IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY ANNE HEDRICH,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, H. GAYLON GREENHILL, KAY SCHALLENKAMP, JEFFREY C. BARNETT and L. BRENDA CLAYTON,

Defendants.

OPINION AND ORDER

99-C-0719-C

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This is a civil action in which plaintiff Mary Anne Hedrich contends that defendants Board of Regents of the University of Wisconsin System, H. Gaylon Greenhill, Kay Schallenkamp, Jeffrey C. Barnett and L. Brenda Clayton violated her rights in a number of ways: 1) in violation of 42 U.S.C. § 1983, the individual defendants conspired to deny her non-discriminatory procedures for evaluating her application for a tenure position at the University of Wisconsin-Whitewater and deprived her of her constitutionally protected liberty interest in her good name and reputation when they made defamatory statements about her in

conjunction with their refusal to offer her tenure; 2) defendant Board of Regents violated her rights under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34; and 3) defendant Board of Regents discriminated against her on the basis of her sex, sexual orientation and association and retaliated against her in violation of Title VII (42 U.S.C. §§ 2000e-2000e-17). Defendants have moved to dismiss 1) plaintiff's claims under § 1983, contending that plaintiff has failed to state claims on which relief may be granted; and 2) plaintiff's claim under the Age Discrimination in Employment Act because the Eleventh Amendment bars age discrimination actions against states and state agencies such as the Board of Regents. Also, defendants have moved for summary judgment on plaintiff's Title VII claims and on any part of plaintiff's § 1983 claim that survives the motion to dismiss.

I conclude that plaintiff has stated an actionable claim of deprivation of her liberty interest in her reputation under § 1983 but has failed to state a claim with respect to her other claim under this section in which she alleges that the individual defendants conspired her to deprive her of her asserted "liberty interest in the non-discriminatory application of the tenure evaluation procedures." I conclude that even if both claims survived defendants' motion to dismiss, plaintiff has failed to adduce sufficient proof to raise a jury issue on either claim, that the Eleventh Amendment bars her claims under the Age Discrimination in Employment Act, that she did not file timely discrimination and retaliation charges with the Equal Employment

Opportunities Commission and therefore did not meet the statutory prerequisites for bringing a Title VII action in federal court and that, even if she had met the statutory prerequisites, she has failed to adduce sufficient proof to raise a jury issue on her Title VII claims. Therefore, judgment will be entered in favor of defendants. I note that plaintiff has withdrawn her state law claim of breach of contract and is not pursuing the claim she alleged in her complaint under Wisconsin's Fair Employment Act, Wis. Stat. §§ 111.31-111.395.

FACT FINDING FOR MOTION TO DISMISS

Solely for the purpose of deciding the motion to dismiss, I find that the complaint fairly alleges the following facts.

Allegations of Fact

Plaintiff Mary Anne Hedrich is a resident of Wisconsin. At all material times she was employed as an assistant professor in the Department of Health, Physical Education, Recreation and Coaching (for brevity, I will refer to it as the Phy Ed Department) and was a member of the graduate faculty in the School of Graduate Studies at the University of Wisconsin-Whitewater. Defendant Board of Regents is the governing body of the University of Wisconsin system with ultimate authority regarding personnel matters and the governance

of the University of Wisconsin-Whitewater. While plaintiff was employed at Whitewater, defendant H. Gaylon Greenhill was Chancellor, defendant Kay Schallenkamp was Provost and Vice-Chancellor for Academic Affairs, defendant Jeffrey C. Barnett was Dean of the College of Education and defendant L. Brenda Clayton was chair of the tenured faculty and either assistant to the department chair or chair of the Phy Ed Department.

In the fall of 1990, when plaintiff was almost 54 years old, she joined the Phy Ed Department as an instructor. Beginning in 1990, plaintiff became a friend of Dr. Steven Albrechtsen, a professor in her department. Because of her friendship with Albrechtsen and also because she is heterosexual, plaintiff was subjected to sex-based discrimination and retaliation by members of the department, the controlling majority of whom are homosexual females. In accordance with the terms of her appointment, plaintiff was considered for tenure in the 1995-96 school year. Beginning on or after January 1, 1995, the individual defendants conspired to deny her tenure arbitrarily and capriciously by insuring that her consideration for tenure would be based on incomplete records and files. In December 1995, the tenured faculty of plaintiff's department considered plaintiff's application for tenure and, on the basis of incomplete records and files, voted not to recommend her for tenure.

On or about January 25, 1996, defendant Provost Schallenkamp wrote plaintiff to inform her that the 1996-97 academic year would be her final year of appointment at the

university. At plaintiff's request the tenured faculty of the department reconsidered its first vote. However, like the initial decision, the reconsideration was based upon incomplete records. The faculty did not change its recommendation to deny tenure.

Plaintiff appealed the denial of tenure to the university's Faculty Grievance and Hearing Committee, which formed the Mary Anne Hedrich Tenure Appeals Panel to review the appeal. On June 14, 1996, the panel concluded that the department's evaluation of plaintiff's research was not consistent with the performance criteria adopted by the department. The panel retained jurisdiction of the appeal pending its final resolution.

On June 28, 1996, defendant Greenhill issued a memorandum attempting to confirm plaintiff's terminal appointment for 1996-97. In the memorandum, he stated that "[i]f she compiles the credentials expected of a teacher/scholar by UW-Whitewater during the coming year, I will be open to reconsider."

