2000 WL 34230253
Only the Westlaw citation is currently available.
United States District Court,
W.D. Wisconsin.

Ann Al YASIRI, Plaintiff,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, David Markee, Robert Culbertson, Ralph Curtis, Mittie Nimocks, Scott White, Jerry Strohm, Teresa Burns, William Campbell, Kathryn Winz, Richard Waugh, Sherrie Nicol, Abdol Soofi, Brian Peckham and Farhad Dehghan, Defendants.

No. 99-C-0051-C. | Jan. 28, 2000.

Attorneys and Law Firms

David E. Rohrer, for Plaintiff.

Richard Moriarty, Assistant Attorney General, Madison, WI, for Defendants.

OPINION AND ORDER

CRABB, J.

***1** In this civil action for declaratory, injunctive and monetary relief, plaintiff Ann Al Yasiri is contending that defendants Board of Regents of the University of Wisconsin System, David Markee, Robert Culbertson, Ralph Curtis, Mittie Nimocks, Scott White, Jerry Strohm, Teresa Burns, William Campbell, Kathryn Winz, Richard Waugh, Sherrie Nicol, Abdol Soofi, Brian Peckham and Farhad Dehghan discriminated against her on the basis of her sex and her marital relationship in violation of 42 U.S.C. § 2000e and 42 U.S.C. § 1983 when they denied her a tenured faculty position at the University of Wisconsin-Platteville.

Subject matter jurisdiction is present. *See* 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). Presently before the court is defendants' motion for summary judgment as well as their motion to strike or disregard plaintiff's proposed findings of fact. Because I find that plaintiff has not adduced any factual evidence from which a jury could conclude that she was subject to unlawful sex-based discrimination under Title VII or the equal protection clause or that defendants violated the First Amendment by denying her tenure on the basis of her marital relationship, defendants' motion for summary judgment will be granted.

As explained in this court's *Procedures to be Followed on Motions for Summary Judgment,* a copy of which was given to each party with the Preliminary Pretrial Conference Order on April 29, 1999, I will take as undisputed defendants' proposed facts that plaintiff does not contest specifically with proposed facts of her own that are based on record evidence. *See Procedures,* II.C.1 ("Unless the nonmovant properly places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the finding of fact initially proposed by the movant.") Many of plaintiff's responses to defendants' proposed findings of fact do not cite to record evidence. For example, plaintiff's response to defendants' proposed finding # 93 is "Deny. (*See* Plaintiff's Proposed Findings of Fact ¶¶ passim)." Plt .'s Resp. to Defs.' Proposed Findings of Fact # 93; *see also* Plt.'s Resp.63, 70, 71, 72, 98, 111 and 112, dkt. # 38. Such responses are not adequate to put defendants' proposed findings of fact into dispute and will be ignored.

As defendants argue in their motion to strike, many of plaintiff's 325 proposed findings of fact also fail to comply with this court's procedures. However, rather than striking all of plaintiff's proposed findings, I will disregard those that (1) cite defendants' proposed findings as evidence in support of her proposal, without citing any evidence in the record; (2) cite evidence that does not support the proposed fact; (3) repeat findings of fact proposed by defendants; and (4) cite statements in affidavits that are outside the affiant's personal knowledge, *see Stagman v. Ryan,* 176 F.3d 986, 995 (7th Cir.1999) (discussing Fed.R.Civ.P. 56(e)'s prohibition of "statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory"). In all other respects, defendants' motion to strike or disregard plaintiff's proposed findings of fact will be denied and plaintiff will not be given an opportunity to amend or supplement her proposals.

***2** Defendants argue that there is no genuine issue of material fact relating to the retaliation claim plaintiff set out in her complaint. Plaintiff fails to address defendants' argument or to set forth any independent arguments in support of her retaliation claim. *See* Plt.'s Br. in Opp., dkt. # 36. Without some explanation of the claim, I cannot evaluate its merits and must conclude that plaintiff has abandoned it. "Arguments not developed in any meaningful way are waived." *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.,* 181 F.3d 799, 808 (7th Cir.1999); *see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG,* 165 F.3d 526, 528 (7th Cir.1998); *Colburn v. Trustees of*

Indiana University, 973 F.2d 581, 593 (7th Cir.1992) ("[Plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim"); *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Bd.,* 957 F.2d 302, 305 (7th Cir.1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

For purposes of summary judgment, I find the following facts submitted by the parties to be material and undisputed.

UNDISPUTED FACTS

A. *Parties*

Plaintiff Ann Al Yasiri was a member of the Department of Economics at the University of Wisconsin-Platteville from 1980 to 1996. Defendant Board of Regents of the University of Wisconsin System is the corporate body responsible for governance of the University of Wisconsin System. Defendant Ralph Curtis was associate vice chancellor at Platteville from 1980 to 1992 and from 1993 to 1997 and interim vice chancellor from 1992 to 1993; Curtis retired from the university in July 1998. Defendant Robert Culbertson was chancellor at Platteville from 1993 to June 1996 and is now a faculty member. Defendant David Markee has been chancellor since August 1996. Defendants Scott White (business and accounting professor), Jerry Strohm (biology professor) and Mittie Nimocks are faculty members who served on the faculty senate during the 1996-97 academic year. Defendants Teresa Burns (humanities professor), Kathryn Winz (criminal justice professor), Sherrie Nicol (mathematics professor), William Campbell (mathematics professor), Richard Waugh (social science professor), Abdol Soofi (economics professor), Brian Peckham (economics professor) and Farhad Dehghan (economics professor) are faculty members at Platteville.

