GENDER DISCRIMINATION, HIGHER EDUCATION, AND THE SEVENTH CIRCUIT: BALANCING ACADEMIC FREEDOM WITH PROTECTIONS UNDER TITLE VII, CASE NOTE: *FARRELL VS. BUTLER UNIVERSITY*

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INTRODUCTION

When most people are passed over for an award, they do not litigate it even if they suspect the selection process was tainted. However, one woman, Grace Farrell, PhD, did.[2] Tired of what she perceived as another instance of gender discrimination at Butler University, Farrell took the University to court over its Professional Excellence Program award—an annual award given to two outstanding professors in the areas of teaching, service, and scholarship.[3] While Farrell's decision to litigate may be unusual, consider that the award was established to address the pay gap between male and female faculty members, yet no female faculty members had ever won.[4]

Farrell took a risky step by choosing litigation. Her chance of prevailing was slim because courts traditionally defer to universities in academic decisions,[5] and proving gender discrimination is generally difficult.[6] In fact, at the time Farrell filed suit, no one had successfully established a discrimination claim over an academic or professional award.[7]

The district court granted summary judgment for the University.[8] On appeal, the Seventh Circuit ultimately affirmed the district court's judgment.[9]

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2. Farrell v. Butler Univ., 421 F.3d 609 (7th Cir. 2005).

3. *Id.* at 612.

4. *Id.*

5. 1 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 9-10 (4th ed. 2006).

6. Carlo A. Pedrioli, *A New Image in the Looking Glass: Faculty Mentoring, Invitational Rhetoric, and the Second-Class Status of Women in U.S. Academia*, 15 HASTINGS WOMEN'S L.J. 185, 194 (2004).

7. *See, e.g.*, *Farrell*, 421 F.3d at 614 ("We have held that the denial of a raise qualifies as an adverse employment action . . . but that the denial of a bonus does not ") (citing *Hunt v. City of Markham*, 219 F.3d 649, 654 (7th Cir. 2000) and *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000).

8. *Id.* at 612.

However, the court demonstrated how to achieve a delicate balance between protecting individual rights under Title VII and respecting academic freedom.

This case note analyzes the legal framework of a gender discrimination claim in higher education and considers the Seventh Circuit's continuing refinement of the appropriate level of judicial deference to educational institutions in academic matters. Part I summarizes the background and facts of *Farrell v. Butler University*. Part II discusses gender discrimination in higher education in general and the use of deference by courts in cases involving universities. Parts III and IV, respectively, discuss the elements required for disparate treatment and disparate impact claims and review the court's treatment of Farrell's facts with respect to these elements. Part V discusses the arguments for the courts' use of limited, rather than substantial, deference[10] to academic decisions and explores the Seventh Circuit's use of limited deference in cases in which an adverse employment action is based on academic performance.

I. BACKGROUND FACTS AND SUMMARY OF THE CASE

Farrell has been a tenured professor of English at Butler University since 1987.[11] From 1987 to 1989, she served as the head of the English department.[12] In 1996, the University created a Faculty Compensation Task Force to evaluate problems with gender inequities in faculty employment..[13] The task force was particularly concerned with pay disparities between male and female faculty members.[14] "[T]he [t]ask [f]orce reported that male professors tended to have higher mean salaries than female professors at all rank levels."[15] It made several recommendations to University administration, including implementing a Professional Excellence Program (PEP) to reward two "professors who had been tenured full professors for at least five years and who demonstrated sustained excellence in scholarship, teaching[,] and service."[16] The committee reviewed the candidates' performance for the most recent five-year period.[17] The PEP bestowed a permanent increase in salary.[18]

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9. *Id.* at 617.

10. I use the term "substantial" to refer to the level of deference courts traditionally use in legal disputes involving universities. Relying on the principles of academic freedom, courts tend to accept a university's reasoning without much, if any, inquiry. I use the term "limited deference" to refer to the narrow level of deference in which judges only defer to academic decisions but also look closely at the individual facts of the case. I use these terms to emphasize the difference between the court's traditional use of deference in academic situations and the newly emerging, lesser type of deference illustrated in the Farrell case.

11. *Farrell*, 421 F.3d at 611.

12. *Id.*

13. *Id.* at 612.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 617 n.3.

18. *Id.* at 614.

The University did not contest Farrell's assertion that the PEP was created to address the pay disparity between genders;[19] however, the record was unclear how the University expected that the PEP, as implemented, could possibly have served this goal. Since the University could not limit the award to female faculty members without discriminating against male faculty members, both women and men were eligible to apply for the PEP.[20] Most troubling, however, was that by requiring candidates to have served the university for five full years after receiving tenure, few female faculty members even met the eligibility criteria.[21] In fact, Farrell was the only female professor eligible from the College of Liberal Arts and Sciences, and only two female professors from the entire Butler faculty, including Farrell, were eligible.[22]

Farrell applied for the PEP in 2000 and 2001, but, in each year, two male professors were selected instead.[23] Believing that the University's selection of award recipients was discriminatory, Farrell filed a Title VII gender discrimination suit in federal court.[24]

The United States District Court for the Southern District of Indiana granted summary judgment for the University.[25] It reasoned that although Farrell established a prima facie case for her disparate treatment and disparate impact claims, Farrell did not prove that the University's decision not to award her with the PEP award in 2000 and 2001 was discriminatory.[26] Therefore,

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19. *See id.* at 612.

20. Title VII prohibits discrimination based on gender and protects both women and men. 42 U.S.C. § 2000e-2(a)(1) (2000). *See also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 718 (1982) (holding that the policy of a state-supported university of limiting its enrollment to its School of Nursing to women violates the Equal Protection clause of the Fourteenth Amendment). Because both male and female faculty members were eligible for the PEP, it was a questionable response to the problem of gender equity. Perhaps the task force envisioned an award reserved for female faculty members, only to find out later it could not legally exclude males.

21. *Farrell*, 421 F.3d at 612. It is more difficult for female faculty members to meet these criteria because, in general, women have joined the faculty more recently and have more frequent breaks in service for family and personal leaves of absence. *See* Mary Ann Mason & Marc Goulden, *Do Babies Matter (Part II)?: Closing the Baby Gap*, ACADEME, Nov.-Dec. 2004, at 11, 11, *available at* http://www.aaup.org/publications/Academe/2004/04nd/04ndmaso.htm. *See generally* NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SEC., WOMEN AND RETIREMENT SECURITY 8-9 (1998), *available at* http://www.ssa.gov/history/pdf/sswomen.pdf [hereinafter WOMEN AND RETIREMENT SECURITY].

22. *Farrell*, 421 F.3d at 616.

23. A total of four male recipients. *Id.* at 612.

24. *Id.* Title VII prohibits public and private employers from discriminating based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). Prior to filing suit in federal court, Farrell filed a claim with the University's faculty grievance board and the Equal Employment Opportunity Commission, as required under federal law. *Farrell*, 421 F.3d at 612.

25. *Farrell*, 421 F.3d at 612.

