Ending Sex Discrimination in Academia

A few federal courts have reversed their hands-off policy toward higher education and are ruling on the employment rights of women

A sex discrimination suit brought 7 years ago by a University of Minnesota chemist ended recently with the plaintiff being awarded $100,000. In addition, a quota was imposed on the chemistry department whereby two of the next five tenure-track openings must be filled by women, and a university-wide "preference" for hiring women faculty members was created. Settlement also called for appointment of a "special master" by the U.S. District Court for the Fourth Division of Minnesota. This magistrate will resolve all past or future sex discrimination claims, will have power to award cash damages or faculty positions (including tenure), and will oversee hiring at the university until 1989.

"I have great satisfaction," says Shyamala Rajender, the one-time Minnesota chemist who was denied a tenure-track position and now practices patent law in San Francisco. "At least I've done something for women in chemistry and maybe through all the university."

Settled by a sweeping, 51-page consent decree after 11 weeks of trial, the case is significant in several respects. The cash settlement is one of the largest of its kind, and, for an institution of higher education, the imposition of quotas and the oversight of hiring by a court-appointed master has heretofore been without precedent.

The case is nonetheless part of an emerging pattern. In the past, courts have been reluctant to interfere with faculty hiring and promotion. A small but not insignificant trend has recently developed, however, whereby some lower courts, appellate courts, and court-approved settlements have called for concrete action in cases of proved sex discrimination at colleges and universities, the Minnesota case being the most recent and most sweeping. Other provisions of the consent decree:

- For purposes of its affirmative action program, the University of Minnesota must waive its policy of not hiring its own graduates and postgraduates for tenure-track positions.
- Formulas based on national statistics will be used to define "availability pools"—the proportion of women who have obtained advance degrees during the past 5 to 10 years. Where a man and a woman are "approximately equal" in their qualifications for a position, and the hiring unit employs a lower percentage of women than the number derived by the availability formula, the female candidate will have preference.
- A seven-member intern committee is to be set up to consult with the university administration on equal opportunity issues. Two of these faculty members will be elected by the group of women who were discriminated against.
- Unless hiring has been properly conducted under new rules involving stringent advertising and recruitment procedures, no one can be hired to fill any academic vacancy.

What all this portends for academic science is not clear, though the potential for increasing litigation over sex discrimination issues clearly exists. Take chemistry, the nub of the Minnesota case. More women than ever are enrolling in and graduating from chemistry Ph.D. programs. Despite a resulting expansion in the pool of female applicants, however, chemistry departments around the country remain almost entirely male.

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Some observers suggest that the situation may be about to change. "Settlements such as the one in Minnesota are a sign to institutions of what they can expect when they lose a case," says Bernice Sandler, director of the Program on the Status and Education of Women at the Association of American Colleges. "It's the prospect of losing the litigation that will bring some of the institutions around." Others disagree, saying that even in the face of court settlements, living up to terms can be difficult. Such is the situation as seen by at least one administrator at Minnesota, Dean Roger Staehle. "I don't know if you have tried to hire women in chemistry, but let me tell you something. Everybody in the country is out trying to hire women scientists. . . . Every university has got the same problem we've got. And look, there are only so many women."

Whatever its ultimate impact on hiring and promotions, the Minnesota case is already raising complaints in some quarters over issues of academic freedom. "It's a disaster for higher education," says Sheldon Steinback, an attorney for the American Council on Education. "It is part of a pattern of erosion of the peer review process and the posture of the institution as the ultimate determiner of who is the most appropriate person to hold a position." In response, Robert Shutes, one of the lawyers for Rajender, says: "We don't think the issue of academic freedom can in any way enter into this debate. It obviously does not encompass sex discrimination."

The legislative basis for sex-discrimination suits in academia was created back in 1972 when Title VII of the 1964 Civil Rights Act was amended to cover all employees at institutions of higher education. Under the law, remedies other than settlement in court are also available. For example, penalties can include the withholding of federal funds until an institution complies with federal affirmative action programs. According to a recent report by the National Academy of Sciences, however, these penalties have been applied on a token basis—only for a period of a week or two until the institution agreed to come into compliance at some future date.* The

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most important sanction which the law provides is a pre-award compliance review for grant and contracts exceeding $1 million. The first of these reviews, however, was completed more than 6 years after the 1972 amendments, and most of the reviews are still incomplete.

Women scientists who have turned to the courts have for the most part come away frustrated. Typical is the case of Sharon Johnson, a biochemist who was denied tenure at the University of Pittsburgh. The court in 1977 found that there was a statistical case for discrimination against women in the hiring and promotion practices of the university, but that the university had nondiscriminatory reasons for refusing tenure to Johnson. It also expressed its reluctance to "take over the matter of promotion and tenure for college professors," saying that "we must leave such decisions to the Ph.D.'s in academia."