B. *Plaintiff's Qualifications*

1. *Education*
In 1969, plaintiff received a bachelor of science degree with honors from the University of Wisconsin-Platteville, with a major in political science and comprehensive social sciences with concentrations in history, economics and sociology. In 1972, she received a masters of arts in political science from the University of Wisconsin-Madison. In 1977, she received a bachelor of science and education degree with honors from the University of Wisconsin-Platteville with a major in social science and a minor in economics. (She does not explain why she obtained two bachelor's degrees). Plaintiff has not obtained a doctoral degree in economics or a terminal degree in any field.

*3 Plaintiff took a number of postsecondary courses in economics, many of which were taught or co-taught by her husband, Kahtan Al Yasiri, an economics professor at the University of Wisconsin-Platteville. In each of the courses plaintiff's husband taught or co-taught, she received a grade of "A." In the courses "Algebra" and "Math of Investment," she received a grade of "C."

2. *Scholarly publications*
Plaintiff has not written any scholarly publications in any field, including economics.

3. *Student evaluations*
Plaintiff received positive evaluations from her students for each academic year between 1987 and 1996.

C. *Plaintiff's Employment in the Department of Economics*

In January 1980, plaintiff was hired as an academic staff lecturer for a .25 position in the economics department at the University of Wisconsin-Platteville for the spring semester. In May 1980, she was given a .50 lecturer position. She was reappointed to this position every year until the 1987-88 academic year, when her position was converted to a tenure track faculty position.

From 1980 until her termination, plaintiff was the only female in the economics department, which had as many as 8 faculty members during that period.

D. *Requirement of a Doctorate Degree in Economics*

1. *College of Business, Industry and Communications*[1]

[1] Until June 30, 1994, the name of the college in which plaintiff was employed was the College of Business, Industry and Communications; after June 30, 1994, the name changed to the College of Business and Accounting. For convenience, I will refer to both as the "college."

The position of the College Rank, Salary and Tenure Committee of the college is that a terminal degree alone does not qualify or disqualify a faculty member for retention, tenure or promotion.

In the 1986-87 academic year, five faculty members without terminal degrees were granted tenure in departments other than economics.

2. *Department of Economics*
The Department of Economics considers the following factors in making tenure decisions: teaching effectiveness (60%), scholarly activity (20%), university service (15%) and community service (5%). The department's position is that a terminal degree is not a requirement for tenure.

While serving on a recruitment panel in February 1987, plaintiff, defendants Dehghan and Soofi, Terry Liska, Joshua Robinson and John Simonson agreed that in order to be considered for a tenure appointment, candidates needed to have a Ph.D. or be near completion of a Ph.D. Since 1980, no one without a doctoral degree has been granted tenure in the economics department.

3. *Debate regarding plaintiff's appointment letter*
On October 30, 1986, the economics department faculty passed a motion that a terminal degree should not be a specific requirement for the conversion of plaintiff's staff position to a tenure track position or for any subsequent decision concerning her tenure in the department. In negotiations with university administration over plaintiff's conversion to a tenure track position, department chair Simonson argued that plaintiff should not be required to obtain a terminal degree in economics by any particular date for retention, promotion or tenure. Simonson was unpersuasive: the administration's appointment letter to plaintiff offering her a tenure track position stated that "[t]he University usually expects that a tenured faculty member in Economics will have the Ph.D. degree. It is the University's expectation that this will be true in your situation, and that you must have the Ph.D. degree in Economics no later than August 31, 1995." The letter stated that plaintiff would be reviewed for tenure during the 1995-96 academic year. Plaintiff accepted the university's offer and the specified terms in writing on February 27, 1987.

***4** On December 7, 1988, Vice-Chancellor Lee Halgren wrote a memorandum to department chair Liska, stating that the offer and acceptance of plaintiff's appointment contained "a stipulation that a Ph.D. degree in economics be obtained by August 31, 1995" before plaintiff would be considered for tenure. On July 17, 1989 and July 5, 1990, Halgren sent a memorandum to plaintiff, quoting the 1987 appointment letter and stating that he did "not view ... [plaintiff's] academic credentials [as] adequate to receive tenure at this University." On April 5, 1993, Halgren, now the acting chancellor, wrote plaintiff again, referring to the stipulation in the 1987 appointment letter and stating that the chancellor's office must receive verification of plaintiff's completion of a doctoral degree by August 31, 1995. Plaintiff did not respond directly to any of Halgren's memoranda.

