

On Processing Complaints of Discrimination

The report that follows, a revision of a report originally adopted in 1977, was approved by the Association's Committee A on Academic Freedom and Tenure and adopted by the Association's Council in November 1991. It was endorsed by the Seventy-eighth Annual Meeting in June 1992.

Introduction

The Association has, through its statement *On Discrimination*, declared its opposition to improper discrimination in colleges and universities and has resolved to work toward correcting inequities:

The Association is committed to use its procedures and to take measures, including censure, against colleges and universities practicing illegal or unconstitutional discrimination, or discrimination on a basis not demonstrably related to the job function involved, including, but not limited to, age, sex, disability, race, religion, national origin, marital status, or sexual orientation.¹

With respect to procedures within colleges and universities suitable for identifying and processing complaints of discrimination in a decision against reappointment, the Association, in Regulation 10 of its *Recommended Institutional Regulations on Academic Freedom and Tenure*, sets forth the following provisions:

If a faculty member on probationary or other nontenured appointment alleges that a decision against reappointment was based significantly on considerations that violate (a) academic freedom or (b) governing policies on making appointments without prejudice with respect to race, sex, religion, national origin, age, disability, marital status, or sexual orientation, the allegation will be given preliminary consideration by the [insert name of committee], which will seek to settle the matter by informal methods. The allegation will be accompanied by a statement that the faculty member agrees to the presentation, for the consideration of the faculty committee, of such reasons and evidence as the institution may allege in support of its decision. If the difficulty is unresolved at this stage, and if the committee so recommends, the matter will be heard in the manner set forth in Regulations 5 and 6, except that the faculty member making the complaint is responsible for stating the grounds upon which the allegations are based, and the burden of proof will rest upon the faculty member. If the faculty member succeeds in establishing a prima facie case, it is incumbent upon those who made the decision against reappointment to come forward with evidence in support of their decision. Statistical evidence of improper discrimination may be used in establishing a prima facie case.²

This report examines evidentiary issues of proof of discrimination and provides guidance to faculty, administrators, and the Association's staff on handling complaints raising claims of discrimination. While the report was drafted specifically to address allegations of discrimination on the basis of sex, it has over the years proven useful for complaints of improper discrimination based on other attributes as well.

The Nature of Sex-Discrimination Claims

Sex discrimination can occur at every stage of decision making in an individual's teaching career (e.g., entry, salary, fringe benefits, assignments, academic rank, reappointment, tenure, and retirement). At each stage, some complaints of sex discrimination may be accompanied by supporting evidence of a relatively conventional kind. More often than not, however, sex-discrimination claims present the special difficulty of proving motivation.

1. *The Importance of Motivation.* Most complaints involving sex discrimination require proof of an improper motive for an otherwise proper action. The need to assess motivation in processing complaints is not limited to those alleging sex discrimination. Many other complaints involving a faculty member's status, such as allegations that the faculty member's appointment was not renewed for reasons violative of academic freedom or that a termination for financial exigency was in bad faith, rest upon demonstration of improper motivation. To a significant extent, evidence to support allegations of sex discrimination must be sought in much the same way as in other complaints of violations of Association-supported standards. Proving improper motivation can, however, be more difficult in the area of sex discrimination, because it is the kind of discrimination that often relates to who a person is rather than to what a person says or does.³ In a complaint involving academic freedom, for example, the complainant will generally assert that the adverse action which allegedly constitutes a violation of academic freedom is in retaliation for something the complainant did or said and that, but for the protected speech or conduct, the adverse action would not have occurred. Sex discrimination, on the other hand, may not result from anything someone says or does. The involuntary characteristic of sex may itself motivate discrimination. It is difficult in such circumstances to point to an "incident" to which the alleged discrimination can be traced, a fact which ordinarily makes proof of discrimination much more elusive.