Plaintiff asked for a "Notestein Review" of the tenure decision, pursuant to Wis. Stat. § 36.12(2)(b). (Neither side explains why § 36.12(2)(b) procedures are referred to as "Notestein Reviews" or "Notestein Review Committees.") On or about September 23, 1996, the Tenure Appeals Panel amended its original report to allow such a review. Although defendant Chancellor Greenhill tried to prevent the statutory review process from going forward, on or about October 6, 1997, the Executive Committee of the university's faculty

senate empaneled a Notestein Review Committee and defendant Greenhill authorized university payment of the costs related to the committee's work. At all material times, jurisdiction and responsibility for the proper operation and conduct of the process for credential reviews regarding tenure rested with the Faculty Senate Executive Committee, which retains jurisdiction until the final Tenure Appeals Committee recommendations are submitted to the chancellor. It is only at that point that the chancellor has a proper role to play in the tenure decision process.

On or about November 5, 1997, the Notestein Review Committee made a report that was adverse to plaintiff. However, it too was flawed because the committee had followed improper procedures and had not treated plaintiff fairly. Members of the committee had not received all the documentation about plaintiff that should have been made available to them if they were going to undertake a fair, objective and reasonable review. The committee members never met together and therefore never deliberated as a group. The committee's failure to comply with the letter and intent of the applicable statutes, rules and regulations was brought to the attention of the Executive Committee of the Faculty Senate, where a determination on plaintiff's tenure has been pending since November 5, 1997.

To date, no committee or authorized official of the university has performed a complete or fair review of plaintiff's credentials and qualifications for tenure. Without that, it has not

been possible for the chancellor to make a decision on tenure. In the event the chancellor were to make a final decision denying tenure, plaintiff would have the right to appeal the decision to defendant Board of Regents. Despite the fact that plaintiff has received no proper termination notice from the university and retains her keys and university identification card, there has been a de facto termination of her employment.

In addition to making slanderous and libelous statements that plaintiff is not qualified for tenure, all of which are false and defamatory, the individual defendants have acted to deprive plaintiff of her good name and reputation to the extent that they have made it impossible for her to continue gainful employment in the occupation and career of her choice. The individual defendants have all acted maliciously and willfully for the purpose of discriminating against plaintiff on the basis of her sex, sexual orientation and age. Plaintiff has been replaced on the faculty by a person or persons who are much younger than she.

FACT FINDING FOR SUMMARY JUDGMENT MOTION

Several comments are in order before I set out the undisputed facts. Both in proposing facts and in responding to the findings of fact proposed by defendants, plaintiff failed to comply with this court's Procedures to be Followed on Motions for Summary Judgment in certain respects. First, she included many propositions of fact in one proposal in violation of the

procedures, see I.C.2: "Factual propositions shall be set forth in numbered paragraphs, and to the extent practicable, each paragraph shall state only one factual proposition," and she did the same in her responses in violation of II.C.4:

> If properly disputing the movant's proposed findings of fact alone does not adequately support the nonmovant's position or adequately address the undisputed facts necessary to the movant's position, the nonmovant may present its own proposed findings of fact (or a stipulation of fact between or among all of the parties to the action), and such proposed findings shall be made with the specificity required of the movant.

Second, in her lengthy responses to defendants' proposed findings, plaintiff failed to cite admissible evidence in support of many of the propositions she was advancing, in violation of II.C.3: "The court will not consider any factual propositions contained in the response to proposed findings of fact not supported properly and sufficiently by admissible evidence," and II.C.3.d: "The citations to the record in the nonmovant's response to proposed findings of fact shall be made with the specificity required of the movant." In determining the undisputed facts, I have ignored assertions made by plaintiff in her response to defendants' proposed findings of fact that are not set out as additional proposed facts and that are not supported by a citation to admissible evidence in the record.

For the purpose of deciding defendants' motion for summary judgment, I find from the findings of fact proposed by the parties that there is no genuine dispute about the following material facts. (I have not repeated facts set out above as alleged in the complaint, except

where necessary to provide context or to show the discrepancy between plaintiff's allegations in her complaint and what she is able to put into dispute.)

Undisputed Facts

On October 16, 1995, plaintiff received official notice of a tenure evaluation meeting scheduled to start on December 4, 1995, at which the Phy Ed tenured faculty would evaluate her performance and her professional service, in the course of which they would review her teaching, research, professional and public service and student evaluations. Plaintiff was advised that she or any other person could present information at the meeting that was relevant to the evaluation.

The Phy Ed tenured faculty met on December 4, 8, and 18, 1995, to consider plaintiff's tenure application. Plaintiff appeared before the group for twenty minutes on December 4. On December 18, 1995, the faculty voted to give her ratings of 2 in teaching, 3 in research and scholarly activity and 2 in service. According to the University Handbook, 1 is the highest rating; 4 is the lowest. The vote was 7 to 1 not to recommend tenure. On December 18, 1995, at 2:00 p.m., James Miller, chair of the department, directed plaintiff to provide cover letters for four articles she had submitted for publication, together with corresponding receipt letters from publishers, and to do so by 4:30 p.m. that day.

On January 16, 1996, Miller notified defendants Barnett (Dean of the College of Education) and Chancellor Greenhill of the Phy Ed Department's decision not to recommend tenure. He told both men that the faculty had discussed plaintiff's research and scholarly activity at length and that although plaintiff had submitted four manuscripts for publication, none had been accepted or published at the time the faculty met. In a memorandum written the same day to defendants Greenhill and Provost Schallenkamp, defendant Barnett concurred in the Phy Ed Department's decision not to recommend tenure. He noted that plaintiff had not supplied any written documentation about her achievements in the areas of teaching, research and service even though she had been advised to do so. He noted also that plaintiff had supplied the department with copies of peer reviews and letters of receipt of manuscripts from publishers but had not submitted a resume or other list of professional presentations, memberships, committee work or other achievements. He added that although plaintiff had submitted four manuscripts for publication, she had no refereed publications and only minimal professional presentations at scholarly meetings. During the interview process and at annual reviews, defendant Barnett had told plaintiff that a record of scholarly publications in refereed journals was both important and necessary for tenure. On January 16, 1996, plaintiff was notified that the Phy Ed Department had voted not to recommend her for tenure. Defendant Schallenkamp wrote plaintiff on January 25, 1996, to advise her that the 1996-97 school year

would be her final year at the university.

