stance of substantive non-interference and explained the manner in which it would review an academic decision:

> [T]he criteria and procedures established by a university for promotion and reappointment of faculty members are controlling. Thus, where the criteria are reasonably related to the professional duties of the academic position sought and to the personal qualifications of the applicant, and are applied through prescribed or settled procedures fairly and reasonably followed, the court should not substitute its judgment for that of the university authorities.[196]

In essence, the court stated that it would be willing to find academic Title VII violations based on procedural irregularities, though it was unwilling to interfere in the merits of an academic decision.

Similarly, the court in *Huang v. College of the Holy Cross*,[197] found that the irregular procedures followed in the plaintiff's case may have warranted a finding of discrimination, but it refused to substitute its judgment for that of the college on the substantive issue.[198] Therefore, if a faculty plaintiff could establish that tenure decision-making pro-

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192. *See supra* notes 174-80 and accompanying text.
193. JUDICIAL RECOGNITION OF ACADEMIC COLLECTIVE INTERESTS, *supra* note 21, at 493.
194. *See supra* note 9 and accompanying text.
195. 421 F. Supp. 152 (D. Mass. 1975).
196. *Id.* at 158.
197. 436 F. Supp. 639 (D. Mass. 1977).
198. *Id.* at 653.

cedures were not fairly applied in his case, pretext might be established and the court would be likely to intervene.

The Second Circuit in *Zahorik v. Cornell University*[199] noted that it was not the province of the judiciary to determine the level of achievement required for tenure in a particular case.[200] The court added that, "[d]epartures from procedural regularity, such as a failure to collect all available evidence, can raise a question as to the good faith of the process where the departure may reasonably affect the decision."[201] If this inference of discrimination were coupled with a showing that a candidate had significant support for a favorable decision from the faculty or outside scholars, a prima facie case would be established.[202] The burden of production would shift to the defendant, and its response could "be attacked both on its logic and the substantiality of the underlying file."[203] Thus, the defendant's articulation would have to encompass both the procedural and substantive aspects of its decision and would afford the plaintiff a greater opportunity to show pretext.

V. Conclusion

A faculty plaintiff alleging "disparate treatment" in a university setting faces almost insurmountable barriers to proving his claim. The most viable method of showing discrimination under Title VII in this type of case is the three-step analysis enunciated by the Supreme Court in *McDonnell Douglas* and refined in several subsequent decisions. Particularly in a university context, the faculty plaintiff should be required to prove only objective qualification in order to meet the prima facie test. Evidence relating to the subjective elements which are the basis of a tenure decision should be introduced by the defendant as part of his articulation of a legitimate nondiscriminatory reason for his actions.

However, in the university context, the defendant's burden should be two-fold. As the Supreme Court noted in *McDonnell Douglas*, the defendant must articulate a legitimate reason for the action taken. Additionally, it should be required to show that the review procedures followed in the plaintiff's case were in strict accordance with policies detailed in the faculty handbook or, where no handbook is in use, that

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199. 84 Fair Empl. Prac. Cas. (BNA) 165 (2d Cir. Feb. 22, 1984).
200. *Id.* at 170.
201. *Id.*
202. *Id.*
203. *Id.*

the standard procedures of the department and the institution have been substantially followed. This would afford a faculty plaintiff the opportunity to attack the university's decision on both substantive and procedural grounds. Since courts are reluctant to intervene in substantive academic decision-making but are willing to review procedural irregularities, the plaintiff would have an opportunity to show that a procedural irregularity resulted in a discriminatory determination in his case.

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