

***O'BOYLE ET AL. v. LOUISIANA TECH:
IS THE PARTY OVER FOR TRADITIONAL
PAY PRACTICES IN BUSINESS SCHOOLS?***

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ABSTRACT

The language in the Civil Rights Act of 1991 relating to "alternative selection practices equally effective in achieving legitimate employment goals" may require business schools to alter their traditional compensation practices. More specifically, the practice of paying newer faculty members more than faculty members currently on staff may be unlawful age discrimination. A suit filed in Louisiana, *O'Boyle et al. v. Louisiana Tech*, may help clarify the related issues.

In December 1993, six tenured faculty in the College of Business of Louisiana Tech University filed a petition in the 19th Judicial District Court of Louisiana [1]. The plaintiffs alleged age discrimination in pay practices. Language in the 1991 Civil Rights Act (CRA) relating to "alternative selection practices equally effective in achieving legitimate employment goals" may be central to the eventual outcome of this case. As suggested in a recent article, the CRA may require business schools at U.S. colleges and universities to alter their traditional staffing and compensation practices [2]. *O'Boyle et al. v. Louisiana Tech* could be a test case in that regard.

The *O'Boyle* plaintiffs range in age from fifty-one to sixty, with service dates from 1970 to 1978. They allege that because of their age, they have been and continue to be victims of illegal discriminatory treatment with respect to their compensation, terms, conditions, and privileges of employment.

Eleven junior faculty were identified in the petition. All are younger than the plaintiffs, and all were hired after 1987. Ten receive salaries greater than the six plaintiffs; the other junior faculty member is paid more than three of the plaintiffs. Clearly, the plaintiffs will have no difficulty showing their pay is less than that of the younger faculty. However, demonstrating the discriminatory pay practices are based on age rather than market forces will be an arduous task.

THE NONPERFORMANCE ARGUMENT

Louisiana Tech may assert the plaintiffs are not productive scholars. Unquestionably, a university charged with pay-related age discrimination has little to fear if it can show that faculty members who experienced the adverse impact were not productive from a research standpoint. This may be easier said than done.

Generally speaking, universities do a poor job of documenting performance. Most regional accrediting agencies like the Southern Association of Colleges and Schools (SACS) have not historically required any documentation regarding faculty evaluation. Only recently has SACS included a standard dealing with institutional effectiveness, and even that does not specifically address the absolute necessity of documenting faculty performance. Even more significantly, the American Assembly of Collegiate Schools of Business (AACSB) has not required documentation of performance evaluation. The new standards of the AACSB allude to the need for evaluation as part of faculty development, but do not specifically require documentation.

When a tenured faculty member's productivity (i.e., publications) declines, frequently very little is said, much less documented. The only indication of unacceptable performance an unproductive faculty member may receive is a relatively small or nonexistent merit increase.

In the absence of adequate documentation, the plaintiffs at Louisiana Tech could claim that performance was not discussed, adequate resources were not provided, or there were no accommodations for research. In fact, in the absence of documentation the plaintiffs could make any number of other claims that would be burdensome to the university's defense.

THE EQUITY ADJUSTMENT ARGUMENT

Throughout the seventies and eighties, business schools routinely paid newly-hired faculty members more than faculty members already on staff. This was due to a prevailing labor market in which many business schools felt compelled to bid for new faculty by paying rates equivalent to (salary compression) or in excess of (salary inversion) the pay of senior faculty. Until now, there has been relatively little pressure from business faculties to correct compensation systems that produced the compression and inversion.

Consequently, business school administrators have not been too concerned about the inequities associated with salary compression and inversion. They believed that salary inversion was a function of the market for labor and, therefore, defensible. The pervasiveness of inequities makes it apparent that administrators believed there was no real legal need to be concerned. Recent research has demonstrated that university administrators conduct the affairs of their institutions totally unaware of potential legal liabilities [3]. There is reason to believe there is a lack of awareness of risk associated with salary inversion, even after passage of the CRA in 1991.

On the surface, business schools experiencing salary compression or inversion appeared relatively safe from legal harm. Pay practices that had an adverse impact against older faculty could be justified, and there were ample legal precedents. Or so it seemed until the CRA.

Louisiana Tech could and probably will argue that salary inversion is a condition of the market whereby business schools must pay the going rate to attract scholarly faculty members with a doctorate in business from a prestigious university. Louisiana Tech probably will assert that under the protracted financial crisis in Louisiana, it has been impossible to adjust the pay of the older faculty upward to correct the inequities. Funding equity adjustments would have been a difficult undertaking since operating revenues were declining as a result of decreasing enrollment and dwindling financial support from state and federal sources. Both arguments are flawed.