Plaintiff asked for reconsideration of the tenure decision. The department's tenured faculty met on February 16 and 21, 1996, to reconsider the decision and reconfirmed it.

Plaintiff appealed the departmental tenure decision to the Faculty Grievance and Hearing Committee on April 17, 1996. The committee responded by forming the Hedrich Tenure Appeals Panel to review the appeal. On May 14, 1996, the panel met with plaintiff and some of the Phy Ed Department's tenured faculty, one of whom was a Professor Jones. Jones expressed his belief that when plaintiff appeared before the faculty tenure committee, she had not presented her documentary material professionally and the material she had presented was not consistent with the materials submitted by other recent tenure candidates. On June 14, 1996, the panel issued a report, noting that the department had not established its own written standards for acceptable evidence of scholarly activity for tenure. In the absence of such departmental standards, the panel looked to the standards in the University Handbook, which permits the consideration of research materials "so far advanced as to be capable of being evaluated." In the panel's view, when the department took the position that publication in peer-reviewed journals was a crucial factor in attaining tenure, it was not acting consistently with the University Handbook's statement that material sufficiently advanced to be "capable of being evaluated" could be considered in evaluating an applicant for tenure. The panel found

also that all the available evidence concerning plaintiff's scholarship had been presented to the department for consideration in December 1995 and February 1996 and that no useful purpose would be served in remanding the matter to the department for reconsideration. It retained jurisdiction of the appeal pending its final resolution.

The panel made no finding that the departmental decision had been based on "impermissible factors," as defined by Wis. Admin. Code § UWS 3.08. It forwarded the matter to defendant Chancellor Greenhill, who affirmed the department's decision on June 28, 1996, after finding an absence of clear evidence that plaintiff possessed the credentials expected of a teacher and scholar. He conveyed his decision to the panel and other interested parties in a memorandum.

On June 28, 1996, Richard Schauer, Chair of the university's Academic Freedom and Tenure Committee, recommended that a "Notestein Review Committee" be convened to determine whether plaintiff should be given tenure. He made a second request on July 2, 1996. On July 8, 1996, Douglas Eamon, Chair of the Hedrich Tenure Appeals Panel, made a separate request for a Notestein Review Committee, stating his belief that the finding of a violation of the procedures for tenure review would automatically trigger the convening of the committee.

Defendant Greenhill responded to Schauer on July 9, 1996, explaining that he did not support the convening of the committee to review the Phy Ed Department's decision on tenure

because he did not believe the decision was based on a consideration of impermissible factors. He responded to Eamon on July 10, 1999, saying that a Notestein Committee is not triggered automatically but requires a finding that a tenure decision was based on impermissible findings and that the standard method of handling a tenure decision that is flawed in other respects is to remand it to the department.

On October 25, 1996, the Hedrich Tenure Appeals Panel purported to amend its previous report, adding a finding that "the decision of the [Phy Ed Department] to deny tenure constitutes 'improper consideration' as described in § UWS 3.08(1)(c)2: 'Available data bearing materially on the quality of performance were not considered. . . .'" The panel recommended that the matter be remanded to the department to reconsider its rating of plaintiff's research and that the department review all current research materials and follow Faculty Personnel Rules in a manner consistent with other recent tenure decisions. Defendant Greenhill's first reaction was to agree with the panel's recommendation to remand the matter to the department. On October 29, 1996, he notified plaintiff of the panel's recommendation to remand and directed her to provide all materials relating to tenure for the department to review so that there could be no question that any materials were not reviewed. Also, he advised defendant Clayton, the new department chair, of the panel's recommendation and directed her to review all materials and to make a solid tenure decision consistent with other

tenure decisions.

On October 30, 1996, defendant Greenhill received a request from the Phy Ed Department's tenured faculty to dismiss the panel's findings and to uphold their previous decision, stating that plaintiff's appeal was not timely and that she had failed to demonstrate a violation of university rules. On November 11, 1996, the department's tenured faculty wrote to defendant Greenhill again, indicating that they would take no action on the remand until they heard from him whether he still believed the remand was appropriate. The communications from the faculty and from Schauer caused defendant Greenhill to review his previous position. He determined that remand was not appropriate because the panel had made no finding that the department's tenure decision was based on impermissible factors but had indicated only that the department's evaluation of plaintiff's scholarly activity was not "consistent" with the University Handbook. He believed that this should be interpreted as the panel's disagreement with the department's evaluation of plaintiff's candidacy. On November 22, 1996, he withdrew his earlier directions and confirmed that the final decision on plaintiff's tenure had been made and communicated in June 1996.

On December 14, 1996, Academic Freedom and Tenure Committee Chair Schauer asked that the Faculty Senate Executive Committee convene in emergency session to consider plaintiff's tenure appeal. Defendant Greenhill wrote to Schauer on December 16, 1996, saying

that a Notestein Committee would be inappropriate because there were no impermissible factors relied upon by the department in reaching its tenure decision; the department's faculty had determined on two occasions that plaintiff did not meet tenure standards; and he wanted to bring the matter to a close so that plaintiff could get on with her life.