The abdication of the courts to the time-honored review by one's peers (what some call the "old boy" network of school chums and colleagues) began to give way back in 1977 with the case of *Lamphere* v. *Brown University*. In a consent decree, tenure was awarded as a remedy, and a fund, limited to $400,000, was established by the university for the settlement of class-action suits that were involved in the case.

In contrast to this settlement, which was merely approved by the court, the 1978 case of *Sweeney* v. *Board of Trustees of Keene State College* was the first in which a court itself ruled on sex-related employment issues, specifically, on the allegation that promotion to full professorship had been denied because of gender. By way of remedy, the court ordered promotion. The court's judgement in *Sweeney* was also upheld by the First Circuit Court of Appeals. In commenting on this case, the court noted that a previous opinion of the First Circuit Court of Appeals (*Faro*, 1974) had been widely cited by lower courts as support for the idea that courts should exercise minimal scrutiny of college and university employment practices. This idea, the appellate court said, had been stretched too far. "This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when the bias is not expressed overtly. We fear, however, that the commonsense position we took in *Faro*, namely that courts must be ever mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964."

In the 1979 case of *Kunda* v. *Muhlenberg College*, a federal court for the first time ordered tenure as a remedy. In early 1980, this ruling was upheld by the Third Circuit Court of Appeals.

Though settled out-of-court, the case of *Rajender* v. *University of Minnesota*, in which the consent decree was tentatively approved by U.S. District Court Judge Miles Lord on 25 April, is the most sweeping so far. During the trial, attorneys for Rajender showed that 96 tenure and tenure-track faculty positions had opened since 1972 at the university's Institute of Technology (which houses the chemistry department), and that all were filled by men. And in the chemistry department itself, according to testimony presented by Lillian Williams, the university affirmative action officer, 69 prospective chemistry faculty candidates had been officially invited to the university for interview since 1968 and only one was a woman. This lone female, moreover, elicited a rather candid response from one faculty member. Under the "weaknesses" section of the faculty evaluation sheet for the candidate, chemistry professor Edward Leete in 1972 wrote: "I have to state that she would have problems because she is a woman. I guess I am a male chauvinist pig."

Williams also acknowledged that a system existed whereby chemistry faculty members would unofficially write colleagues at other universities to notify them of openings, and would recommend them for vacant department positions. All of the people contacted were men.

In 1977, Rajender's case was certified as a class-action suit for female faculty members and applicants. In light of the recent consent decree, her attorneys now estimate that other settlements could total $10 million. Unlike Brown University, Minnesota has no court-approved ceiling on the class-action settlements, and administrators say they will not set up a special fund to pay claims, presumably to avoid what might appear to be an open invitation to would-be claimants.

Why did it take 7 years to arrive at a settlement? During the hearing in April when Judge Lord tentatively approved the settlement, university attorney Charles Mays said conflicts between equal opportunity for women and academic excellence had caused the suit to drag. Lord interrupted. That kind of thinking, he said, is just used as a cover for discrimination. "The argument that academic excellence and equal opportunity principles [are] in conflict is so much hogwash."

Many observers do not agree. Philip Handler, president of the National Academy of Sciences, recently commented in his annual report to the members of the academy that the bond between the universities and the government was under increasing strain. "One grievance particularly affects the tranquility of the marriage," he said. "This is the expressed willingness of government to withhold all payments in support of research as a sanction to be imposed as a means of enforcing regulations intended to achieve social goals irrelevant to the research enterprise per se, most notably 'affirmative action' in appointment to the faculty of women, blacks, and other minorities. In the course of a few such enforcement proceedings, the government has sought and obtained university records concerning the details of individual faculty appointments—explicit affirmation by government that it considers other criteria to be as significant as academic competence, if not more so, in appointments to the faculty. Yet, nothing can so damage the future of a university as an appointment to the faculty of anyone less than the best whom the university might otherwise have attracted to its company." Many disagree with this analysis, of course, and some observers point to the academy as a particularly poor model with respect to the election of women and minorities.

Minneapolis *Tribune* Photo

Shyamala Rajender

Debate surrounding the issues of academic freedom and equal opportunity in hiring and promotion is likely to become lively, given the recent court rulings. Settlements such as the one in Minne-

sota seem part of an emerging trend, and, considering the well-entrenched reliance on review by one's peers, there will undoubtedly be resistance.