On July 1, 1991, department chair Simonson wrote plaintiff a letter regarding her tenure track status. Simonson expressed concern about the administration's requirement that she obtain a doctoral degree in economics in order to be considered for tenure and encouraged plaintiff to challenge this requirement. Plaintiff never questioned the administration directly about its requirement that she obtain a doctoral degree before the vote by the economics department in January 1996.

In June 1993, June 1994 and July 1995, department chair Liska wrote plaintiff memoranda in which he discussed plaintiff's reappointment and the criteria for tenure. Liska said that plaintiff's tenure decision would "be based solely on merit and performance."

On May 6, 1994, defendant Chancellor Culbertson sent plaintiff a memorandum, stating that "[y]ou are reminded that completion of the doctoral degree prior to August 31, 1995, is a stipulation for tenure consideration." Plaintiff did not respond directly to defendant Culbertson's letter. On April 27, 1995, defendant Culbertson wrote plaintiff to remind her of the doctoral requirement in the 1987 appointment letter. Plaintiff did not respond.

On March 3, 1995, Gloria Stephenson (then the acting dean of the college) wrote a memorandum to defendant Curtis and the university Rank, Salary and Tenure Commission, noting concerns about plaintiff's progress toward tenure and stating that "[i]t is clear from this [1987 appointment] letter that [plaintiff] must have the Ph.D. degree in Economics no later than August 31, 1995." Stephenson sent copies to plaintiff and Liska. In response, plaintiff wrote a letter to Stephenson on March 8, 1995, and a letter to defendant Curtis and the university Rank, Salary and Tenure Commission on March 28, 1995, objecting to the conclusion that she was required to obtain a Ph.D. in economics by August 31, 1995. In Stephenson's reply, she reiterated her concerns about plaintiff's progress. On April 27, 1995, a revised copy of Stephenson's March 3 memorandum was sent to the university Rank, Salary and Tenure Commission, defendant Curtis, Liska and plaintiff with the language quoted above omitted. On May 9, 1995, plaintiff sent Stephenson another letter in which she reiterated her objections to the memorandum.

***5** On August 18, 1995, defendant Chancellor Curtis sent a memorandum to Liska with a copy to plaintiff,

reiterating the administration's position that plaintiff must obtain a Ph.D. in economics by August 31, 1995, in order to be considered for tenure and noting that many faculty at the university had been denied tenure because of a lack of degrees in their fields. Plaintiff did not respond directly to this letter.

E. *Alleged Bias*

1. *Defendant Abdol Soofi*

Plaintiff's husband, Kahtan Al Yasiri, was Dean of the College of Business, Industry and Communication from 1966 to 1994. The college included the Department of Economics. In spring of 1988, defendant Soofi asked Kahtan Al Yasiri for his support as dean of the college in helping Soofi become chair of the economics department. Kahtan Al Yasiri responded that he would follow the department's vote on Soofi's candidacy. The department voted to make Liska the chair. Defendant Soofi told Kahtan Al Yasiri that he was angry because of the outcome of the vote and that the standards in the college were very low.

2. *Nepotism complaint by defendants Soofi, Peckham and Dehghan*

In a letter from defendant Soofi to Chancellor Chmurny dated November 21, 1988, Soofi referred to plaintiff as an example of mediocrity in the department and asserted that the department recommendation for plaintiff's retention was illegitimate. On May 2, 1989, defendants Soofi, Peckham and Dehghan sent a complaint to Chmurny, alleging that Kahtan Al Yasiri had used his influence as dean to secure preferential treatment for plaintiff in violation of the Wisconsin Administrative Code. They supplemented their original complaint on May 15, 1989.

On June 8, 1989, the chancellor's office issued a statement to the media, stating that Chmurny had dismissed the nepotism complaint against Kahtan Al Yasiri after completing an investigation.

F. *Department Vote on Plaintiff's Petition for Tenure*

On October 10, 1995, defendants Dehghan, Peckham and Soofi wrote to Vice Chancellor Curtis, asking him whether the requirement that plaintiff receive a doctorate was binding.

In January 1996, the Economics Department Review Body consisted of defendants Dehghan, Peckham and Soofi as well as Liska and Simonson. The department review body was responsible for reviewing petitions for retention, promotion and tenure in the economics department. On January 24, 1996, the body discussed a motion to adopt a resolution in favor of plaintiff's petition for conversion of her appointment to an assistant professor with tenure. Defendants Dehghan, Peckham and Soofi voted against the motion; Liska and Simonson voted for the motion. On January 30, 1996, Soofi filed responses to plaintiff's request for a written statement of the reasons for his negative vote and on February 1, 1996, Dehghan and Peckham filed their reasons.

Dehghan voted against plaintiff's tenure in the belief that she did not satisfy the minimum standard for tenure or fulfill her contractual agreement with the university because she had not obtained a doctorate. In addition, Dehghan thought that plaintiff's courses lacked theoretical and analytical content and that plaintiff was unable to teach the advanced theory courses because of her lack of training in the field of economics.