26. *Id.* at 609.

according to the court, Farrell did not establish a valid legal claim.[27] She appealed to the Seventh Circuit Court of Appeals, which affirmed the district court's summary judgment order.[28]

II. GENDER DISCRIMINATION IN HIGHER EDUCATION

A. *Concerns over Gender Discrimination at Colleges and Universities*

Gender discrimination is prohibited in higher education by several federal statutes, including Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Pay Act.[29] Despite these statutes, gender equity in higher education is a continuing concern. Women earn more than half of all graduate degrees,[30] but hold only 24% of full professorships,[31] 31% of tenured positions,[32] and 40.9% of tenure track positions.[33] Gender inequity in higher education is attributed to many factors, including the increasing use of part-time instructors over full-time tenure-track faculty, women choosing career paths other than tenure-track positions, and gender discrimination.[34] Moreover, women as assistant, associate, and full professors on average earn only 83% of what their male counterparts earn.[35]

Gender bias in academia takes many forms, including sexual harassment and gender bias in hiring, promotions, awards of tenure, and work distribution

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27. *Id.*

28. *Id.* at 617.

29. KAPLIN & LEE, *supra* note 5, at 371. Title VII prohibits public and private employers from discriminating based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2000). Title IX prohibits gender discrimination in educational programs and in activities receiving federal funds. 20 U.S.C. §§ 1681-1688 (2000). The Equal Pay Act prohibits employers from paying lower wages to one gender for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," with exceptions for wage differentials based on factors other than sex. 29 U.S.C. § 206(d)(1) (2000). Title VII is the most comprehensive of the federal anti-discrimination laws, and gender discrimination claims by faculty members are generally filed under Title VII. Joseph Beckham, *Disparate Impact Analysis Under the ADEA: A Standard of "Reasonableness" for College and University Employees*, 201 EDUC. L. REP. 409, 410 (2005); Mary Hora, *The Courts and Academia: Tenure Discrimination Claims Against Colleges and Universities*, 30 J.L. & EDUC. 349, 351 (2001) (specifically relating to tenure claims).

30. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 2006 at 5 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf.

31. *Id.* at 4.

32. *Id.* at 9.

33. *Id.* at 21.

34. *Id.* at 6-12. Authors indicate four "Faculty Gender Equity Indicator[s]": (1) employment status, (2) tenure status, (3) full professor rank, and (4) average salary. *Id.*

35. *Id.* at 15.

decisions.[36] Gender discrimination claims are particularly common in tenure disputes.[37] However, few plaintiffs are successful because they often have no direct evidence of discrimination, and the current legal framework makes it nearly impossible to prove a gender discrimination claim with indirect evidence.[38]

Although few plaintiffs are successful,[39] gender discrimination claims are of great concern to institutions of higher education.[40] Responding to allegations of discrimination diverts resources that could be used for educational programs, impacts working relationships, and consumes administrators' time and energy.[41] Universities struggle with gender equity because many initiatives that seek to equalize pay or status between genders are subject to claims of discrimination by male employees.[42] Systems of shared governance between administrators and faculty add complexity to employment decisions, including multiple decision makers and internal proceedings, making it difficult to pinpoint and eliminate more subtle gender bias.[43]

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36. Jennifer Freyd, *References on Chilly Climate for Women Faculty in Academe*, http://dynamic.uoregon.edu/~jjf/chillyclimate.html (last visited Jan. 21, 2007). Other studies have recognized gender bias reflected in student evaluations, which are often important criteria in hiring and tenure decisions. *Id.*

37. *See generally* Hora, *supra* note 29, at 349. Hora notes that tenure discrimination claims against universities more than tripled between 1992 and 1997. *Id.* Other sources note that between 1994 and 1999 the average number of claims filed per institution rose from less than one per year to three per year. Lawrence C. DiNardo et al., *Specialized ADR to Settle Faculty Employment Disputes*, 28 J.C. & U.L. 129, 136 (2001) (citation omitted).

38. Hora, *supra* note 29, at 352-55; KAPLIN & LEE, *supra* note 5, at 514-15; Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity In Higher Education*, 29 HARV. J.L. & GENDER 247, 264 (2006).

39. KAPLIN & LEE, *supra* note 5, at 502. "Women who have challenged the fairness of peer judgments generally have not been successful in court . . . However, women who could demonstrate actual gender bias in employment decisions . . . or a clearly different objective standard for men and women . . . have prevailed . . . ." *Id.* at 514-15 (citations omitted). Only one in every four faculty plaintiffs prevails in civil rights cases. Barbara A. Lee, *Employment Discrimination in Higher Education*, 26 J.C. & U.L. 291, 292 (1998) (citing GEORGE R. LANOUE & BARBARA A. LEE, ACADEMICS IN COURT 30 (1987)).

40. *See* Hora, *supra* note 29, at 349.

41. Ann H. Franke, *Why Battles Over Tenure Shouldn't End Up in the Courtroom*, CHRON. OF HIGHER EDUC., Aug. 11, 2000, at B6.

42. *See* Ana M. Perez-Arrieta, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context*, 31 J.C. & U.L. 393, 395-96 (2005).

43. Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 BUFF. WOMEN'S L.J. 55, 86-87 (1999-2000); Franke, *supra* note 41; Hora, *supra* note 29, at 355; Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 5 (2006).

B. *Courts' Deference to Universities' Academic Decisions*

In a typical employment discrimination case, the court gives only limited deference to the employer's business reasons for its decision.[44] Conversely, in cases where the employer is a college or university, courts traditionally defer to the university when the decision involves academic issues.[45] Since a faculty member's job performance is closely aligned with academic standards, courts tend to review faculty hiring, tenure, and promotion decisions with less rigor than other employment actions.[46] Therefore, faculty plaintiffs struggle with an additional hurdle if the university cites academic performance, such as poor teaching or research skills, in defense of its actions.[47]

The court's role in Title VII cases involving higher education is generally to settle the employment dispute while preserving the university's academic freedom.[48] Academic freedom is traditionally recognized as the university's "'four essential freedoms . . . to determine . . . who may teach, what may be taught, how it shall it be taught, and who may be admitted to study" without interference from the political sphere.[49] Although academic freedom is rooted in preserving faculty members' First Amendment rights, courts view academic freedom as an institutional privilege and tend to defer to academic decisions made by universities in most types of litigation.[50] That is, courts are reluctant to interfere when a judgment against a university will burden its ability to

44. Note that several scholars, most recently Chad Derum and Karen Engle, argue that courts are increasingly giving too much deference to all employers in Title VII discrimination cases. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption In Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1179 (2003). The Seventh Circuit has opined, "We have warned repeatedly that we do not sit as a super-personnel department that reexamines an entity's business decision and reviews the propriety of the decision." Nawrot v. CPC Int'l., 277 F.3d 896, 906 (7th Cir. 2002) (citations omitted). *See also* Gordon v. United Airlines, Inc., 246 F.3d 878, 889 (7th Cir. 2001); Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000); Dale v. Chi. Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).

45. KAPLIN & LEE, *supra* note 5; Sturm, *supra* note 38, at 264.

46. *See* Susan A. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. Chi. L. Rev. 1317, 1318-19 (1992). However, the legislative history shows a lack of not intent that educational employment be treated differently than other types of employment. *Id.* at 1317 n.4.

47. Moss, *supra* note 43, at 5-6.

48. Bartholomew, *supra* note 43, at 63.

49. Sweezy v. N.H., 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring) (citation omitted). Courts primarily recognize academic freedom as an institutional right, a prerogative of the university administration. KAPLIN & LEE, *supra* note 5, at 621-22, 625-26. Faculty members also enjoy academic freedom, protected by First Amendment rights and the tenure system. *Id*. at 613-14. However, when a faculty member and the university disagree on an academic matter, such as appropriate course content or teaching methodology, courts recognize the right of the university administration to make these judgments. *See* J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 86-87 (2004); Pacholski, *supra* note 46, at 1324.