It is factually indisputable that the practice of paying new faculty more than established faculty tends to have an adverse impact on older faculty members; new faculty tend to be younger than established faculty. And no evidence has been presented to suggest that Louisiana Tech gave serious thought to increasing salaries to correct the inequities.

Furthermore, in a civil rights context, the alleged financial crisis in Louisiana may be interpreted as a pretext. Its stated policies of fairness in employment practices notwithstanding, correcting the salary inequities would have been relatively inexpensive had Louisiana Tech recognized its legal liabilities. The most serious impact of the cost of correcting the inequities might have been to slow down the rate of growth of the faculty at Louisiana Tech.

THE VALIDITY OF FACULTY HIRING STANDARDS

Ostensibly, Congress passed the CRA with the intent of restoring the power of plaintiffs that existed before the Supreme Court decision in *Wards Cove Packing Co. v. Atonio* [4]. However, the new civil rights law extends the concept of job relatedness in a way that may challenge traditional faculty staffing practices [5]. More specifically, the new law negates language in *Wards Cove*, which says the existence of alternative business practices that may have a less discriminatory impact only suggests, but does not prove, discrimination.

Now, under the CRA, it is unlawful for a defendant to refuse to adopt known alternatives that may be less discriminatory, but just as effective, in serving the employer's business purpose. It is this language that may prove troubling if business schools' compensation practices have had an adverse impact on protected groups.

The staffing process for most business schools is tradition-bound, and alternatives have not been examined to any great extent. Even though the AACSB faculty qualification standards are flexible enough to permit hiring faculty at salaries that would not result in salary inversion, it is probably safe to say that most business schools have not availed themselves of these alternatives.

The College of Business at Louisiana Tech offers a DBA program; however, it is like the majority of business schools in the United States in that its primary function is teaching. Among state colleges in Louisiana, Louisiana Tech is at the third tier of state funding—a sure sign the mission at Louisiana Tech is essentially teaching and not research. As such, it could be argued there is no need to employ a large corps of research scholars with prestigious publication records.

Equal employment opportunity proponents would argue that even in the tight employment market of 1987 through 1990, Louisiana Tech could have employed faculty easily at salaries lower than those of the plaintiffs. It is assumed Louisiana Tech's policy is to hire individuals who have a doctorate in the same discipline in which they teach, who have a scholarly background, and who are graduated from a prestigious university. The question arising in the context of the CRA is: did Louisiana Tech have suitable alternatives that would have been just as effective and would not have resulted in salary inversion to the detriment of older faculty?

Based on past practice in business schools, a doctorate has *not* always been necessary to effectively teach certain business courses. People from a variety of professional and occupational groups without a related degree or experience have competently taught business courses. The practice of employing people with diverse backgrounds as instructors to teach business courses supports the argument that it is *not* always necessary to employ high-priced doctors of philosophy (Ph.D.) from a specific business discipline.

Additionally, business schools can employ Ph.D. candidates from other disciplines who can effectively teach business courses at pay rates less than senior faculty. For example, a Ph.D. from the field of psychology may have sufficient related experience to teach a course in organizational behavior. Psychology Ph.D.s have been successfully employed in this capacity by management departments for some time [6]. Likewise, a certified public accountant (CPA) from the field of accounting or master of business administration (MBA) degree holders could be effective in teaching principles of accounting. And holders of the juris doctorate have traditionally taught legal environment and business law courses.

Examples such as these could probably be drawn from other business disciplines as well. Because of a surplus of people with advanced degrees in related

disciplines [7], there is a sizeable market of prospective faculty who could effectively teach certain business courses and would do so at relatively lower salaries.

In business schools that are aggressively engaged in research, of course, it may be unwise to hire individuals from certain nonbusiness disciplines. However, the business school at Louisiana Tech, as we said earlier, is assumed to be primarily a teaching institution. Even assuming that Louisiana Tech was at the vanguard of business research, there would be a problem making a judgment before the fact that an individual from a nonbusiness discipline does not have the requisite research skills. For example, it may be inappropriate, from a research standpoint, to hire an economist to teach accounting, or a clinical psychologist to teach marketing; however, an industrial psychologist or industrial sociologist *may* be able to teach and conduct research in organizational behavior.