*6 Peckham voted against tenure because he thought that if plaintiff was granted tenure, it would be unfair to other candidates who had been terminated because of their failures to obtain doctorates in violation of their contracts and it would violate § 13 of the university's Rank, Salary and Tenure Rules, which requires that tenure should be recommended only if the candidate has received the appropriate terminal degree as established by her department. Peckham also thought that there was an absence of evidence of plaintiff's professional competence, including her failure to (1) write scholarly publications; (2) lead seminars for the department, (3) participate in collaborative courses within the department; (4) invite members of the department review body to observe her classes; and (5) evince any knowledge of economics through informal colloquies with others.

Soofi's reasons for voting against tenure for plaintiff were that (1) she had failed to obtain the appropriate terminal degree under § 13 of the university's rank, salary and tenure rules; (2) she did not have the requisite minimum educational background in economics, analytical skills or research experience; (3) she had failed to present or publish scholarly papers or participate in economics seminars; and (4) her courses were devoid of substantive economic analysis.

On February 19, 1996, Dehghan, Peckham and Soofi received a letter from department chair Liska, requesting their recusal from future deliberations concerning plaintiff's petition for tenure. The same day, they all declined to recuse themselves.

On March 13, 1996, the department review body met again to reconsider plaintiff's petition for tenure and again

voted 3 to 2 against recommending plaintiff's tenure. Dehghan, Peckham and Soofi voted against the motion for reconsideration for the same reasons they had voted to recommend that plaintiff not be granted tenure.

G. *Plaintiff's Appeal of Department's Recommendation*

Plaintiff appealed the department's recommendation to an appeals committee. After hearings, the appeals committee found that impermissible factors may have influenced the department review body's vote and recommended that a special committee be set up to review plaintiff's tenure decision pursuant to the provisions of Wis. Stat. § 36.13(2)(b). (Committees formed under this statute are known in the university system as "Notestein Committees.")

H. *The Notestein Committee*

1. *The Notestein Committee procedures*

On February 3, 1997, Curtis met with defendants White, Nimocks and Strohm (all officers on the faculty senate) to discuss the formation of a Notestein Committee. On February 11, 1997, White presented the faculty senate a set of procedures for governing selection of the Notestein Committee as well as the criteria to be used by the committee in making a recommendation to the chancellor. At that time, university personnel rules and Wis. Stat. § 36.13(2)(c) set forth the procedures for selecting and conducting proceedings of Notestein Committees. The procedures that defendant White presented to the senate differed from the procedures set forth by the personnel rules. For instance, the procedures proposed by White provided that the task of the committee was to "review the assigned faculty member's record and make a recommendation to either grant the faculty member tenure or to not grant the faculty member tenure," whereas the personnel rules provided that the committee was to follow "the customary decision rules of the department" in determining whether to recommend tenure to the chancellor. At the same meeting, the faculty senate appointed defendants Strohm, Burns and Campbell as members of the committee to select the members of the Notestein Committee.

*7 In March 1997, defendant Campbell told defendant Strohm that the procedures adopted by the faculty senate deviated from the university's personnel rules. The University of Wisconsin System's legal counsel informed defendant Curtis that the university had had procedures in place governing Notestein Committees before the faculty senate approved different procedures; defendant Curtis told defendant Markee about the conflict.

On March 27, 1997, Liska wrote a letter to the Notestein Committee, setting forth the criteria for tenure in the Department of Economics. In an appearance before the committee, Liska informed the committee that its function was to sit as a surrogate for the department.

2. *Members of the Notestein Committee*

The Notestein Selection Committee chose five people to serve on the Notestein Committee: three individuals from UW-Platteville: John Ambrosius (Department of Agriculture); Sherrie Nicol (Math Department); Richard Waugh (Geology/Geography Department); and two individuals from UW-La Crosse: Wahhab Khandker (Economics Department) and Mary Hampton (Economics Department). Curtis appointed Kevin McGee, a tenured faculty member in the UW-Oshkosh Department of Economics, to serve as a non-voting consultant to the committee.

The selection committee did not consider anyone from the former College of Business, Industry and Communications because of the previous litigation that had involved accusations of nepotism against plaintiff's husband. The selection committee also did not consider members of the business department. It considered faculty from other campuses in order to include economics faculty but did so without determining whether there were faculty in areas closely related to economics at Platteville.

When Ambrosius resigned from the committee in April 1997, because of health problems, Strohm appointed Kathryn Winz, a member of the Criminal Justice Department at Platteville.

3. *Decision of the Notestein Committee*

At the beginning of the committee's proceedings on May 13, 1997, the committee members discussed the function of the committee and the criteria for their recommendation. At the conclusion of the hearings, defendant Nicol made a motion that plaintiff had met the minimal departmental criteria for tenure. However, the committee unanimously recommended that plaintiff not be granted tenure for a variety of reasons, emphasizing her lack of a doctoral degree.