50. Byrne, *supra* note 49, at 86-87.

perform educational functions or establish a precedent that will create a burden for other similar institutions.[51]

Additionally, courts regard a university's employment decisions, such as appointment, promotion, and tenure, to be academic decisions that require expert judgments suitably governed by the traditions of the academic institution.[52] Traditionally, courts believe that employment decisions at universities are the "prerogative of peer review committees, department heads, deans[,] and others in the institution's administrative hierarchy."[53] Judges generally believe that they do not possess the background necessary to review such judgments because employment decisions require evaluation of complex factors such as research quality, professional reputation, and teaching skills.[54] Such judgments are perceived to require expert knowledge of the faculty member's academic discipline and his or her specific teaching and research specialties.[55] The United States Supreme Court has opined: "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is . . . a substantial departure from accepted academic norms."[56]

Therefore, in allegations where the adverse employment action,[57] such as denial of tenure or a raise, is based on poor academic performance, a court is unlikely to interfere because of the principle of academic freedom.[58] A university's assertion that its actions were based on unsatisfactory scholarship, teaching, or service is usually sufficient to justify deference to the university.[59] However, critics of judicial deference are concerned that courts do not give

51. KAPLIN & LEE, *supra* note 5, at 130.

52. *Id.*

53. DiNardo et al., *supra* note 37, at 130 (quoting John D. Copland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 246 (1996)).

54. KAPLIN & LEE, *supra* note 5, at 502-03. Case law consistently affirms this sentiment. *See* Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591, 1596 (1988). The court in *Farrell* relied on *Vanasco v. National-Louis University*, 137 F.3d 962, 968 (7th Cir. 1998) and *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984). Farrell v. Butler Univ., 421 F.3d 609, 616 (7th Cir. 2005). *See also* EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331, 339 (7th Cir. 1983) ("Courts have no more business in substituting their judgment for that of a legitimate peer review determination than they do in determining whether a particular physician or surgeon is qualified to practice in a particular hospital.").

55. Moss, *supra* note 43, at 5-6.

56. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1984).

57. An adverse employment action is "[a]n employer's decision that substantially and negatively affects an employee's job, such as a termination, demotion, or pay cut." BLACK'S LAW DICTIONARY 59 (8th ed. 2004).

58. *Univ. of Notre Dame du Lac*, 715 F.2d at 339; KAPLIN & LEE, *supra* note 5, at 127.

59. KAPLIN & LEE, *supra* note 5, at 129-31.

appropriate attention to the individual facts of these cases[60] and that deference allows discrimination by academic departments to go unchecked.[61]

Courts' use of deference in academic decisions stems from other misperceptions about university administration.[62] For example, deference to academic decisions has been linked to an assumption held by judges and juries that university administrators and faculty, some of America's most educated citizens, are above sexism or racism.[63] Furthermore, since most universities have formal policies against discrimination and provide training and awareness programs regarding gender discrimination, judges have the impression that discrimination is not tolerated in higher education.[64]

A faculty recognition program, such as Butler University's PEP, is an example of academic decision-making with which courts are reluctant to interfere,[65] and understandably so. Experienced selection committee members consider a variety of complex factors including research quality, publication, contribution to one's field of study, service to the university, and teaching ability.[66] Yet a dilemma exists—when an allegation arises, how can judges ensure that awards programs are not spoiled by gender discrimination while continuing to preserve the university's academic freedom? The court in *Farrell* attempted to do just that.

III. FARRELL'S DISPARATE TREATMENT CLAIM

Gender discrimination claims under Title VII generally fall under two categories: disparate treatment and disparate impact. Disparate treatment occurs when an employer intentionally deals with an employee differently because of his or her sex.[67] Disparate impact occurs when a facially neutral employment practice produces unintentional adverse effects that result in sex discrimination.[68] Farrell filed both types of claims against Butler University.[69]

With respect to her disparate treatment claim, Farrell claimed the award selection process was discriminatory.[70] Specifically, Farrell alleged that her

60. *See, e.g.*, Bartholomew, *supra* note 43, at 65.

61. Moss, *supra* note 43, at 3.

62. *See* Gray, *supra* note 54, at 1596.

63. *Id.*

64. *See* Moss, *supra* note 43, at 17. In addition, some believe that social norms will deter most forms of discrimination based on economic models of efficient business or educational operations. *Id.* at 17-18.

65. *Id.* at 2-3 n.2.

66. These factors were criteria for selection of PEP award recipients. Farrell v. Butler Univ., 421 F.3d 609, 612 (7th Cir. 2005).

67. BLACK'S LAW DICTIONARY 504 (8th ed. 2004).

68. *Id.*

69. *Farrell*, 421 F.3d. 609.

70. *Id.* at 615.

PEP application was treated less favorably than other applications because of her sex.[71]

A disparate treatment claim can be proven through direct or indirect evidence.[72] Farrell had no direct evidence of misconduct or bias by the selection committee;[73] therefore, she had to prove her claim through indirect evidence,[74] which is typically more difficult.

To prove disparate treatment with indirect evidence, the plaintiff must satisfy the test established by the Supreme Court in 1973.[75] Under the *McDonnell Douglas* test, "the plaintiff bears the initial burden of establishing a prima facie case."[76] After the plaintiff proves a prima facie case, the burden shifts to the employer to prove a nondiscriminatory reason for its decision.[77] The burden then shifts back to the plaintiff to demonstrate that the employer's stated reason is a pretext to cover intentional discrimination.[78] At the summary judgment stage, the plaintiff only needs to "produce evidence from which a rational factfinder could infer that the [employer] lied about its proffered reasons" for the action.[79]

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71. *Id.* at 615-16.

72. *Id.* at 612-13 (citing O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 983 (7th Cir. 2001)).

73. *Id.* at 613.

74. Direct evidence is defined as evidence "based on personal knowledge or observation and that, if true, proves a fact without interference or presumption." BLACK'S LAW DICTIONARY 596 (8th ed. 2004). Indirect evidence, also known as circumstantial evidence, is based on inference and not on personal knowledge. *Id.* at 595-96. The Seventh Circuit has provided a more detailed explanation of the difference between direct and indirect evidence in *Rudin v. Lincoln Land Community College*, 420 F.3d 712, 720-21 (7th Cir. 2005). In *Rudin*, the court described three types of indirect evidence:

> The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. . . . Second is evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment. . . . Third is evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief.

Id. (citing Troupe v. May Dep't Stores, 20 F.3d 734, 736 (7th Cir. 1994)).

75. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See also* Lim v. Tr. of Ind. Univ., 297 F.3d 575, 580 (7th Cir. 2002).

76. *Farrell*, 421 F.3d at 613 (citing *McDonnell*, 411 U.S. at 802).

77. *Id.* (citing *McDonnell*, 411 U.S. at 802).

78. *Id.* (citing Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1009 (7th Cir. 2000)).

79. Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 726 (7th Cir. 2005) (citation omitted).