Principles and standards relating to academic freedom, moreover, have gained more widespread acceptance in the academic community than any analogous principles and standards in the area of sex discrimination in academic life. Consequently, it seems reasonable to anticipate that some faculty members and administrative officers may be less sensitive to, and less supportive of, complaints of sex discrimination than experience has shown them to be concerning complaints raising issues of academic freedom.

2. *Evidence of Sex Discrimination.* Ascertaining whether improper motive was involved in a given case becomes more manageable when the general search for bias is made more concrete. The categories listed below are intended to specify the types of evidence from which sex discrimination can be inferred. While descriptive, they are not intended to be exhaustive.

These categories consist, in general, of evidence specifically related to sex, and evidence reflecting general institutional deficiencies not specifically related to sex. Direct evidence of sexual bias and unequal application of standards are examples of evidence specifically related to sex. Vague criteria for appointment and promotion, failure to give reasons for nonrenewal upon the faculty member's request, inadequate grievance mechanisms, and deviations from procedures normally employed by an institution are examples of evidence reflecting general deficiencies in procedure. This second type of evidence, while not necessarily as probative of sex discrimination as evidence that is specifically related to sex, might, where there is more direct evidence, be considered part of the totality of circumstances from which sex discrimination can be inferred.

- a. *Direct evidence of sex discrimination.* Criteria that are themselves discriminatory, and sexist statements or conduct, provide direct evidence of sex discrimination. Criteria used for making decisions in colleges and universities are rarely discriminatory on their face. It is highly unlikely that such criteria would be used to select for or against a sexual characteristic.⁴ Sexist statements or conduct, whether or not well intentioned, also constitute direct evidence of sex discrimination, and are much more common than obviously discriminatory criteria. Such evidence would be present, for example, if a member of a tenure committee were to state: "Women make bad engineers," or "I will resign if a woman is granted tenure."
- b. *Unequal application of standards.* Unequal treatment of men and women provides one of the most telling forms of evidence of sex discrimination. A criterion might be applied to a member of one sex but not to a similarly situated member of the opposite sex; or the same criterion might be applied more rigorously to a member of one sex than to a similarly situated member of the opposite sex. For example, a woman

may be denied tenure (1) for lack of a Ph.D. in a department that has recently granted tenure to a man without one; (2) because of "inadequate teaching" when her teaching evaluations are virtually identical to those of a male faculty member who has been granted tenure; or (3) where standards traditionally considered important by the institution would have strongly suggested a different result.

Because sex discrimination is seldom overt, statistical evidence is an essential tool. Statistics may not, alone, establish discrimination, but they can provide an adequate basis for requesting an explanation from the institution. In approving the "relevance of statistics as a means of shifting the burden to come forward with evidence," the Association's Council Committee on Discrimination pointed to the historically effective application of statistics in detecting and remedying racial discrimination in the composition of juries. The committee noted that, because it was virtually impossible to prove that the persistent absence of blacks from juries was the result of discrimination in each particular case, federal courts came to regard the significant disparity in the proportion of blacks on juries as permitting a prima facie inference that racial discrimination was a contributing element. This inference shifted the burden to the state, even though overt discrimination could not be proved in an individual case.

The following types of statistical data, while not individually or collectively determinative, may be meaningful in cases involving allegations of sex discrimination at the college or university level: (1) salary differentials between men and women (comparisons should, where possible, take into account factors such as institution, department, rank, and years of experience); (2) numerical differentials between men and women (comparisons should, where possible, take into account the same factors as in salary differentials, and also tenured or nontenured status); (3) the proportion of women on the faculty in relation to (i) the number of qualified women available for appointment, and (ii) affirmative-action goals; (4) changes in the percentage of women on the faculty; (5) the number and distribution of women on decision-making bodies; and (6) differential promotion and tenuring rates. The Association should intensify its work in gathering and developing such statistical data to the extent that they are not already available from other sources.