On January 17, 1997, plaintiff asked the Faculty Senate Executive Committee to convene a Notestein Review Committee. On February 18, 1997, defendant Greenhill wrote to Executive Committee Chair Frank Hanson, explaining his reasons for believing that the campus appeals process had been concluded. On March 13, 1997, the Faculty Senate Executive Committee recommended the appointment of an ad hoc committee, the Hedrich Credential Review Committee, to evaluate the adequacy of plaintiff's credentials at the time of the original tenure review and reconsideration. Defendant Greenhill wrote to Hanson again on March 19, 1997, stating that he considered the matter closed and that he believed the Faculty Senate lacked authority to proceed in the matter.

On April 10, 1997, Hanson advised Schauer that, upon a favorable finding by a credential review committee, the chancellor could recommend tenure for Hedrich despite the departmental decision to deny her tenure, but that the chancellor was not obligated to act on the recommendation. On April 24, 1997, Hanson asked plaintiff to submit to the Faculty Senate Executive Committee the same documentation she had submitted to the department

so that the committee could conduct a credential review. Hanson sent a second request for documentation to plaintiff on May 15, 1997. On May 20, 1997, defendant Barnett (Dean of Education) responded to a request from Hanson for the materials from plaintiff's initial tenure review, saying that no materials had ever been forwarded to him, that plaintiff had not submitted the materials although the department had asked for them twice, that the department had had only student evaluations and peer reviews to rely upon in its evaluation and that plaintiff had made only an oral presentation of her work before the committee.

On May 20, 1997, plaintiff submitted a number of documents to Hanson, including papers referring to activities that had taken place well after the tenure decision and reconsideration. Hanson asked plaintiff again to produce only the documents given to the original department review panel.

On June 17, 1997, Schauer wrote to Hanson, asking for a recommendation that plaintiff's employment with the university be continued until the end of the fall 1997 semester or until such time as her tenure status was resolved. The Faculty Senate Executive Committee met on June 26, 1997, to discuss various faculty personnel issues, including plaintiff's credential review. The committee found that the documents submitted to them by plaintiff were not the same documents that were available to the department when it made its review of plaintiff's tenure application. The committee members could not agree to ask the chancellor to keep

plaintiff employed as Schauer had requested, but they agreed to advise the chancellor that they would not oppose such a decision on his part.

On July 2, 1997, Chancellor Greenhill notified Hanson that plaintiff's appointment to the faculty concluded on May 24, 1997, and the university had no plan to continue her appointment. Plaintiff asked for a Notestein Committee review of the tenure decision. Also, she sought the intervention of the Faculty Senate Executive Committee regarding her appeal. The committee empaneled a Hedrich Credential Review Committee on October 6, 1997, after determining that a Notestein Committee was not appropriate because there had been no finding that the department had considered any impermissible factors when it denied plaintiff tenure. The Executive Committee decided to empanel a Credentials Review Committee to review plaintiff"s credentials in order to help the chancellor make a solid decision regarding plaintiff's credentials. The committee was organized in accordance with the same rules that would have applied to a Notestein Committee with the one exception that its findings were not binding on the chancellor.

On October 6, 1997, Hanson advised the Hedrich Credential Review Committee that they were to examine and evaluate the credentials that Hedrich had submitted to the department for its original tenure review and reconsideration and to render a decision to the appropriate persons within 30 days on two questions: whether plaintiff's academic

qualifications and credentials satisfied all relevant credential requirements at the university and whether plaintiff's professional performance satisfied the performance standards for tenure as defined by the University of Wisconsin-Whitewater Faculty Personnel Rules. On November 5, 1997, the committee found that 1) plaintiff's academic qualifications and credentials did not satisfy all relevant credential requirements at the university and that 2) plaintiff's professional performance did not satisfy the performance standards for tenure as defined by the university rules. The committee found that it appeared that plaintiff had not presented her materials in a professional manner and that the areas of research and service were both very weak.

Plaintiff did not file a charge of discrimination with the Equal Employment Opportunities Commission regarding defendants' alleged discrimination in the handling of her tenure application until September 1998, when she filed a copy of the discrimination charge she had filed earlier in the month with the Wisconsin Personnel Commission. In that charge she alleged discrimination based on gender, sexual orientation and age. Ruling on a motion to dismiss, the Wisconsin Personnel Commission found that any reasonable person in plaintiff's shoes would have known by June 28, 1996, that her tenure application had been denied. The commission concluded that even if plaintiff had not realized until the start of classes in the 1997-98 academic year that she would no longer be associated with the university, that was more than 300 days before she filed her complaint with the commission on September 1, 1998.

The commission dismissed plaintiff's employment discrimination claims because she had failed to file a timely charge. Plaintiff began judicial review proceedings under Wis. Stat. ch. 227 in the Circuit Court for Waukesha County, Wisconsin, challenging the commission's decision. The court affirmed the decision on February 11, 1999. Plaintiff appealed to the Court of Appeals, District 1. The appeal is pending.

On May 21, 1999, the Equal Employment Opportunities Commission issued a Dismissal and Notice of Rights to plaintiff, stating that it could not investigate her charge because it was not filed within the statutory time limit. The 300th day prior to September 1, 1998 (the date on which plaintiff first filed a charge of discrimination with either the Wisconsin Personnel Commission or the Equal Employment Opportunities Commission), was November 5, 1997.

The only retaliation claim asserted in the charges of discrimination filed with either commission alleges retaliation based on plaintiff's association with Albrechtsen and is alleged to have originated with the controlling majority of the tenured faculty in the Phy Ed Department who are "females whose sexual orientation is other than heterosexual." The 180th day prior to September 1, 1998 (the date on which plaintiff first filed a charge of discrimination with the Wisconsin Personnel Commission) was March 3, 1998.