First, Farrell had to prove her prima facie case.[80] To do so, she had to establish four elements: (1) she was a member of a protected class; (2) her performance at work was satisfactory; (3) she suffered an adverse employment action; and (4) she was treated less favorably than at least one similarly-situated colleague of the opposite sex.[81]

Farrell easily established three elements of her prima facie case. First, as a woman, she was a member of a protected class based on gender.[82] Second, she performed her job so satisfactorily that she qualified to apply for one of the University's most coveted awards.[83] Also, Farrell was treated less favorably by the selection committee than the similarly-situated male applicants who were awarded the PEP award and received a permanent pay increase.[84] The third element, whether Farrell suffered an adverse employment action when she did not win the PEP award, was at issue.[85]

The court carefully considered whether Farrell suffered an adverse employment action under current precedent.[86] Traditionally, an adverse employment action is defined as an employer action that substantially and negatively impacts an employee, typically resulting in a loss of pay or monetary benefits.[87] Examples of adverse employment actions include termination, demotion, discipline, or a reduction in an employment benefit.[88] Even with a generous reading of the definition of an adverse employment action, failing to win an award is unlikely to qualify because it does not result in a loss of pay or monetary benefits to the employee.[89] Furthermore, there was no precedent in the Seventh Circuit or other federal circuits that failing to win

80. *Farrell*, 421 F.3d at 613.

81. *Id.* (citing Lim v. Tr. of Ind. Univ., 297 F.3d 575, 580 (7th Cir. 2002); *Paluck*, 221 F.3d at 1012)).

82. 42 U.S.C. § 2000e-2(a)(1) (2000).

83. *Farrell*, 421 F.3d at 612. In many situations, whether the employee was performing her job satisfactorily is at issue. *See, e.g.*, Walker v. Bd. of Regents of the Univ. of Wis. Sys., 410 F.3d 387 (7th Cir. 2005); *Lim*, 297 F.3d 575.

84. *Farrell*, 421 F.3d at 614.

85. *Id.* at 612.

86. *Id.* at 613-14.

87. BLACK'S LAW DICTIONARY 59 (8th ed. 2004). Although the term is associated with "ultimate" employer decisions such as hiring, promotion, termination, and compensation, some circuits have interpreted the term more broadly. Maria Greco Danaher, *Definition of "Adverse Employment Action" Remains Unsettled*, 8 LAWS' J. 2, 2 (2006). The Seventh Circuit has adopted a broad understanding of an adverse employment action and does not require an actual loss of pay or monetary benefit. *Farrell*, 421 F.3d at 613-14 (citing Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 901 (7th Cir. 2003); Haugerud v. Amery Sch. Dist., 259 F.3d 678, 691 (7th Cir. 2001)).

88. *See Farrell*, 421 F.3d at 613-14. For a summary of Seventh Circuit rulings on whether a plaintiff experienced an adverse employment action, see Markel v. Bd. of Regents of the Univ. of Wis. Sys., 276 F.3d 906, 911-12 (7th Cir. 2002).

89. A monetary award, typically viewed as a bonus, is discretionary action rewarding an employee. *Farrell*, 421 F.3d at 614.

an award was actionable.[90] Yet the court found that the issue required further consideration because the PEP award bestowed a permanent pay increase upon the recipient.[91]

Seventh Circuit precedent established that the denial of a raise generally qualified as an adverse employment action.[92] However, the Seventh Circuit also previously established that denial of a bonus did not qualify as an adverse employment action.[93] A raise is a regular pay increase, typically awarded to all employees performing satisfactorily.[94] Denying or reducing a raise has "continuing effects" because it reduces future salaries and may impact fringe benefits.[95] Unlike a raise, a bonus is generally "sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer."[96] Bonuses are generally used to reward top performers, and although an employee who does not receive a bonus may be disappointed, he or she has not experienced an actual loss of compensation.[97] Farrell's ability to make her prima facie case turned on whether the PEP award was more like a raise than a bonus.[98] If it was more like a raise, it was actionable in the Seventh Circuit as an adverse employment action; however, if the award was more like a bonus, it was not actionable.[99]

The PEP award did not fall neatly into either category—raise or bonus.[100] It was more like a raise in that it provided a permanent increase in pay and was announced in a regular, annual presentation.[101] It was more like a bonus in that it was is not a normal element of the faculty's compensation plan, and it rewarded only two members of the faculty rather than being awarded to all

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90. In only one other federal case, *Demuren v. Old Dominion University*, 33 F. Supp.2d 469 (E.D. Va. 1999), *aff'd*, 188 F.3d 501 (4th Cir. 1999), did a faculty member sue when not selected for an award on a discrimination claim based on national origin. *Farrell* is the first claim based on a theory of gender discrimination.

91. *See Farrell*, 421 F.3d at 614.

92. *Id.* at 613-14 (citing Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)); Hunt v. City of Markham, Ill., 219 F.3d 649, 654 (7th Cir. 2000).

93. *Farrell*, 421 F.3d at 614 (citing Miller v. Am. Fam. Mut. Ins. Co., 203 F.3d 997, 1006 (7th Cir. 2000)); *see also* Rabinovitz v. Pena, 89 F.3d 482, 488-89 (1996).

94. *See Farrell*, 421 F.3d at 618 (Flaum, J., dissenting).

95. Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000). Since raises are often awarded as a percentage of annual salary, employees who do not receive the raise are continually penalized with lower increases than their peers each year. *Id.*

96. *Hunt*, 219 F.3d at 654. Denial of a raise is considered a denial of a "permanent" benefit. *Id.*

97. The Seventh Circuit has explained, "[N]ot everything that makes an employee unhappy is an actionable adverse action." *Smart*, 89 F.3d at 441. The "loss of a bonus is not an adverse employment action in a case . . . where the employee is not automatically entitled to the bonus." *Rabinovitz*, 89 F.3d at 488-89.

98. *Farrell*, 421 F.3d at 614 (7th Cir. 2005).

99. *Id.*

100. *Id.*

101. *Id.*

employees.[102] Ultimately the court classified the PEP award as a raise, relying on *Power v. Summers*, which held that faculty members who did not receive the same "catch-up raise" as their peers experienced an adverse employment action.[103] Thus, the court, in a split decision, held that Farrell experienced an adverse employment action, allowing her to make her prima facie case.[104]

Perhaps foreseeing criticism for allowing a claim over an academic award to go forward, the court explained its policy considerations.[105] Recognizing an opportunity for employer abuse in awards programs, the court felt that classifying the award as merely a bonus would give the University a "license to discriminate openly" in its selection of recipients, leaving faculty members without any legal recourse.[106] The court implied that the possibility of litigation would encourage universities to take additional steps to ensure that selection committees were free from bias.[107] The court specifically commented on the irony that the PEP award was designed to address gender inequity at the University but was never awarded to a woman.[108] Although the court went no further, its comments evoke a reprimand.[109]

After Farrell made her prima facie case, the burden shifted to the University to provide a legitimate, nondiscriminatory reason why the selection committee did not give her the award.[110] Under the *McDonnell Douglas* test, the employer's reason can be virtually any business reason.[111] The University presented evidence of the selection committee's careful consideration of each applicant's qualifications, based on teaching, service, and scholarship criteria.[112] The court held that these justifications were sufficient to prove that the selection committee's decision was based on nondiscriminatory reasons.[113]

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102. *Id.*

103. *Id.* (citing Power v. Summers, 226 F.3d 815, 821 (7th Cir. 2000)).

104. *Id.* at 614.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at n.1.

> We note our struggle with the determination of whether the PEP award was more similar to a raise or a bonus. We also find it ironic that the PEP program, created in response to a report noting gender inequity at Butler, has never been awarded to a woman in the two years the award was granted.

Id.

109. *Id.* at 614.