- c. *General deficiencies in procedure.* The general deficiencies in procedure summarized above are familiar to the Association's work. The operating assumption that procedural irregularities often indicate substantive violations has guided traditional Committee A work. The Association, when presenting its concern about an academic freedom case to administrative officers, often refers to inadequate evaluation procedures and provisions for due process, the failure to state reasons for nonreappointment, or the statement of vague reasons, as increasing its concern.⁵ The Association, on occasion, has also expressed concern over a substantive decision that is an inexplicable departure from results generally reached in similar circumstances. The importance of circumstantial evidence in establishing sex discrimination suggests careful attention to this factor.

It is important to reiterate that these types of evidence from which sex discrimination can be inferred are not exhaustive, and that they cannot be fitted into an abstract formula that might indicate in advance the precise combination of relevant criteria that would create a presumption of sex discrimination in a particular case. The identification and processing of complaints involving sex discrimination must depend on accumulated precedent and on the sensitivity and judgment of those responsible for seeing them to a conclusion.

The Association's Processing of Complaints of Sex Discrimination

This section of the subcommittee's report, while it may also be applicable in part to review bodies at colleges and universities, discusses particular aspects of the processing by the Association's staff of complaints of sex discrimination. As in the subcommittee's specification of evidence of sex discrimination, this discussion is not intended to be exhaustive.

1. *The Complaint*

- a. *Complaint evaluation.* The faculty member who believes that his or her rights as an academic have been infringed and who seeks the assistance of the Association is expected to present relevant evidence. Faculty colleagues and members of the Association's staff can often be helpful in clarifying issues and identifying the kind of evidence that may be pertinent. Staff members should help faculty members recognize and develop complaints involving sex discrimination by explaining what constitutes "evidence" and by guiding complainants in collecting such evidence. Inquiries currently made of complainants who allege certain procedural violations (for example, seeking, inter alia, letters of appointment, the faculty handbook, the current contract, and a letter of nonreappointment) provide an appropriate analogy.
- b. *"Mixed" complaints.* Complaints by faculty members will often include the possibility of both sex discrimination and other violations of Association policy. Thus, for example, the complaint may involve late notice or excessive probation as well as sex discrimination. Although the former grounds may more easily be established, any evidence of sex discrimination should be carefully collected and weighed. The more obvious violation, standing alone, may ultimately be deemed an inadequately serious matter to warrant further action. The complaint of sex discrimination, on the other hand, may reflect serious problems that should be pursued. Collecting evidence of sex discrimination is therefore important even when the complaint could be processed on some other, more easily established, ground.
- c. *Multiple jurisdictions.* Complainants should be systematically informed by the staff of their right to go to the Equal Employment Opportunity Commission (EEOC), to other state and federal administrative agencies, and to the courts. The Association in principle is willing to proceed even if an EEOC complaint or a judicial action is also initiated, but it is often more difficult for the Association to pursue a complaint which is simultaneously pending before an administrative or judicial body. College and university officials are less likely to cooperate with representatives of the Association in both the production and assessment of relevant evidence when other proceedings have been instituted.

These facts should be conveyed to complainants, but without any suggestion that the complainant's election of institutional, administrative, and/or judicial remedies would preclude the Association's involvement in a complaint of sex discrimination any more than in a complaint involving academic freedom. In appropriate circumstances, the Association should pursue the complaint and attempt to discover the relevant evidence even though institutional officials may decline to cooperate in the inquiry.

2. *Case Status.* A "complaint" becomes a "case" in Association terminology when the general secretary, or a staff member acting on behalf of the general secretary, communicates with a college or university administration to express the Association's concern, usually with a recommendation for corrective action.
 - a. *Informal assistance.* The Association's staff may, and often should, take a variety of steps before deciding whether the evidence warrants opening a case, including the collection and analysis of data, letters or calls of inquiry, informal efforts to resolve the difficulty, and assistance in helping the complainant pursue remedies through institutional channels. Institutional channels, including hearings before faculty committees as called for in the *Recommended Institutional Regulations*, are in many instances the best forum for an initial review of the range of complaints brought to the attention of the Association. The particular difficulties inherent in proving sex discrimination underline the value of such hearings, which give institutions an opportunity to resolve disputes internally and produce a record upon which the institution's own action can later be reviewed by the Association under a standard of reasonableness. The test for taking any of these steps should be the same for complaints alleging sex discrimination as for any other complaint: whether the action contemplated is an

appropriate measure under the circumstances. The complainant need not provide the Association with any specific quantum of proof to gain informal assistance.