I. *Plaintiff's Internal Complaint of Discrimination*

On April 24, 1996, plaintiff filed a formal complaint of discriminatory conduct with the university's affirmative action office, contending that the decision of the department review body was discriminatory and should be vacated. She contended also that defendants Dehghan,

Peckham and Soofi had harassed her and discriminated and retaliated against her because of her gender and marital relationship.

In a letter to defendant Culbertson dated July 15, 1996, plaintiff asked the chancellor to direct the university's affirmative action officer to investigate her complaint. In a letter to plaintiff dated September 17, 1996, defendant Markee (Culbertson's successor), stated that in accordance with university policy, he would forward plaintiff's complaint to the Complaints and Grievances Commission for a hearing. In response, plaintiff wrote a letter to defendant Markee, requesting an investigation by the affirmative action office and opposing a hearing by the Complaints and Grievances Commission.

***8** Plaintiff refused to accept the established procedures for resolving internal discrimination complaints. She was informed that an investigation by the affirmative action officer was not contemplated by the written established procedures and she was provided with copies of the relevant written procedures and offered the committee hearing option on several occasions. Because plaintiff refused to take advantage of the written established procedures, her complaint was dismissed.

OPINION

A. *Standard of Review*

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Seventh Circuit has recognized that courts must apply the summary judgment standard with rigor in employment discrimination cases because "motive, intent and credibility are crucial issues." *Crim v. Board of Education of Cairo School Dist. No. 1,* 147 F.3d 535, 540 (7th Cir.1998). However, even in employment discrimination cases, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, *see Celotex,* 477 U.S. at 324, and must carry her burden with more than mere conclusions and allegations. *See id.* at 321-22.

B. *Gender Discrimination: Title VII and Equal Protection Claim*

"Title VII provides a comprehensive statutory scheme for protecting rights against discrimination in employment.... It is well-established that Title VII's own remedial mechanisms are the only ones available to protect the rights created by Title VII." *Waid v. Merrill Area Public Schools,* 91 F.3d 857, 862 (7th Cir.1996). In *Waid,* the Court of Appeals for the Seventh Circuit held that "Title VII preempted any of [plaintiff's] claims for equitable relief under § 1983 or Title IX." *Id.* (citing *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.) In *Waid,* the court limited its holding to equitable relief because before 1991, Title VII provided only equitable remedies. In 1991, Congress amended Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-2, expanding the remedies available to include compensatory and punitive damages. As a result, "Congress has set up an enforcement mechanism with full remedies" and "that regulatory structure may not be bypassed by resort to laws of more general applicability like § 1983." *Boulahanis v. Board of Regents,* No. 99-1561, 1999 WL 1101400, at *7 (7th Cir. Dec.3, 1999) (discussing Title VI). The one exception is that "Title VII does not preempt a cause of action for intentional discrimination in violation of the Constitution." *See Waid,* 91 F.3d at 862 (citing *Trigg v. Fort Wayne Community Schools,* 766 F.2d 299, 300-01 (7th Cir.1985)). Therefore, plaintiff's claim under § 1983 is limited to intentional discrimination on the basis of gender in violation of the equal protection clause.

***9** A plaintiff in an employment discrimination action may prove discrimination in two ways: by direct evidence and by indirect evidence. Plaintiff has not presented direct evidence that defendants discriminated against her by denying her tenure. That being so, she must prove discrimination by indirect evidence according to the burden-shifting formula established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Cheek v. Peabody Coal Co.,* 97 F.3d 200, 203 (7th Cir.1996). In addition, in order to sustain her equal protection claim under the Fourteenth Amendment, plaintiff must show intentional discrimination by the individual defendants. *See also see King v. Board of Regents of the Univ. of Wisconsin System,* 898 F.2d 533, 37 (7th Cir.1990) (noting that defendant must intend to harass in equal protection claim but not in Title VII claim).

To successfully oppose defendants' summary judgment motion, plaintiff must establish a prima facie case of

gender discrimination, *see Namenwirth v. Board of Regents of University of Wisconsin System,* 769 F.2d 1235, 1240 (7th Cir.1985), by showing that (1) she is a member of a protected class; (2) she was qualified for tenure; (3) she was denied tenure; and (4) an applicant not in a protected class was granted tenure. *See id.* If plaintiff satisfies all of these elements, the burden of production shifts to defendant to produce a legitimate, nondiscriminatory reason for failing to given her tenure. *See Wolf v. Buss (America) Inc.,* 77 F.3d 914, 919 (7th Cir.1996); *Johnson v. University of Wisconsin-Eau Claire,* 70 F.3d 469, 479 (7th Cir.1995); *Namenwirth,* 769 F.2d at 1240. If defendant can articulate a nondiscriminatory reason, it has satisfied its burden of production and the burden shifts back to plaintiff to show by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. *See Wolf,* 77 F.3d at 919.