110. *Id.*

111. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); *see also* Christopher R. Hedican et al., McDonnell Douglas*: Alive and Well*, 52 DRAKE L. REV. 383, 386-87 (describing how in *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court faulted the Fifth Circuit's interpretation of the burden the employer must meet as requiring that the employer show that the person it hired instead of the plaintiff was better qualified, and holding instead that the employer's burden is met if it simply articulates a legitimate, nondiscriminatory reason—explains why it did what it did).

112. *Farrell*, 321 F.3d at 615.

113. *Id.*

After the University satisfied its burden, the burden shifted back to Farrell to prove that the University's stated reasons were pretextual and were a cover-up for intentional discrimination.[114] When the burden shifted back to Farrell, she had little evidence to rebut the University's justifications.[115] Farrell asserted that friendships among male committee members and male candidates impermissibly influenced the selection process in favor of male faculty and resulted in the selection of a male committee member to receive an award.[116] However suspect, the court concluded that these reasons failed to establish pretext because they were unconnected to the consideration of Farrell's application.[117]

As further evidence of pretext, Farrell cited her own academic credentials, including her numerous awards and publications.[118] The court, however, warned that a candidate's personal opinion of his or her own qualifications did not establish pretext.[119] According to the court, evidence of competing qualifications was not sufficient unless the "differences [were] so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue."[120] In a university setting, with many accomplished faculty members in different disciplines, this situation is likely to be extremely rare.

The court acknowledged the traditional approach of deference to universities in academic matters: "[S]cholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service."[121] The court, however, demonstrated only limited deference in this case. The court preserved the university's academic freedom by respecting the university's academic judgment in establishing and applying the PEP eligibility and selection criteria.[122] It did so by choosing not to analyze whether the PEP selection criteria were discriminatory or to compare Farrell's achievements to those of the PEP recipients.[123] This deference was only limited, however, because the court also considered the individual facts of Farrell's application to determine whether the committee's selection process was discriminatory.[124]

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114. *Id.*
115. *Id.* at 615-16.
116. *Id.* at 615.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (quoting Millbrook v. IBP, Inc., 280 F.3d 1169, 1180 (7th Cir. 2002)).
121. *Id.* at 616 (citations omitted).
122. *Id.*
123. *Id.* at 615-16. In most academic award competitions, the selection committees will face a pool of highly qualified applicants with diverse achievements. Considering that there are likely more deserving candidates than awards, few would argue that the court should replace its judgment with the selection committee.
124. *Id.* at 617 n.3.

According to the court, the evidence suggested that the selection committee fairly considered Farrell's application and followed the established selection criteria.[125] In fact, the selection committee even allowed Farrell to supplement her application with achievements made outside of the review period to accommodate a leave of absence she took during that time.[126] The court focused on the procedural aspects of the claim and deferred to the university's academic judgment of the candidates qualifications.[127] Ultimately, the court held that Farrell failed to establish her disparate treatment claim.[128]

IV. FARRELL'S DISPARATE IMPACT CLAIM

In addition to her disparate treatment claim, Farrell filed a disparate impact claim alleging that the PEP's eligibility criteria and candidate evaluation process has a discriminatory impact on female faculty members.[129] The disparate impact claim provided another opportunity for relief if Farrell could prove that the PEP's policies and procedures were inherently discriminatory.[130] "Under a disparate impact theory, an employer is held liable when a facially neutral employment practice disproportionately impacts members of a legally protected group."[131] Again, Farrell faced a high burden of proof.[132]

As with disparate treatment, a shifting-burdens framework is used to prove a disparate impact claim.[133] In order to establish a prima facie case, the plaintiff must prove, "by a preponderance of evidence that the employment policy or practice had an adverse disparate impact on women on the basis of their gender."[134]

> The plaintiff must first "isolate and identify 'the specific employment practices that are allegedly responsible for any observed statistical disparities'", [sic] and second demonstrate causation by offering "statistical evidence of a kind and degree sufficient to show that the

125. *Id.* at 617.

126. *Id.* n.3. The PEP requirements included the previous five years of teaching and student evaluation summaries. *Id.* The 2000 selection committee allowed Farrell to submit an additional uninterrupted five-year period for consideration since she had a leave of absence during the most recent five-year period. *Id.*

127. *Id.* at 616.

128. *Id.*

129. *Id.*

130. *Id.*; *see* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 953-55 (2005) (discussing the history of disparate impact employment discrimination claims).

131. *Farrell*, 421 F.3d at 616 (citation omitted).

132. *See* Gray, *supra* note 54, at 1601-04.

133. *Id.* at 1603 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

134. *Farrell*, 421 F.3d at 616 (citations omitted).

> practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in protected group [sic]."[135]

The plaintiff must also show that he or she has standing to bring the disparate impact claim: that he or she was personally injured by the defendant's employment practice.[136]

After the plaintiff establishes a prima facie case of discrimination, the employer bears the burden of justifying the policies by showing that the policies were job related and consistent with business necessity.[137] If the employer provides this justification, "[t]he burden shifts back to the plaintiff to prove that there was another available method of evaluation [that] was equally valid and less discriminatory that the employer refused to use."[138] Like in disparate treatment claims, the plaintiff retains the ultimate burden of persuasion.[139]

First, Farrell identified the specific employment practice in question as the PEP eligibility and evaluation criteria.[140] Farrell argued that the PEP eligibility criteria resulted in adverse treatment of women because so few could apply.[141] In her EEOC Charge of Discrimination Questionnaire, she alleged an "'inherent or deliberate bias against women faculty and, in this case, only two women from the entire faculty . . . met the criteria for the award, yet many more men [were] eligible.'"[142] Although Farrell satisfied the first two elements—isolating the discriminatory employment practice and demonstrating a disproportionate effect on women—the court explained that Farrell did not have standing to bring a disparate impact claim because she *was* eligible for the award and therefore was not negatively impacted by the eligibility requirements.[143]

Second, Farrell asserted that because the PEP selection committee emphasized length of service to the University, male faculty members, who generally had been teaching at the University longer than female faculty members, had an unfair advantage.[144] This claim also failed because Farrell did

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135. *Id.* (quoting Bennett v. Roberts, 295 F.3d 687, 698 (7th Cir. 2002); Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 513 (7th Cir. 1996)).

136. *Id.* at 617.

137. Adams v. City of Chi., 469 F.3d 609, 613 (7th Cir. 2006) (citations omitted); *see also* Beckham, *supra* note 29, at 410-11.

138. Bryant v. City of Chi., 200 F.3d 1092, 1094 (7th Cir. 2000) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

139. Beckham, *supra* note 29, at 412.

140. *Farrell*, 421 F.3d at 616-17.

141. *See id.* at 616.

142. *Id.*

143. *Id.* at 617.