- b. *Standards for opening a case.* A case may be opened when the information available to the staff permits a reasonable inference of a significant departure from principles or procedural standards supported by the Association. This is no magical moment, clear to all involved. It is the point at which the staff can reasonably state to the administration that a credible claim appears to exist. The initial approach to the administration should explain that the assessment offered has been based primarily on information received from other sources and should invite the administration to comment and to provide information which might add to the Association's understanding of the matter.

This procedure for opening a case applies to the entire range of Committee A complaints and, in essence, reflects the judgment that an adequate basis exists for asking the college or university to provide a valid explanation. Placing a burden of explanation on the institution can be justified on two grounds: (1) sufficient evidence exists to enable the Association's staff to make a reasonable inference that a lack of adherence to standards supported by the Association may have occurred, and (2) the administration has better access to the reasons for its position.

- c. *The response of the administration.* On some occasions, an administration will respond by accepting the staff's recommendation for corrective action. On other occasions, the administration's explanation of its position will prove, after further discussion with the complainant, to meet the Association's concerns. On still other occasions, an administration may state reasons that appear valid on their face, but are in fact a pretext that camouflages a departure from principles or procedural standards supported by the Association. As in establishing an inference that a departure may have occurred, it will often be necessary to rely on circumstantial evidence to demonstrate that an apparently valid reason is actually a pretext. These determinations are difficult and must be made carefully. The Association does not, for example, substitute its own judgment for the professional judgment of an academic department. Nor does it do so in evaluating a claim of sex discrimination. In an assessment of whether a stated reason is valid, it is not the right to judge that is being questioned, nor the expertise of the judges, but whether the judgment was, in fact, professional and nondiscriminatory. Thus, an administration's apparently valid explanation of an action against a complainant, like the staff's expression of its reasonable inference that sex discrimination was actually a factor in such a decision, is rebuttable rather than conclusive.

3. *Formal Investigation*

- a. *Standards for authorizing an investigation.* The degree of importance of the principles and procedural standards at issue in a particular case, the degree of seriousness of the case itself, and the utility of an investigation and a potential published report, are major factors in a decision by the general secretary to authorize an investigation by an ad hoc committee. The resolutions passed by the 1971 and 1975 annual meetings emphasize that the Association has committed itself to use all its applicable procedures and sanctions, including censure, in appropriate cases involving sex discrimination. The importance of clarifying and elaborating Association policy in the area of sex discrimination is an additional factor to consider in a decision to investigate.
- b. *Investigation during litigation.* The 1965 *Report of the Special Committee on Procedures for the Disposition of Complaints under the Principles of Academic Freedom and Tenure* pointed out that the pendency of litigation often makes it difficult for the Association to conduct a formal investigation. Institutional officials may, on the advice of counsel, decline to cooperate. As the 1965 report noted, this position may be justified, or it may unreasonably be used as an obstructive device.⁶ Moreover, the importance of such cooperation may vary from case to case. In determining whether to authorize a formal investigation while litigation is pending, the interests of the

Association, which are based on its own standards of proper academic practice, may be different from the issues before the courts.