OPINION

I. MOTION TO DISMISS

A. Section 1983 Claims

1. Discrimination in procedures for tenure

Although it appears from plaintiff's complaint that she is asserting a § 1983 claim against defendant Board of Regents, plaintiff has advised the court and opposing counsel that she is not suing the board under that section. No such suit could succeed because the board is not a "person" for § 1983 purposes, see Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989), and suits against states and state agencies are barred by the Eleventh Amendment, see id., except in two circumstances: if a state makes an explicit waiver of its immunity, see Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank, 119 S. Ct. 2219, 2228-29 (1999), or if the state makes a voluntary decision to participate in a federally regulated activity that subjects it to suit. See id. Plaintiff does not contend that the state has waived its immunity for § 1983 (but see discussion, *infra*, on her contention that it has waived its immunity with respect to her Age Discrimination in Employment Act claim) or that waiver has occurred because of the university's participation in a federally regulated activity.

Recognizing that almost thirty years ago, the United States Supreme Court held in Board of Regents v. Roth, 408 U.S. 564, 573-76 (1972), that a university professor does not

have a constitutionally protected property interest in employment if he lacks tenure rights or an employment contract, plaintiff has tried to distinguish her claim from Professor Roth's. She concedes that she has no protected property interest in a grant of tenure but she contends that she has "a constitutionally protected liberty interest in the non-discriminatory application of the tenure evaluation procedures secured to her by Wisconsin law." Plt.'s Br. in Opp. to Defts.' Mot. to Dismiss, dkt. #15, at 2. Exactly what this liberty interest might be is left unexplained. The purpose of identifying a constitutionally protected liberty or property interest is to bring into play procedural protections. It is doubtful that what plaintiff wants is notice and an opportunity for hearing whenever she is to be subjected to discriminatory procedures. (Characterizing her claim as she does is not a method for obtaining close judicial scrutiny of the university's observance of the state's tenure evaluation laws and regulations. Not only does Roth foreclose that but even if plaintiff could show that she had a constitutionally protected property right in tenure, she would be entitled to nothing more than a determination of the adequacy of the notice she was provided and the fairness of the hearing she was given. The Constitution does not equate state laws or regulations with the constitutional minima of due process protections. See River Park, Inc. v. City of Highland Park, 23 F.3d 164, 168 (7th Cir. 1994) ("the Constitution does not require state and local governments to adhere to their procedural promises") (citing Olim v. Wakinkona, 461 U.S. 238, 248-51 (1983); Archie v.

Racine, 847 F.2d 1211, 1215-18 (7th Cir. 1988) (en banc)). What plaintiff seems to be asserting is an equal protection claim: if the state provides a benefit, such as particular procedures to be followed in making a tenure decision, it must provide those benefits in a non-discriminatory manner. At least, this is the conclusion I draw from her sole citation in support of her § 1983 claim, Hishon v. King & Spalding, 467 U.S. 69 (1984). Although Hishon was brought under Title VII and not under § 1983, its holding suggests a potential equal protection claim. The Supreme Court held that the plaintiff was entitled to fair consideration for partnership in a law firm under either of two theories. The first has no bearing on this case because it requires a plaintiff to be able to prove that she had a contractual relationship in which her employer promised to consider her for promotion or, in Hishon's case, a partnership. If so, "[t]he contractual relationship of employment triggers the provision of Title VII governing 'terms, conditions, or privileges of employment.'" Id. at 74. The second theory is more helpful to plaintiff. If the benefit of consideration for partnership is a "part and parcel of the employment relationship," id. at 75, "it may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." Id.

It is well established that public employees have an equal protection right not to be discriminated against in the terms, conditions and benefits of employment, see, e.g., Davis v.

Passman, 442 U.S. 228, 236 (1979) (congressional employees have constitutional right to be free from illegal discrimination in employment); see also Gregory v. Ashcroft, 501 U.S. 452 (1991) (analyzing validity of Missouri's mandatory retirement age for judges under equal protection clause); King v. Board of Regents of University of Wisconsin System, 898 F.2d 533 (7th Cir. 1990) (sexual harassment is violation of equal protection); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986) (same).

The university tenure procedures are designed to insure fair and impartial evaluation of tenure applications. For persons hired for a tenure track position, the procedures are part of the terms, conditions and benefits of their employment. Such persons know that they are not guaranteed tenure but know also that state statutes and regulations provide for fair and non-discriminatory evaluation of all tenure applications, not just of one class of persons such as white males. Therefore, I am prepared to find that plaintiff's claim of discriminatory application of the tenure procedures survives defendants' motion to dismiss in this respect. However, plaintiff's complaint faces another hurdle. She has alleged in conclusory fashion that the individual defendants conspired to deny her tenure by insuring that the persons considering her application would have incomplete records and files before them. She has not fleshed out this allegation with any explanation of the conspiracy, such as when the conspirators met, how they reached agreement or what acts they took to implement the conspiracy. It is well

established law that mere allegations of a conspiracy are insufficient to withstand a motion to dismiss. See, e.g., Moore v. Marketplace, 754 F.2d 1336, 1352 (7th Cir. 1985) (citing Tarkowski v. Robert Bartlett Realty, 644 F.2d 1204, 1206 (7th Cir. 1980); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969)). Defendants' motion to dismiss this claim against the individual defendants will be granted. For the sake of completeness, however, I will address it further in connection with defendants' motion for summary judgment.