144. *Id.* at 615. Male faculty members are more likely to have more years of service because of women's comparatively recent entrance into faculty positions and fewer breaks in service for family needs than women. *See* Mason & Goulden, *supra* note 21. *See generally* WOMEN AND RETIREMENT SECURITY, *supra* note 21.

not show that the candidate evaluation process had an adverse impact on a protected class or group of employees.[145] Her allegations ultimately focused on her own application, which the court rejected because they did not "amount to a disparate impact on the evaluation of women candidates in general."[146] Thus, Farrell failed to make a prima facie case and her disparate impact claim was dismissed.[147]

Dismissal of the disparate impact claim initially seems odd considering the wide disparity between the number of male and female applicants. Although this disparity was strong evidence of disparate impact in the PEP eligibility criteria, Farrell could not prevail because her eligibility to apply for the PEP prevented her from establishing standing.[148] The disparity was so pervasive that it prevented Farrell from proving a claim regarding the selection process because disparate impact theory requires a plaintiff to prove a disproportionate effect on a group.[149] Since only two women were eligible to apply, Farrell could not show that a group of women were harmed in the selection phase.[150] Essentially, the selection committee could not be faulted for discriminating against women as a group when it was given a pool of candidates that was almost entirely men.[151] Ultimately, the Court of Appeals granted summary judgment for the University on both the disparate treatment and disparate impact claims.[152]

If Farrell, however, had standing based on eligibility criteria, she would have had a strong disparate impact claim.[153] Although the University would likely argue that PEP's eligibility criteria based on service were "job-related and consistent with business necessity,"[154] a plaintiff could likely show that opening the award to all tenured faculty members was equally valid and less discriminatory. Judicial deference would allow the court to defer to the university's judgment, but the court's reprimand in the first footnote indicates

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145. *Farrell*, 421 F.3d at 617.

146. *Id.*

147. *Id.*

> Dr. Farrell's purported evidence, that the selection committee failed to consider her alternative and supplemental submissions regarding her teaching activities, hardly amounts to a disparate impact in general. . . . Given the singularity of the accusations, we find it too much of a stretch to say that the selection committee's procedures can be characterized as employment practices having a disparate impact on women.

Id.

148. *Id.*

149. *Id.*; *see* Sturm, *supra* note 38, at 263-64.

150. *Farrell*, 421 F.3d at 616.

151. *See id.* at 617.

152. *Id.*

153. Another possibly successful plaintiff could be a female faculty member who met the PEP requirements for teaching and scholarship but did not meet the lengthy service requirement.

154. Adams v. City of Chi., 469 F.3d 609, 613 (7th Cir. 2006) (citations omitted).

that the court was concerned that something went wrong at Butler University: "We also find it ironic that the PEP program, created in response to a report noting gender inequity at Butler, has never been awarded to a woman in the two years the award was granted."[155] This suspicion, paired with the eligibility statistics and the University's admission that the award was intended to address gender inequity, may have led the court to rule against the University if the disparate impact claim had been brought by a plaintiff with standing.

VI. *FARRELL* AND THE SEVENTH CIRCUIT'S APPROACH TO LIMITED DEFERENCE

A. *Arguments for Limited Judicial Deference in Higher Education Employment Disputes*

Although Farrell's claims were ultimately dismissed, this case is significant because it demonstrated a shift in the court's approach to academic disputes.[156] Using the traditional approach, the court could have deferred more substantially to the University's freedom to recognize faculty members based on academic criteria and immediately dismissed the case.[157] Instead, the *Farrell* court made a limited inquiry into the PEP's selection process, and achieved a necessary balance between respecting academic freedom and protecting faculty members' rights under Title VII.[158]

Legal scholars and activists have called for courts to use limited deference in employment discrimination cases.[159] For example, scholars Mark Bartholomew and Mary Gray argue that judicial deference to universities in employment disputes is inappropriate and should be limited.[160] They argue that judges are highly trained and educated and are no less qualified to evaluate

155. *Farrell*, 421 F.3d 614 at n.1. For example, the selection process may have had an adverse impact on women in the accommodations made for science professors. *Id.* at 616-17. The selection committee put less emphasis on the number of published materials by a candidate because there are fewer publishing opportunities for those in the sciences than in the humanities. *Id.* Considering that female professors are underrepresented in the sciences, this adjustment likely made the applications of more male professors more favorable and competitive.

156. *See id.* at 613-14.

157. *See id.* at 616. Although the court expressed reluctance to review the merits of academic honors, it cannot be faulted for failure to do so. *Id.*

158. *See id.* at 615, 617.

159. *E.g.*, Bartholomew, *supra* note 43, at 78, 85-86; Gray, *supra* note 54, at 1596-1600; Hora, *supra* note 29, at 354-55. Some scholars, such as Scott Moss, believe that academic deference should be eliminated, except possibly to allow for limited deference in the context of tenure decisions. Moss, *supra* note 43, at 6-9. Moss asserts that deference is "effectively a . . . repeal of Title VII for a favored sector." *Id.* at 22. The PEP's selection process considered similar criteria as those used in tenure decisions, teaching, scholarship, and service to the university. *Farrell*, 421 F.3d at 612.

160. Bartholomew, *supra* note 43, at 78, 85-86; Gray, *supra* note 54, at 1596-1600.

employment decisions in universities than disputes in other industries.[161] Gray asserts that courts should carefully "examine whether universities genuinely are making faculty personnel decisions on academic grounds."[162] Deference to the university is appropriate, according to Bartholomew and Gray, when the university in question demonstrates that specific academic criteria are used in decisions and that mechanisms are in place to insulate the process from bias.[163]

Yet this approach may still allow subtle forms of discrimination to go unchecked.[164] Therefore, Bartholomew further argues that courts should consider statistical evidence that reveals a pattern of discrimination as well as the professor's academic record when evaluating the claim.[165] Legal scholar Mary Hora agrees with Bartholomew's argument that courts could consider statistical data.[166] Hora asserts that, in some contexts, such as a claim under the Equal Pay Act, courts should be more willing to consider individual comparisons of candidates involved in the dispute to effectively determine if discrimination is present.[167] Hora explains that plaintiffs often have evidence of discriminatory remarks made by peer reviewers or administrators but are unable to persuade the courts as to how those statements impact the employment decision.[168] Considering additional statistical information in light of these remarks may help plaintiffs establish a connection between remarks and other subtle expressions of bias with the employment action in question.[169]

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161. Bartholomew, *supra* note 43, at 78, 83; Gray, *supra* note 54, at 1596-97; Moss, *supra* note 43, at 6-7.

162. Gray, *supra* note 54, at 1615.

163. Bartholomew, *supra* note 43, at 86-87. Moss notes the specific concern of tenure decisions, which are highly subjective academic evaluations of scholarship, teaching, and collegiality: "[T]he reasons given for tenure denials tend to be largely subjective—exactly the sorts of reasons that can arise from unconscious discrimination or can mask intentional animus." Moss, *supra* note 43, at 9. Note that the qualifications evaluated in *Farrell* were similar to those considered in tenure decisions, teaching, scholarship, and service to the university. *Farrell*, 421 F.3d at 612.

164. However, this problem persists across many industries, not just higher education. EQUAL EMP. OPPORTUNITY COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2006 (2006), http://www.eeoc.gov/abouteeoc/plan/par/2006/index.html (see Message from the Chair, Naomi Churchill Earp).

165. Bartholomew, *supra* note 43, at 88-89.

166. Hora, *supra* note 29, at 355.

167. *Id.* Other scholars have also advocated for the same. See Donna R. Euben, "*Show me the Money": Pay Equity in the Academy*, ACADEME, Jul.-Aug. 2001, at 30, 31, *available at* http://www.aaup.org/publications/Academe/2001/01ja/ja01eube.htm; Perez-Arrieta, *supra* note 42, at 393. This approach is not currently applied in claims against universities under the Equal Pay Act. Euben, *supra*. As the Seventh Circuit noted, it is not appropriate in highly subjective evaluations such as academic honors or tenure decisions to make such individual comparisons. *Farrell*, 421 F.3d at 616.