Because "the prima facie elements were never meant to be applied rigidly," *Pilditch v. Board of Education of City of Chicago,* 3 F.3d 1113, 1116 (7th Cir.1993), the court may expedite the process by proceeding directly to the pertinent issue of illegal discrimination without deciding whether the plaintiff has established a prima facie case of discrimination. *See Vanasco v. National-Louis University,* 137 F.3d 962, 966 (7th Cir.1998) (ADEA case); *E.E.O.C. v. Our Lady of Resurrection Medical Ctr.,* 77 F.3d 145, 149 (7th Cir.1996). Plaintiff asserts that she can establish sufficient indirect evidence of illegal discrimination through the *McDonnell Douglas* test to ward off summary judgment. I need not consider whether this is true because I find that even if plaintiff could establish a prima facie case, she has not adduced evidence sufficient to raise a triable issue that defendants' articulated reasons for denying her tenure are pretextual.

There are two possible methods by which defendant board of regents could have granted plaintiff tenure: "upon the affirmative recommendation of the appropriate chancellor and the appropriate academic department," Wis. Stat. § 36.13(2)(a), or if the following three conditions are met: (1) the chancellor gives an affirmative recommendation; (2) "a faculty committee authorized ... to review the negative recommendation of the academic department finds that the decision of the academic department was based upon impermissible factors"; and (3) the Notestein Committee gives an affirmative recommendation. Wis. Stat. § 36.13(2)(b).

1. *Economics Department Review Body*

***10** The board did not grant plaintiff tenure under § 36.13(2)(a) because the Department of Economics voted twice against recommending tenure. The three members of the Economics Department Review Body voting "no" set forth various nondiscriminatory reasons to justify their votes. Specifically, they were concerned with plaintiffs professional competence in light of the facts that she did not have a Ph.D. in economics, any scholarly publications or participation in economics seminars or collaborative courses within the department. Also, they were concerned with the low level of theoretical and analytical content in plaintiff's courses as well as her inability to teach advanced theory courses because of her lack of training in the field of economics.

In an effort to demonstrate that the nondiscriminatory reasons offered by defendants Dehghan, Peckham and Soofi are a pretext for gender discrimination, plaintiff argues that her appointment letter did not contain a stipulation that she had to receive a Ph.D. before she was considered for tenure and that even if it did, she was singled out for this requirement. This argument is disingenuous. Whether or not the language in the appointment letter itself was ambiguous, plaintiff was notified as early as July 1989 and repeatedly thereafter that members of the university's administration (Vice-Chancellor Halgren, Chancellor Culbertson, Dean Stephenson, Chancellor Curtis) interpreted the appointment letter as requiring a doctorate degree. In fact, department chair Simonson encouraged plaintiff to challenge what he saw as the administration's requirement that she obtain a Ph.D. The letters from various administration officials evidence the reasonableness of the belief of Soofi, Dehghan and Peckham that plaintiff was required to obtain a Ph.D. Plaintiff's argument that she was singled for such requirement is unpersuasive in light of the undisputed fact that no candidate without a Ph.D. has received tenure in the Department of Economics since 1980.

Plaintiff also tries to demonstrate pretext by arguing that her favorable student evaluations provide support her qualifications for tenure because the economics department gives heavy weight to a candidate's teaching effectiveness in tenure decisions. Although plaintiff received favorable student evaluations, defendants Soofi, Dehghan and Peckham were concerned with her ability to be an effective teacher of economics because she lacked training and research in economics. Specifically, they pointed to the lack of theoretical and analytical content in her courses as well as her inability to teach advanced theory courses. Teaching effectiveness is not judged solely by student evaluations. The majority of plaintiff's colleagues did not believe that she had the requisite "amount of promise" to be a tenured economics professor. *Namenwirth,* 769 F.2d at 1242. In *Vanasco,* 137 F.3d at 968, the plaintiff attempted "to demonstrate that the University's reasons for denying her tenure were [a

pretext for age discrimination] by providing evidence of her accomplishments as a teacher." In rejecting plaintiff's argument, the Court of Appeals for the Seventh Circuit stated that "[t]he University's dissatisfaction with [plaintiff]'s performance did not stem, however, from her ability as a classroom teacher." *Id.* The court concluded that it "must not second-guess the expert decisions of faculty committees in the absence of evidence that those decisions mask actual but unarticulated reasons for the University's action." *Id.*

*11 Plaintiff has failed to offer any admissible evidence that the reasons defendants Dehghan, Peckham and Soofi gave for voting against tenure were pretextual. Defendants' proffered reasons are not implausible or without factual support, so as to suggest that they are a coverup for sex discrimination. They have a firm factual basis. Plaintiff may wish that defendants had viewed those facts differently and ignored her inadequate scholarly credentials, but she cannot say that the defendants relied on inaccurate information or misinterpreted the facts.

2. *Notestein Committee*

Plaintiff argues that she was discriminated against on the basis of her sex because defendants Nimocks, White, Strohm (members of the faculty senate), defendants Burns, Campbell and Strohm (members of the Notestein Selection Committee) and defendants Chancellor Markee and Vice-Chancellor Curtis failed to comply with the university's personnel rules and Wis. Stat. § 36.12(2)(c) in selecting members for the Notestein Committee and setting forth criteria for the committee's vote. Although defendants failed to comply with the established procedure for selecting members of the Notestein Committee, plaintiff has offered no evidence that the procedural irregularities were attributable to her sex. Defendants' noncompliance might support a state law claim; it does not support plaintiff's federal constitutional claims of sex discrimination.