2. Defamation

By themselves, defamatory remarks by government officials do not violate an individual's due process rights. See Paul v. Davis, 424 U.S. 693, 708-09 (1976). However, defamatory remarks coupled with a discharge from employment may implicate the due process clause. See, e.g., Strasburger v. Board of Education, Hardin County Community Unit School Dist. No. 1, 143 F.3d 351, 355-56 (7th Cir. 1998):

> Although the Constitution guarantees neither liberty of occupation, Board of Regents v. Roth, 408 U.S. 564, 573 (1981), nor liberty of reputation, Paul v. Davis, 424 U.S. 693, 708 (1976), the Supreme Court suggested in Roth that the state infringes on an employee's liberty interest if it discharges an employee while making false charges against him, so damaging the employee that he is precluded as a practical matter from finding other government employment.

In order to state a claim, a plaintiff must show that the allegedly defamatory remarks were stigmatizing, that they were disseminated publicly and that she suffered a tangible loss of other

employment opportunities as a result of public disclosure. See id. at 356-57.

Plaintiff has alleged that the individual defendants made false and slanderous statements about her and that their remarks made it impossible for her to continue in her career. She does not allege that defendants' remarks were disseminated publicly, but reading the complaint in the light most favorable to her, as I must, I can infer that the statements were made publicly. This is sufficient to state a claim. Whether plaintiff has adduced facts sufficient to survive defendants' motion for summary judgment is a separate question to be addressed later.

B. Age Discrimination in Employment Act

Plaintiff concedes that defendant Board of Regents cannot be sued for age discrimination unless it has waived the immunity it shares with the state of Wisconsin under the Eleventh Amendment. See Kimel v. Florida Board of Regents, 120 S. Ct. 631, 649-50 (2000). She argues, however, that defendant waived its immunity when it removed this action from state court. The only support she has for this proposition is a statement made by Justice Kennedy in a concurring opinion in Wisconsin Dept. of Corrections v. Schacht, 624 U.S. 381, 394 (1998), suggesting that as of that date the Court had not addressed the question whether a state might be held to have waived its Eleventh Amendment immunity by joining in a removal

petition. Any implication that such conduct might constitute a valid waiver did not survive the Court's opinion in College Savings Bank, 119 S. Ct. at 2228-29, in which the Court held that a state cannot be held to have waived its immunity constructively or by implication. See also Higgins v. Mississippi, No. 97-3521, 2000 WL 869416, at *1-2 (7th Cir. June 30, 2000) (failure of state to raise Eleventh Amendment immunity as defense does not prevent court from raising defense on its own). I conclude that plaintiff's claim against defendant Board of Regents for violation of the Age Discrimination in Employment Act is barred by the state's Eleventh Amendment immunity. Defendants' motion to dismiss this claim will be granted.

II. SUMMARY JUDGMENT

A. Title VII Claims

The initial issue is whether plaintiff's filing of charges with the EEOC in September 1998 was timely. If it was not and if plaintiff cannot show that any exception to the statutory deadlines applies, then she has not met the statutory prerequisite for a Title VII lawsuit. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (timely filing of EEOC charge is not jurisdictional prerequisite but is treated like statue of limitations); see also Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980) (limitations periods guarantee protection of civil rights laws to those who assert rights promptly and also protect employers from burden of

having to defend against stale claims). 42 U.S.C. § 2000e-5(e) gives claimants 180 days in which to file a complaint with the EEOC unless the claimant has initially instituted proceedings with a state or local agency that has authority to grant or seek relief, in which case the time is extended to 300 days. Plaintiff filed her complaints of discrimination and retaliation with the Wisconsin Personnel Commission on September 1, 1998 and with the EEOC later in the month. Under 29 C.F.R. § 1601.74(a), n.12, filing with the Wisconsin Personnel Commission extends the time for filing all charges covering employment practices of the state of Wisconsin except those charges alleging retaliation under § 704 of Title VII. Thus, in calculating whether plaintiff filed within the time provided following the occurrences of discrimination or retaliation about which she is complaining, two different time limits apply. For her claim of discrimination, she had 300 days after the alleged discrimination occurred in which to file a complaint. If the discrimination occurred no earlier than November 5, 1997, her complaint was timely. As for her claim of retaliation, however, the retaliatory acts must have occurred no earlier than March 3, 1998.

Plaintiff contends that both her complaints were timely because she has not yet received an official and final notification of the denial of her tenure application. Alternatively, she contends that her discrimination complaint was timely because she had no reason to believe that her tenure application was denied officially until November 5, 1997, the date the Hedrich

Credential Review Committee established by the Faculty Senate Executive Committee found that her academic qualifications and credentials were wanting.

Plaintiff's first theory is anomalous. It raises the obvious question why she is suing if no tenure decision has been made and additional avenues for appeal remain open to her. I will not dwell on the inconsistency between her filing of this suit and her professed belief that she has no reason to believe that she has been denied tenure officially. The Supreme Court's holding in Ricks, 449 U.S. at 261, makes clear that it is the "alleged unlawful employment practice" that triggers the running of the filing time and not the existence of additional appeal rights. The Court added that the university's willingness to entertain "a grievance complaining of the tenure decision does not suggest that the earlier decision [denying tenure] was in any respect tentative." Id. Plaintiff argues that her case differs from Ricks because she has never received a letter from defendant Board of Regents advising her that her tenure application has been denied, as Professor Ricks did. By the time Ricks learned of the denial of his application, the tenure committee had twice recommended that he not receive tenure, the faculty senate had voted to support the tenure committee's recommendation and the board had voted formally to deny him tenure. By contrast, plaintiff argues, her tenure committee has made only one preliminary recommendation, which was set aside shortly thereafter by the Tenure Appeals Panel; the faculty senate has not voted whether to support the tenure committee's

recommendation; and the Board of Regents has not considered whether to deny plaintiff tenure. In fact, she adds, the Tenure Appeals Panel ruled that the department's tenure committee engaged in an erroneous tenure review in reaching its initial recommendation and the panel has retained jurisdiction awaiting a proper credential review.