168. Hora, *supra* note 29, at 354 (discussing Grant v. Cornell Univ., 87 F. Supp. 2d 153 (N.D.N.Y. 2000) and Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000)). Note that Farrell struggled with this problem in her disparate impact claim, as she could not prove that male friendships on the selection committee adversely affected the consideration of her own application. *Farrell*, 421 F.3d at 615.

169. Hora, *supra* note 29, at 354.

Understandably, courts are reluctant to intervene in highly subjective matters of academic recognition "in the absence of clear discrimination"[170] and the use of statistical data may help plaintiffs meet this high burden.

Additionally, Bartholomew points to the fact that courts do not defer to universities in Title IX cases involving discrimination or harassment of students.[171] Studies of student claims under Title IX show little if any deference to the university, even when academic freedom is at stake.[172] Harassing behavior cannot be justified by poor academic performance; therefore, a university's response to a sexual harassment claim is evaluated under the same standards as other employers.[173] Holding a university liable for sexual harassment does not interfere with the university's freedoms to oversee teaching and learning, and therefore, deferring to the university in such matters would be unreasonable.

Some scholars have identified a trend in courts' increasing involvement in disputes in higher education.[174] Kaplin and Lee note that in the last half of the twentieth century, increasing regulation by state and local governments has required courts to more carefully review university actions.[175] Universities have responded by strengthening self-governance, implementing better institutional guidelines and grievance processes, reducing the likelihood of judicial intervention.[176] Although courts continue to defer to the university's academic judgment, they more carefully review whether the university has followed its established procedures and provided adequate due process.[177]

B. *The Seventh Circuit's Approach is Consistent with Scholars' Recommendations for Limited Deference*

Farrell continues a trend by the Seventh Circuit to apply limited deference into university employment decisions.[178] Unlike the traditional approach whereby courts defer to universities and avoid evaluating the individual merits of the case,[179] the Seventh Circuit approaches university employment disputes much like it addresses disputes in other industries, but it continues to defer to

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170. *Farrell*, 421 F.3d at 616.

171. Bartholomew, *supra* note 43, at 58-60. Bartholomew refers to the difference in courts' treatment of claims under Title VII and Title IX as a deference double standard. *Id.* at 91.

172. *Id.* at 58; Gray, *supra* note 51 at 1613.

173. Gray, *supra* note 51 at 1613; *see also* Bartholomew, *supra* note 42 at 68-69. Bartholomew specifically refers to student discrimination claims filed under Title IX.

174. KAPLIN & LEE, *supra* note 5, at 11, 15.

175. *Id.* at 15.

176. *Id.*

177. *Id.* at 15-16.

178. *See* Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712 (7th Cir. 2005); Czubaj v. Ball State Univ., No. 04-1001, 2004 U.S. App. WL 1873213 (7th Cir. Aug. 13, 2004); Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693 (7th Cir. 2003).

179. Byrne, *supra* note 49, at 86-89; KAPLIN & LEE, *supra* note 5, at 9-10.

the university in matters of academic evaluation.[180] While the Seventh Circuit acknowledges academic freedom, in practice, limited deference is not so dissimilar to the court's deference to employer's business judgment.[181] For example, the *Farrell* court's analysis of whether the PEP award was more like a raise or a bonus[182] could be used to evaluate any employer's recognition program. The judges' review of the selection process focused on whether the selection committee followed its published selection procedures.[183] When considering whether Farrell had created a genuine issue of material fact regarding whether the University had lied about why she was not selected for the PEP award, the Seventh Circuit quoted the same standard applied in cases against private sector and other government employers: "[P]retext requires more than showing that the decision was mistaken, ill considered or foolish, and so long as the employer honestly believed those reasons, pretext has not been shown."[184]

This use of limited deference is apparent in several recent cases, including *Cullen v. Indiana University Board of Trustees*,[185] *Rudin v. Lincoln Land Community College*,[186] *Czubaj v. Ball State University*,[187] and *Lim v. Trustees of Indiana University*.[188]

1. *Cullen v. Indiana University Board of Trustees*

Like *Farrell*, *Cullen* demonstrated that a court could look carefully at a university's employment compensation decision without infringing upon academic freedom.[189] The plaintiff in *Cullen* filed a gender discrimination claim under the Equal Pay Act alleging that Indiana University paid her less than a similarly-situated male program director.[190] The Seventh Circuit Court of Appeals demonstrated only limited deference to the university in that it "examine[d] the skills, efforts[,] and responsibilities that two sharing the same job title actually require" in the higher education setting.[191] The court compared degree and experience requirements of the two positions, the scope of projects under the positions, the working conditions of each position, and the

180. *See* Perez-Arrieta, *supra* note 42, at 404.

181. *See* Nawrot v. CPC Int'l., 277 F.3d 896, 906 (7th Cir. 2002); Gordon v. United Airlines Inc., 246 F.3d 878, 889 (7th Cir. 2001); Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000); Dale v. Chi. Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).

182. Farrell v. Butler Univ., 421 F.3d 609, 614 (7th Cir. 2005).

183. *See id.* at 615.

184. *Id.* at 613 (citing Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000)); *see* Hague v. Thompson Distribution Co., 436 F.3d 816, 823 (7th Cir. 2006).

185. 338 F.3d 693 (7th Cir. 2003). For an analysis of the Seventh Circuit's decision, *see* Perez-Arrieta, *supra* note 42, at 404.

186. 420 F.3d 712 (7th Cir. 2005).

187. No. 04-1001, 2004 U.S. App. WL 1873213 (7th Cir. Aug. 13, 2004).

188. 297 F.3d 575 (7th Cir. 2002).

189. 338 F.3d 693.

190. *Id.* at 697; Perez-Arrieta, *supra* note 42, at 394.

191. Perez-Arrieta, *supra* note 42, at 393-94.

amount of responsibility based on the number of employees supervised and the number of students in each program.[192]

Although the court determined that the positions were unequal, the court reviewed the university's affirmative defenses as further support that gender discrimination did not impact compensation decisions.[193] The university cited education, market forces, and the male director's greater responsibilities as legitimate factors accounting for the pay differential between the two employees.[194] These defenses are not unique to higher education.[195] Analyzing these job qualifications and responsibilities did not overlap with academic evaluation or programming.[196]

2. *Rudin v. Lincoln Land Community College*

The Seventh Circuit's analysis in *Rudin* serves as evidence that courts can review compensation decisions for violations under the Equal Pay Act and Title VII without infringing on the university's freedom to oversee teaching and learning.[197] Although analyzing a pay differential may address pay adjustments that are based on academic performance, limited deference is appropriate unless the plaintiff can prove that merit increases were tainted by gender bias.[198] However, this approach is not unlike the court's reluctance to substitute its judgment for the business judgment of other employers.[199]

The Seventh Circuit has also granted faculty plaintiffs a careful review of other types of employment decisions.[200] In *Rudin*, a college instructor filed suit when she was not hired for a full-time, tenure-track position.[201] Evidence that

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192. *Id.* at 399-400.

193. *Cullen*, 338 F.3d at 702-03.

194. *Id.*

195. Perez-Arrieta, *supra* note 42, at 396 (citing defenses available to all employers under the Equal Pay Act, 29 U.S.C. §.206(d)(1)(i)-(iv)(2000)). For example, compare the Seventh Circuit's analysis of a private sector claim under the Equal Pay Act in *Merillat v. Metal Spinners*, 470 F.3d 685, 695-97 (7th Cir. 2006).