The defendant board did not grant plaintiff tenure pursuant to § 36.13(2)(b) because the Notestein Committee, including defendants Winz, Waugh and Nicol, did not recommend tenure. The committee recommended against tenure unanimously for a variety of valid reasons, including plaintiff's failure to obtain a doctoral degree. Plaintiff has not shown that the three women and two men on the committee even considered her sex in making their tenure recommendation.

3. *Plaintiff's internal complaint of discrimination*

Insofar as plaintiff argues that defendants discriminated against her by failing to respond to her complaint of discrimination, she has no evidence of discrimination. Although plaintiff wanted the university's affirmative action officer to investigate her complaint, the university's procedure mandated that a Complaints and Grievances Commission hold a hearing about her complaint. After defendants gave plaintiff ample opportunity to utilize the university's established procedure, they dismissed her complaint. She cannot claim now that defendants discriminated against her because they did not provide the procedure that she demanded, when she has not shown that the affirmative action officer would have provided male faculty members an investigation on demand.

Because no reasonable jury could conclude that plaintiff has demonstrated that defendants' nondiscriminatory reasons for not granting tenure to plaintiff are pretextual and a cover for illegal sex discrimination, defendants' motion for summary judgment on her Title VII and equal protection claims will be granted.

C. *Freedom of Association Claim*

*12 The Supreme Court has recognized a right of association in two distinct senses. *See Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). One involves "choices to enter into and maintain certain intimate human relationships," which are "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. The other is the "right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618.

Although neither the Supreme Court nor Seventh Circuit has addressed the issue whether public employees are protected under the First Amendment from adverse employment actions taken because of an employer's hostility to the employee's spouse, the Seventh Circuit has recognized that the *Connick-Pickering* test would not fit "some associational choices-for instance, whom to marry"-that are purely private matters because it would not be possible to establish that the employee's speech addressed a matter of public concern. *Balton v. City of Milwaukee,* 133 F.3d 1036, 1032 (7th Cir.1998); *Messman v. Helmke,* 133 F.3d 1042, 1046 n. 3 (7th Cir.1998) (noting that in *Balton,* court questioned the usefulness of public concern test in free association claims); *Weicherding v. Riegel,* 160 F.3d 1139, 1142 n. 4 (7th Cir.1998) (same). *See Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Education of Township High School Dist. 205,*

391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

Courts in other circuits have found that adverse employments actions can burden the marital relationship unlawfully, thereby violating the First Amendment right to intimate associate. *See, e.g., Adler v. Pataki,* 185 F.3d 35 (2d Cir.1999) (holding that plaintiff's allegation that he was terminated from state job because his wife was suing state for illegal firing was sufficient to state claim under right to freedom of association); *McCabe v. Sharrett,* 12 F.3d 1558 (11th Cir.1994) (holding that plaintiff had fundamental constitutional right not to suffer adverse employment action because of her marriage to police officer, but holding that transfer to less desirable job served government's compelling interest in maintaining effective functioning of chief's office); *Adkins v. Board of Education,* 982 F.2d 952 (6th Cir.1993) (upholding claim that denial of continued employment because of antipathy toward employee's husband violated right of intimate association). Because plaintiff has failed to set forth sufficient evidence that defendants denied her tenure because of her marital relationship, it is unnecessary to decide the extent to which the First Amendment would protect her from adverse employment action motivated by defendants' hostility to her husband. *See Adler,* 185 F.3d at 44 (discussing what "degree of state interest might be required to overcome a public employee's interest in maintaining a First Amendment right of intimate association despite the employer's concern about some action of the employee's spouse").

1. *Economics Department Review Body*

***13** As discussed above, defendants Soofi, Dehghan and Peckham have offered a variety of nondiscriminatory reasons in support of their vote to deny plaintiff tenure. In response, plaintiff argues that they voted against her tenure appointment because of her marital relationship with Kahtan Al Yasiri, the dean of the college. Specifically, plaintiff contends that defendant Soofi was angry at plaintiff's husband because he did not help Soofi get elected department chair, declined to help Soofi's wife get a job in the college and refused to overrule Simonson's denial of Soofi's request for a reduced schedule. Plaintiff also cites the nepotism complaint filed by Soofi, Peckham and Dehghan in May 1989, in which they alleged that Kahtan Al Yasiri had used his influence as dean to secure preferential treatment for plaintiff.

Viewing the evidence in the light most favorable to the plaintiff, I can find nothing in the record that links defendant Soofi's alleged hostility toward plaintiff's husband with his vote to deny tenure to plaintiff. It is not enough for plaintiff to rest on the syllogism that persons who dislike one spouse always retaliate against the other spouse; defendant Soofi disliked plaintiff's husband; therefore, his vote against plaintiff's tenure application was motivated by a desire to retaliate against plaintiff. Not only is this a matter of dubious logic, there is considerable evidence that defendant Soofi believed honestly that plaintiff was unqualified for a tenured faculty position. Indeed, the nepotism complaint supports defendants' contention that Soofi, Dehghan and Peckham did not see plaintiff as qualified for retention or promotion and that they attributed some of her success in the economics department to her husband's special treatment of her, beginning with his giving her high grades in classes he taught.