The general rule in discrimination cases is that once a reasonable person would recognize the character of an employment action as being illegal, the time for filing a charge of discrimination begins to run. See, e.g., Dasgupta v. University of Wisconsin Board of Regents, 121 F.3d 1138, 1139 (7th Cir. 1997) (no reasonable person would have failed to recognize character of adverse employment actions). In tenure cases, the determination of the triggering date is complicated by the variety of appeal routes that most colleges and universities provide.

Under Wis. Stat. § 36.13(2)(a), a tenure appointment may be made "only upon the affirmative recommendation of the appropriate chancellor and the appropriate academic department." When both her department and the chancellor denied her application, as defendant Provost Schallenkamp advised plaintiff on January 25, 1996, plaintiff knew that she had been denied tenure. The action was final if she did not appeal. She believed that the denial was illegal. One could argue that this was the date that triggered the running of the statutory time period for filing a charge of employment discrimination. However, exhausting

the employer's available remedies has benefits for the parties and for the judicial system, which make it advisable to hold that the period does not begin running until the disappointed tenure applicant has taken reasonable steps to appeal the denial. What "reasonable steps" may be is not always clear. In Ricks, 449 U.S. 250, for example, the Court held that the statutory time period was not tolled by the availability of a grievance procedure by which Ricks could appeal the denial of his tenure. See id. at 260-61 ("we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods . . . The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.") (citing Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)).

In this case, the employer's decision was made on June 28, 1996, when the chancellor affirmed the department's decision to deny tenure. By then, plaintiff had been afforded a reconsideration by her department and had taken an appeal to the Faculty Grievance and Hearing Committee, which set up a Tenure Appeals Panel to consider the handling of plaintiff's tenure application, which in turn had made a decision that did not rest on a finding that the department faculty had considered "impermissible factors" in making their tenure decision. Wis. Stat. § 36.12(2)(b) allows the Board of Regents to grant a tenure appointment without

the affirmative recommendation of the department in certain specified circumstances, one of which is a finding by a faculty committee authorized by the board to review the negative recommendation of the academic department that the department's decision was based upon impermissible factors. Plaintiff may believe that the Faculty Grievance and Hearing Committee made the equivalent of a finding that impermissible factors were considered but she knew on June 28, 1996, that the chancellor did not share her opinion and was not going to recommend her affirmatively for a tenure appointment. At that point, like any reasonable person in her situation, she had to realize that her tenure application had been denied officially. It is true that there remained the possibility of persuading various persons at the university that her application should be reconsidered but plaintiff had availed herself of the prescribed avenues of appeal and had been unsuccessful. Even assuming that because of the various recommendations for a Notestein Review Committee and the additional hearings that took place throughout the 1996-97 academic year, plaintiff had grounds for thinking that no wrong had yet been done to her, it would have been wholly unreasonable for her not to have realized that an allegedly unlawful employment practice had occurred when she learned in late August or early September 1997 that she would not be allowed to teach any classes in the 1997-98 school year.

Plaintiff makes a plausible assertion of estoppel, however. She argues that she was lulled

into not filing a discrimination complaint in the fall of 1997 by the university's actions in empaneling a Notestein Review Committee on October 6, 1997, after the Tenure Appeal Panel had determined that the original recommendations were based on impermissible factors. Whether or not the committee was an actual Notestein Review Committee might bear on the reasonableness of plaintiff's reliance because a Notestein Committee's recommendation is binding on a chancellor, whereas a "non-Notestein" Committee's recommendation has no such force. There are enough factual questions concerning the timeliness of plaintiff's discrimination charge that a finder of fact would have to make the determination at trial. See Lever v. Northwestern University, 979 F.2d 552, 553 (7th Cir. 1992) (when discriminatory act occurs is question of fact).

In this case, however, no trial is necessary because even if plaintiff's discrimination charge is considered timely, she cannot succeed on her underlying claim that defendant Board of Regents discriminated against her in considering her application for tenure. Plaintiff has adduced no evidence to support her claim that defendant discriminated against her on the bases of her sex and her sexual orientation. She has argued vigorously that she was not provided certain protections she believes were owed her under state law but she has neither argued nor proposed any facts to show that another similarly situated male faculty member was treated more favorably than she was. To the contrary, the only references she makes to

unequal treatment are to two female faculty members she believes were treated more favorably than she. Assuming without deciding or implying that plaintiff could pursue a claim of discrimination based on sexual orientation in the absence of any allegations of sexually tinged harassment, see Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997) (allowing sex discrimination claim of sexual harassment to go forward in face of allegations that plaintiff was subjected to harassment with sexual overtones because coworkers believed he was gay); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984) (Title VII does not extend protections to homosexuals), her failure to adduce any evidence that homosexual faculty members were treated more favorably than she was dooms her effort.

In her brief, plaintiff recasts her claim of discrimination as one of associational freedom, arguing that she was discriminated against because of her association with a man who is himself the subject of unlawful gender-based discrimination and retaliation. Plaintiff never raised this claim in her complaint, which may explain why the record is devoid of any properly proposed facts that would allow a jury to find that she associated with such a person, that he was the subject of discrimination or that there is any connection between her association with him and the discrimination she allegedly incurred.