As mentioned, the 1991 AACSB faculty qualification standards are quite flexible. It is clear an attorney could teach law-related business courses (FD.5 (1)), and that a person with a doctorate in any business field could teach in any other business field (FD.5 (2)). A person with a doctorate outside of business can teach business courses related to his/her doctoral background (FD.5 (3)). A person with a doctorate outside of business (e.g., educational administration) could teach any business course provided s/he has related training or experience (FD.5 (4)). And although "their number should be limited," persons with a master's degree in a business-related field with some course work in a business doctoral program can teach business courses (FD.5 (5)).

What seems to be important to the AACSB is that relevant academic preparation and relevant professional experience will be required in establishing a faculty member as acceptable. In fact, business schools have alternatives in faculty staffing that meet AACSB standards and appear to be equally effective in serving their purposes. It may be possible for a faculty member without a directly related doctoral degree to demonstrate "active involvement" over time in the field. Such individuals may fill skill gaps to meet these standards through professional development.

RESEARCH SKILLS AS A BONA FIDE OCCUPATIONAL QUALIFICATION

Lewis and Altbach suggest that after the CRA, the Ph.D., as a bona fide occupational qualification for purposes of employment or promotion, may be at risk.

The problem in academe is that the traditional Ph.D., manifestly a research degree, is not related to the jobs of most American college teachers. For those whose main responsibility is the teaching of undergraduates, how can the Ph.D. be defended as a prerequisite for employment and promotion [5, p. 12]?

Traditionally, the Ph.D. has been designed specifically for the acquisition of research skills. However, the American academic profession is, in large measure,

a teaching profession, with a relatively small segment conducting the majority of serious research. The implication is that since only a small percentage of colleges and universities requires serious research productivity, most of them may find it difficult to defend the requirement of a Ph.D. when facing charges of adverse impact.

Both the extent of research performed at Louisiana Tech and the quality of that research may be overstated. If the business school at Louisiana Tech, like many others, extols the significance of research, yet actually conducts very little research of value, *then paying premium salaries for a research background cannot be grounded in business necessity*. If only a few faculty members in the business school at Louisiana Tech actually conduct research, it may be difficult to justify a requirement for research at all. According to Lewis and Altbach, most faculty members are not scientists.

The majority of American academics with Ph.D.s do essentially *no* [emphasis added] research. Most of the minority who are researchers seldom publish scholarly or scientific books or articles. A 1989 survey of faculty [shows that] 28 percent had never published an article and another 28 percent had published nothing in the past five years. Fifty-seven percent had never published a book or monograph. . . . Only 6 percent focused primarily on research [5, p. 12].

If the business school at Louisiana Tech is essentially a teaching institution, one must question the business purpose of rewarding new faculty for research backgrounds to the detriment of senior faculty. Furthermore, if Louisiana Tech emphasizes the importance of research and, at the same time, does not provide sufficient resources, necessary research equipment, enough time to conduct research, or an adequate library to *all* faculty, it may have problems defending its position. Business schools that pay new faculty more than senior faculty based on research considerations must be prepared to show research resources were available to senior faculty who, in turn, chose not to use them.

Louisiana Tech may contend research is a good indicator of performance and is a sufficient, job-related reason to pay higher salaries to those who are research-oriented. Conventional wisdom suggests teaching and research are not mutually exclusive and good researchers probably bring more to the classroom than non-researchers. For example, the enthusiasm a researcher displays for the discovery process of new information can be contagious in the classroom. Furthermore, the good researchers can disseminate the latest knowledge to the students from up-to-date research literature. The AACSB agrees with this thesis; its task force on research concluded that research enhances one's teaching ability [8].

College and university administrators subscribe to the widely-held view that good research and good teaching go together, but how defensible will this view be in a legal proceeding? One has to worry about the relationship and the dearth of scientific research with which to support it. If good research begets good teaching,

how does this phenomenon occur? For example, can a bad teacher be transformed into a good teacher by engaging in research? If so, when does the transformation take place? As research projects gather steam? When manuscripts are finished? When manuscripts are published? Additionally, if a good researcher/teacher gets bored with research and engages in some other activity (e.g., jogging), how soon does teaching effectiveness begin to fall off? The minute the decision is made to jog, or ten years later?

Complicating any defense of the research-teaching paradigm is the fact that there is *no* research evidence that faculty who engage in research are better teachers than faculty who do no research. The scant research that does exist casts doubt on conventional wisdom. For example, one study found no significant relationship between higher-status types of research and teaching evaluations [9].

It is probably safe to say the engine that drives teaching effectiveness is the same engine that drives research effectiveness—one's level of internal motivation. Accordingly, faculty members who have good internal motivation may be excellent teachers irrespective of the other things they do with their time—whether it's research or jogging.