Plaintiff must establish that defendants voted against tenure *because of* her marriage to Kahtan. The evidence is to the contrary. As members of the Economics Department Review Body, defendants Soofi, Dehghan and Peckham believed that plaintiff was not qualified for tenure because she lacked a Ph.D. in economics, a research agenda, scholarly publications, analytical content in her courses and the ability to teach advanced courses. In light of the evidence of plaintiff's credentials, their opinions were not unreasonable. Furthermore, the Notestein Committee, the body responsible for reviewing plaintiff's request for tenure on appeal, recommended unanimously that she not be granted tenure primarily because of her lack of a Ph.D., affirming the votes of defendants Soofi, Dehghan and Peckham. The committee's vote militates strongly against plaintiff's claim that her tenure denial violated her right to intimate association because she has failed to present evidence that the committee's decision was infected by marital bias as discussed below. Even if the decision at the department level was influenced by a dislike for plaintiff's husband, plaintiff has offered no evidence that her marital relationship was a factor at the committee level, where the determinative tenure decision was made. Whatever defendants Soofi, Dehghan and Peckham thought of plaintiff's husband, they were not the final decisionmakers. Plaintiff suffered no actionable injury as a result of their vote. Accordingly, there is no constitutional violation.

2. *Notestein Committee*

***14** Plaintiff argues that the procedural irregularities in selecting and conducting the Notestein Committee support her assertion that she was discriminated against because of her marriage. She may be correct about the procedural deficiencies, but she has not shown any link between the selection committee's deviation from established procedure and her relationship with her husband. Defendants Strohm, Burns and Campbell selected Khandker and Hampton in order to include members of an economics department. Even if it was

improper under Wis. Stat. § 36.13(2)(b)(3) to select defendant Nicol, a member of the Platteville math department, there is no evidence that the selection committee had an improper motive in doing so. The only evidence that plaintiff cites that reveals a potential bias is the appointment of Winz, who testified in another case several months after her appointment that she thought that friends of Kahtan Al Yasiri received higher salaries than faculty who were not his friends. However, plaintiff has not shown that Winz's negative opinions about plaintiff's husband were known to anyone else at the time she was appointed.

Although it is undisputed that defendants did not comply strictly with the procedures established by the university's personnel code or Wis. Stat. § 36.13(2)(b)(3), they met the requirements of § 36.13(2)(b)(3) by not including any members of the Department of Economics. They included a non-voting consultant to serve on the committee. Further, because of the past allegations of nepotism, the selection committee did not consider anyone from the former College of Business, Industry and Communications. This shows that the selection committee was aware of the potential for personal bias and conflict and sought to exclude faculty members who might have prejudices relating to plaintiff's marital relationship with her husband while he was dean of the college. Although defendants failed to comply with the established procedure for selecting members of a Notestein Committee, plaintiff has failed to establish that defendants' failure would support a jury finding that defendants discriminated against her because of her marital relationship in selecting the committee or in setting forth guidelines for the committee.

Plaintiff contends that it was improper for defendants Winz, Waugh and Nicol to recommend that she be denied tenure once they had determined that plaintiff had met the minimal department criteria for tenure. Regardless why the committee chose to make a two-part decision, plaintiff has adduced nothing to suggest that illegal factors played into the outcome. Plaintiff has also failed to provide any evidence that any of the actions of defendants Markee, Culbertson, Curtis, Nimocks, White and Strohm were motivated by her marital relationship. Defendants' motion for summary judgment will be granted on plaintiff's right to intimate association claim because she has failed to offer evidence sufficient to establish that defendants denied her tenure because of her marital relationship with Kahtan Al Yasiri.

***15** Because defendants' motion for summary judgment on plaintiff's § 1983 claims will be granted on its merits, it is unnecessary to address whether any of defendants would be entitled to qualified immunity under the Eleventh Amendment with respect to any of plaintiff's claims. *See Griffin v. City of Milwaukee,* 74 F.3d 824, 827 (7th Cir.1996) (holding that qualified immunity is not relevant unless evidence supports plaintiff's claims).

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Board of Regents of the University of Wisconsin System, David Markee, Robert Culbertson, Ralph Curtis, Mittie Nimocks, Scott White, Jerry Strohm, Teresa Burns, William Campbell, Kathryn Winz, Richard Waugh, Sherrie Nicol, Abdol Soofi, Brian Peckham and Farhad Dehghan is GRANTED; and

2. The motion of defendants to strike plaintiff Ann Al Yasiri's proposed findings of fact is DENIED as unnecessary.

All Citations

Not Reported in F.Supp.2d, 2000 WL 34230253

End of Document