- c. *Composition and briefing of investigating committees.* The Association properly strives to have at least one person on each investigating committee who has previously served on such a committee. The need for experience likewise suggests that an ad hoc committee investigating a case potentially involving sex discrimination have a member adequately experienced and that the committee be well briefed on the nature of such claims and how they are handled by courts and agencies.
- d. *"Mixed" cases.* Investigating committees are likely to be presented with cases involving both sex discrimination and other issues of concern to the Association. In addition, investigating committees may encounter general practices of sex discrimination unrelated to the case that originally prompted the investigation. The question arises whether in these situations the committee should address the sex-discrimination issues even though a report might be written without reference to sex discrimination. While decisions on the scope of an investigation rest in the last analysis with the ad hoc committee itself, the 1965 report concluded that reports of investigating committees should not be restricted to the particular issues that prompted the investigation.

The Association's functions in freedom and tenure cases are not restricted to judging the particular case of the aggrieved professor. We are not merely an academic legal aid society, but a force for academic freedom and tenure throughout American higher education. When that force can be exerted by dealing generally with the health of the institution under investigation or by dealing with issues of a potentially recurrent character, we believe the opportunity should be taken. An investigation should be regarded as an occasion for the advancement of the principles of the Association rather than as a step in a grievance process; while reports of this character may take somewhat longer, they are worth the cost. And where the pursuit of not strictly material issues carries the committee to areas of uncertain and fruitless speculation, the staff and Committee A may be relied upon to reduce the report to its proper dimension.

The subcommittee reaffirms this view, with the caveat that the investigating committee must in each situation determine whether the facts are so unclear that comment might be premature. The inquiries and reports of investigating committees in cases involving claims of sex discrimination, therefore, should address these claims, as they relate both to the individual complainant and to the institution generally, even though other aspects of the complaint could be addressed without reaching them.

General Patterns of Sex Discrimination in the Absence of an Individual Complaint

Investigations normally are not authorized unless the Association has received an individual complaint. The 1965 report, however, concludes that in certain circumstances investigations should proceed in the absence of an individual complaint. The report points out that conditions in general may be so bad that it would be artificial to dwell on a single offense, that professors may be too intimidated to initiate a complaint, and that severe violations may occur that do not cost anyone a job. It notes with approval a particular investigation that was authorized because of reports of generally poor conditions rather than as a result of a specific complaint and expresses the hope that further investigations will be authorized in this manner.

The reasons stated in the 1965 report for supporting investigations in the absence of specific cases apply with special force to matters of sex discrimination. Statistical evidence might identify situations that are generally so bad that adequate grounds to justify an investigation already are present. Professors who feel discriminated against, and those who might have evidence of discrimination, seem especially likely to feel intimidated, particularly by the

threat of adverse future actions. Further, these cases are more likely than most to place the individual faculty member in opposition to colleagues, rather than only to the administration. In addition, the merits of an individual's case would not be at issue in analyzing a general pattern—a significant consideration given the difficulty of proving discrimination in particular cases. Finally, investigations based on statistical data would enable the Association to focus on the basic source of the problem. The relevant statistical base for a general pattern would often be larger, and might therefore provide more meaningful comparisons than are possible in individual cases.

Investigations based on statistical data, once adequately developed, should be a useful supplement to the case method and, in some respects, could deal with the available evidence more effectively than the case method. Egregious patterns and examples of sex discrimination, as revealed by statistical data and proper investigation and analysis, should be brought to the attention of the profession.

Notes

1. AAUP, *Policy Documents and Reports*, 10th ed. (Washington, D.C., 2006), 229.
2. *Ibid.*, 28.
3. See the 1972 "Report of the Council Committee on Discrimination," *AAUP Bulletin* 58 (1972): 160.
4. An exception would be an improper "anti-nepotism" regulation. See "Faculty Appointment and Family Relationship," *Policy Documents and Reports*, 227.
5. See "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," *ibid.*, 16–21.
6. Committee A has periodically reviewed this issue. The difficulties in proceeding with the investigation are noted in "The Report of Committee A, 1971–72," *AAUP Bulletin* 58 (1972): 145. In 1974, the committee "reaffirmed its position that litigation and investigation can be pursued simultaneously under certain circumstances." See *AAUP Bulletin* 61 (1975): 16.