Take the administration at the University of Minnesota, for example. After the consent decree was announced, administrators at the university said that they merely wanted to end the protracted case. A consent decree was not an admission of guilt, they noted, and said they were already reforming the university's procedures in line with the "spirit of the decree."

A couple of weeks later, however, a reporter for the Minneapolis *Star* discovered that the chemistry department had already made offers to four men who are scheduled to arrive in September—a fact that would seemingly fly in the face of the court-approved quota whereby two of the next five tenure-track openings must be filled by women. According to university officials, the offers were made prior to the consent decree, two in January 1980 and two in 1979. And even though the offers of employment have yet to be approved by the Minnesota Board of Regents, that fact would not necessarily stand in the way. The consent decree has only been tentatively approved by the federal court, the judge deferring on final approval so that notices can be printed in newspapers across the country so that class members in the suit can have time to comment on the terms of the settlement. The date for final approval is set for 1 August. This would technically allow the hiring and approval by the board of regents of four new male faculty in the chemistry department, just as long as it was done before the 1 August deadline. The story in the Minneapolis *Star*, however, seems to have cooled the administration's enthusiasm. University attorney Mays now says that the chemistry department will probably hire only three of the four men. "The administration is dealing with the issue right now," he says with a sigh. "They have not yet made a decision. But I'm sure the ultimate decision will meet both the letter and the spirit of the decree."—WILLIAM J. BROAD

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Math Center Protests Army Contract Terms

As Pentagon research officials tell the story, it was just a case of bureaucratic clumsiness. The Department of Defense (DOD) did not mean to do anything that might restrict the freedom of academics doing basic research with DOD support, but overenthusiastic contract writers in the Army this spring sent a shudder through the Mathematics Research Center (MRC) at the University of Wisconsin in Madison. In renewing the Army's $1.8 million contract with the math center, the government added a couple of restrictive new clauses that prompted several staff researchers to threaten to resign. Coming on the 10th anniversary of the bombing of the Mathematics Research Center by student radicals, this was hardly an auspicious sign for the DOD's plan to reestablish itself as a major funder of university-based research.

There were two offensive clauses. The first, inserted as a parenthetical statement in a section dealing with international conferences sponsored by MRC, said that the Army's funds may not be used "to support participation by Communist nationals." While people at the MRC regard the policy as "utterly stupid," they are prepared to live with it, since it will be possible to use other funds to bring visitors from Communist countries. "There is nothing secret going on here," one MRC staffer said. "We don't have a single classified file." He could not understand why the government would voluntarily cut itself off from a firsthand source of information about current mathematical theory in the Soviet Union and Eastern Europe.

Jagdish Chandra, who directs the mathematics program for the Army Research Office, denied that this clause on Communist visitors represented a new departure in Army policy. He claimed that the DOD has forbidden contractors from using its funds to support Communist participation since 1967. The policy has always been implicit, Chandra said, although it was spelled out for the University of Wisconsin for the first time in the MRC contract this year. Other conference projects have been subject to the same restriction before this. It is "quite possible," Chandra agreed, that the policy is "undesirable." But, as one DOD contract official pointed out, it is difficult to justify paying the travel expenses for Communist nationals while travel funds for U.S. scientists are being cut back.

The Department of Energy (DOE), according to a contracts officer, also follows the no-travel-for-Communists rule, but it does not spell it out in contracts. The policy is applied administratively, meaning the DOE denies reimbursement only when it catches a violation. Visiting scientists from China, under an agreement negotiated earlier this year by Frank Press, will be financed by their own government.

The second unwanted clause was more troublesome, and, indeed, it is still being negotiated by the MRC and the Army. In the first draft, it required that recipients of Army funds send their papers to the chairman of the Army Mathematics Steering Committee for approval before publication. The Army insists that it was only seeking to ensure that the work it sponsors measures up to a high standard. Percy Pierre, assistant secretary of the Army for research, development, and acquisition, told *Science* that he issued a directive last year requiring that all in-house Army research papers be subject to a form of peer review. When he assumed office, he said, he was "appalled" to find that there was no consistent policy for reviewing the output of Army scientists, so he instituted one. His policy, he thinks, may have been mistakenly applied to contract research at universities as well.

The MRC contract appears to have been the first major one to bump into the problem, although Pierre said he also received a vigorous protest from someone at the Massachusetts Institute of Technology, passed to him by White House science adviser Frank Press. In the future, research done on contract will not be reviewed by the Army, but researchers will be asked to file a copy of each paper with the Army at the same time that they send it to a journal for publication.

George Gamota, a physicist who works in the office of the DOD's under secretary for research and engineering, has been trying for several weeks to clear up the confusion and devise a uniform review policy for all the DOD's

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