196. *Cullen*, 338 F.3d at 702-03; *see also* Markel v. Bd. of Regents of the Univ. of Wis. Sys., 276 F.3d 906, 912-13 (7th Cir. 2002) (similar approach to claim under the Equal Pay Act in university setting, court recognized market factors at the time of hire and differences in experience between employees as nondiscriminatory reasons for pay disparity between plaintiff and male colleagues).

197. Perez-Arrieta, *supra* note 42, at 394. Perez-Arrieta's conclusion focuses on how universities can defend claims under the Equal Pay Act using similar strategies as nonacademic employers.

198. *Id.* at 415 ("Although courts are not likely to intervene in the affairs of a college if there are legitimate differences that justify a pay disparity, the courts will not tolerate unlawful behavior.").

199. *Cullen*, 338 F.3d at 702-03. For example, courts do not generally question differences in wage rates set by employers based on productivity or profitability.

200. *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712 (7th Cir. 2005); Czubaj v. Ball State Univ., No. 04-1001, 2004 U.S. App. WL 1873213 (7th Cir. Aug. 13, 2004); Lim v. Trs. of Ind. Univ., 297 F.3d 575 (7th Cir. 2002).

201. *Rudin*, 420 F.3d at 716.

the university did not follow its own hiring procedures, along with comments from the hiring committee chair suggesting that he was pressured to hire a minority candidate, cast doubt on the college's assertion that it hired the most qualified candidate and precluded summary judgment.[202] However, the court clarified that the issue was not whether the plaintiff was more qualified than the person hired but whether discrimination played a role in the hiring decision.[203] Like in *Farrell*, the court made a detailed inquiry into the allegations but continued to affirm the university's role in determining the best candidate based on academic qualifications.[204] The emphasis was on whether the employer followed its own procedures, not who should have gotten the job.[205]

3. *Czubaj v. Ball State University*

In *Czubaj*, the court evaluated a university's employment decisions when academic performance was an underlying factor.[206] The university terminated Czubaj's doctoral assistantship because she did not maintain the required grade point average for the position.[207] The plaintiff asserted that she could not succeed academically because the university required her to work more than twenty hours per week while similarly-situated male assistants did not have to work as many hours.[208] The Seventh Circuit clearly stated its approach to discrimination claims in academia:

> This court will not second-guess the University's expectations about the workload required of a doctoral candidate. . . . However, the legitimacy of those expectations would be undermined by evidence that the University applied the expectations in a discriminatory manner—for instance, if it treated similarly situated male graduate assistants more favorably by letting them work less than [twenty] hours a week.[209]

The court applied the same standard as nonacademic employers—it would not evaluate whether the plaintiff had met the university's expectations but would instead focus on whether there was evidence of discrimination.[210] The court's comment suggests that if the plaintiff had evidence that the male

202. *Id.* at 718.
203. *Id.* at 727.
204. *Id.*
205. *Id.*
206. Czubaj v. Ball State Univ., No. 04-1001, 2004 U.S. App. WL 1873213 (7th Cir. Aug. 13, 2004).
207. *Id.* at *1.
208. *Id.*
209. *Id.* at *2 (citation omitted).
210. *Id. See* Walker v. Bd. of Regents of the Univ. of Wis. Sys., 410 F.3d 387, 394-96 (7th Cir. 2005) (where the university provided evidence that vice-chancellor was terminated because of legitimate performance issues and personality conflicts, the plaintiff did not provide sufficient evidence of pretext).

doctoral assistants were required to work fewer hours, the plaintiff may have had a successful claim.

4. *Lim v. Trustees of Indiana University*

Lim v. Trustees of Indiana University, the most recent higher education employment discrimination case in the Seventh Circuit, omitted references to institutional academic freedom and instead addressed the tenure denial claim only on the merits.[211] The university justified its decision on the plaintiff's failure to publish the minimum number of publications required for tenure.[212] Since the quality of the plaintiff's research or teaching was not at issue, the court was willing to closely evaluate whether the plaintiff had satisfied the publication requirement.[213] However, the court acknowledged that when a university contends an action was taken because of the quality of the plaintiff's work, it will defer to the university unless the plaintiff has sufficient evidence of pretext.[214]

Although the plaintiffs in the above academic discrimination case did not prevail, the cases show that the Seventh Circuit's approach is consistent with recommendations of several legal scholars for limited deference.[215] Under this approach, courts will carefully review the claims of higher education plaintiffs, but academic administrators and faculty members will remain the judge of academic performance.[216] Even when courts give only limited deference to the university, the complexity of hiring and compensation decisions, particularly in academia, and the high burden of proof required under the *McDonnell Douglas* test[217] make it difficult for plaintiffs to prove gender discrimination.

VI. CONCLUSION

Farrell v. Butler University exemplifies the difficult balance between respecting academic freedom while protecting individual rights under Title VII. The case illustrates the Seventh Circuit's approach of limited deference which allows the court to closely consider the individual facts of the case to ensure

211. 297 F.3d 575 (7th Cir. 2002) (gender discrimination claim over denial of tenure because plaintiff did not publish the minimum number of articles required for tenure was unsuccessful; the fact that males had been granted tenure with a similar number of publications was not relevant because requirements for the number of publications had changed).

212. *Id.* at 580-81.

213. *Id.*

214. For more detailed discussions of the court's deference in tenure disputes see Bartholomew, *supra* note 43 and Hora, *supra* note 29.

215. *See* Bartholomew, *supra* note 43, at 78, 85-86; Gray, *supra* note 54, at 1596-1600; Hora, *supra* note 29, at 354-55.

216. Bartholomew, *supra* note 43, at 89-90.

217. Hedican et al., *supra* note 111, at 390 (discussing the high burden on the plaintiff to prove discrimination: "proving an employer lied about the reason for its employment action does not necessarily prove discrimination. The factfinder still must decide if the employer lied as a pretext to hide intentional discrimination").

that decisions are made according to university policies and academic criteria and to preserve academic freedom.[218] Although the court could have easily dismissed Farrell's case with little inquiry, it chose to carefully consider the individual facts of the case to determine whether Farrell had experienced an adverse employment action.[219] Ultimately, Farrell did not have enough evidence of gender discrimination to prevail.[220] Farrell's case is unsettling because the numbers clearly indicate that the University's PEP, which was designed to address gender inequity, may have made the pay gap wider.[221] Although Farrell did not have standing to address this issue because she was eligible for the award, perhaps another female faculty member could raise the issue.[222]

Although courts traditionally defer substantially to universities in academic decisions,[223] *Farrell* represents a shift to the use of limited deference.[224] Limited deference continues to preserve academic freedom, but it balances academic freedom with the need to consider the individual merits of a claim. Considering the reasoning applied in the recent line of higher education employment cases,[225] the Seventh Circuit makes it clear that university employers must provide clearly articulated academic criteria for employment decisions and demonstrate that their decision making processes are fair.[226] The Seventh Circuit's approach responds to the concerns of legal scholars who have criticized the courts for not giving Title VII cases in higher education careful attention.

218. *See supra* Part III.
219. *See supra* Parts III & IV.
220. Farrell v. Butler Univ., 421 F.3d 609, 614, 617 (7th Cir. 2005).
221. *Id.* at 612.
222. *See id.*
223. *See supra* Part II.
224. *See supra* Part V.
225. *See supra* Part V.
226. *See supra* Part V.