THE PEDIGREE ARGUMENT

A preference for hiring faculty employed by, or graduated from, “academically correct” settings is easily disposed of in terms of business necessity. There is little argument with the fact that, in academe, the practice of staffing based on pedigree is well-established.

Despite their fervid vows of dedication to great teachers and to great teaching, when it comes to recruiting their own faculty, college and university presidents increasingly pursue not the acknowledged stars of the classroom but the “marquee names” of the academic world who can add luster to faculty rosters [10, p. 108].

If the business school at Louisiana Tech is predominantly a teaching school and staffing by pedigree does not measurably relate to teaching, then hiring faculty from high-profile, perennially top-ranked universities is a reflection of subjective, business-school values. It would seem difficult, therefore, to defend adverse impact based on the need to employ academically correct faculty.

SOCIAL SECURITY AND MARKET PARTICIPATION

The plaintiffs at Louisiana Tech may need to challenge the conventional wisdom that salary inversion and adverse impact on older faculty is simply a regrettable consequence of the way the market system works. A weakness associated with using the market as an imperative for establishing salaries is that it

assumes there are buyers and sellers who are *free to choose*. By implication, if faculty members are distressed about salary inversion, all they have to do to increase their salary to the “going rate” is to reenter the market. It’s not that simple; older, established faculty who want to participate in the market are forced to incur various social, psychological, and economic costs associated with mobility.

Because of the rigidity of the internal labor market in [academia], mobility is more difficult at the higher ranks, so that good offers made at the senior levels are normally reserved for clearly outstanding faculty. This is especially true if tenure is to be included as part of the employment package [11, p. 53].

In the labor market for business faculty, access to market level salaries is limited, for the most part, to “productive” faculty. And “productive” may be simply a euphemism for young. What may have evolved in business schools is a form of systemic, structured salary discrimination based on age. In short, older faculty do not have access to higher paid positions in other schools because they are simply not a viable part of the business school labor market. Business schools have hamstrung older faculty by systematically rewarding behavior that tends to lock them into de facto discriminatory pay practices.

Whether business schools intentionally lock older faculty out of the market is open to debate. However, lack of intent to discriminate is not a defense as far as adverse impact is concerned. As a practical matter, the system of rewards and consequences at most business schools tends to exacerbate pay discrimination. More to the point, for older, tenured faculty members, there are few rewards for continued productivity (i.e., publishing) that sustains their marketability, and no serious consequences when productivity is lacking.

The system appears to encourage faculty members to take it easy, become established in the community, buy a home, raise a family, and enjoy life. In reality, the business school advocates and sanctions a set of hassle-free, extrinsic rewards that wed established faculty to the institution and limit their mobility.

After a while, the established faculty members become “unproductive.” And since it would be more expensive (market salary, moving expenses, perquisites, tenure) to employ them at a time when they are publishing less, they are no longer marketable. As a result, they become easy to exploit as far as pay policies are concerned. Business schools know there is no need to worry about salary inversion because most older faculty are locked in and cannot leave.

SUMMARY

It may be that in *O’Boyle* the court will view the policies and practices of Louisiana Tech as a means of structuring an environment in which pay discrimination could flourish. Clearly, a case could be made for alternative pay

goals without adversely impacting older faculty. In fact, given today's economic realities in higher education, there is *no* reason to pay new faculty more than existing faculty [12].

Job competition among people with Ph.D.s is so fierce that new faculty can be employed in business schools at salaries *less* than those of the past several years. The lowest salary among the six plaintiffs in the *O'Boyle* case is \$39,359 for nine months. It would be relatively easier today to employ a new faculty member with a business-related Ph.D. at this salary. The market rate for a nonbusiness degree would be somewhat less. Recall also that the AASCB standards are now considerably more liberal regarding the employment of faculty with nonbusiness-related degrees.

In *O'Boyle*, Louisiana Tech can take some solace in the fact that the younger faculty were hired during a time when people with business-related Ph.D.s commanded high salaries. However, any business school hiring new faculty at rates higher than existing faculty today is probably spending money foolishly. More importantly, it is inviting age discrimination liabilities as well.

Who will win this battle? It is still too early to predict. One can only speculate about the outcome. The fact that the case is being processed in a Louisiana state court rather than through the EEOC or the OFCCP and federal courts prompts the caution that the state court may not give much, if any, credence to a standard prescribed by the CRA. One other observation is also in order regarding academic employment litigation in general: Institutions usually prevail [13].

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ENDNOTES

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