The timeliness of plaintiff's discrimination charge may be in doubt; the timing of her retaliation charge is not. Plaintiff has adduced no evidence that she would not have realized

until March 3, 1998, that she had been retaliated against for activity protected under Title VII. Her only argument in this respect is that her claim has not ripened because the Board of Regents has not yet acted. For the reasons previously discussed, I find this argument unconvincing.

Plaintiff argues that defendant is equitably estopped from asserting any limitations defense because it never raised the defense in opposing her discrimination charge before the Wisconsin Personnel Commission. Defendant's failure to raise the defense does not make plaintiff's charge timely. Equitable estoppel comes into play when an opposing party takes steps to prevent a plaintiff from suing in time; nothing that defendant did or failed to do before the Personnel Commission made any difference to the timing of the filing of the charge.

Finally, even if plaintiff's charge of retaliation was timely, it was inadequate. She did not identify in her discrimination charge or in the complaint she filed in this court any actionable retaliation. "Title VII does not treat retaliation as a form of discrimination; it contains a separate provision forbidding retaliation." Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989). Retaliation requires a showing that the employee engaged in statutorily protected expression, that she suffered an adverse employment action and that there is a causal link between the action and the expression. See Brenner v. Brown, 36 F.3d 18, 19 (7th Cir. 1994) (per curiam) (citing Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317,

321 (7th Cir. 1992)). Plaintiff has not adduced any proof that she expressed any opinions to her employers about discrimination covered by Title VII; she has not adduced any proof that she was retaliated against for opposing any kind of discrimination; and none of the employment actions she complains of occurred after she filed her charge with the Wisconsin Personnel Commission. Defendant Board of Regents is entitled to summary judgment on both of plaintiff's Title VII claims.

B. Section 1983 Claims

Although I have found that plaintiff failed to state a claim that the individual defendants denied her equal protection in the manner in which they considered her tenure application, I will take the matter up in connection with defendants' motion for summary judgment so that the record is complete. In proceeding with this claim under § 1983, plaintiff faces a hurdle she does not have under Title VII: she must show that defendants *intended* to discriminate against her because of her membership in a protected class.

1. Discrimination in tenure review

Although plaintiff argues that she was subjected to discriminatory treatment in her

tenure application, she has adduced no evidence to show that she was treated differently from any other similarly situated candidate for tenure. Instead, she has relied solely on her allegation that the individual defendants did not follow the state's and university's mandated procedures for tenure evaluation because they did not consider the unpublished articles she had submitted for publication and because they prevented the various committees and panels from seeing all the materials she had submitted. Defendants have conceded that it was error for the department not to consider the articles plaintiff had submitted for publications but their concession does not prove discrimination. A showing of actionable discrimination under § 1983 requires proof that the decision maker acted intentionally and was motivated by the intent to discriminate against persons such as plaintiff.

Plaintiff has not adduced any evidence to show that the individual defendants acted conspired to ignore the articles she had written or the materials she submitted. She says little or nothing in her brief about the protected class to which she belongs and refers to no evidence that might show that defendants intended to discriminate against such a class. Indeed, as I have noted, to the extent she asserts that she was discriminated against because of her sex, she has undermined her claim by alleging that other female faculty members were given more favorable consideration than she was. Moreover, despite her apparent concession that she has no property right in tenure implicating the due process clause and requiring procedural

protections, she has argued her case as if she did have a federal constitutional right to particular procedural protections. As I have explained, she has no such right. What she does have is a right not to be deprived of the evaluation protections afforded other similarly situated tenure candidates who are not members of her protected class. Unless she shows that the protections she received were not equivalent, she cannot show discrimination. Merely showing that errors were made or that particular procedures were not followed is insufficient if she does not show that the errors or omissions were discriminatory. I conclude that plaintiff has failed to show that she has enough evidence to raise a question for the jury on this § 1983 claim.

2. Slander

Plaintiff has not identified any remarks that any of the individual defendants made about her, making it impossible to evaluate the character of the remarks. She speaks generally about defendants' having criticized the quality of her work, her deficiencies as a scholar and her lack of qualifications for tenure. See Plt.'s Br., dkt. #15, at 7 ("Dr. Hedrich was stigmatized by defendants' actions in finding and asserting that she did not submit materials for her tenure review and did not possess the qualifications as a teacher and a scholar to meet the minimum grounds for tenure.") Stigmatizing remarks must be false assertions of fact. See Strasburger, 143 F.3d at 356. Statements of opinion do not count, unless they imply false assertions of fact.

See id. Even if plaintiff had set out with specificity the false assertions that a particular defendant made about her and even if I assume that the assertions were disseminated, her claim would fail because she has not properly proposed any facts that would allow a jury to find that her difficulty in finding employment is the consequence of defendants' statements and their public disclosure. Therefore, I conclude that the individual defendants are entitled to judgment on this § 1983 claims.

ORDER

IT IS ORDERED that the motion of defendants Board of Regents of the University of Wisconsin System, H. Gaylon Greenhill, Kay Schallenkamp, Jeffrey C. Barnett and L. Brenda Clayton to dismiss the complaint against them is GRANTED with respect to plaintiff Mary Anne Hedrich's claim under the Age Discrimination in Employment Act and plaintiff's claim under 42 U.S.C. § 1983 that defendants conspired to deprive her of a fair evaluation of her application for tenure and DENIED with respect to plaintiff's claim under § 1983 that defendants deprived her of her constitutionally protected interest in her good name and reputation. FURTHER, IT IS ORDERED that defendants' motion for summary judgment is GRANTED on both of plaintiff's § 1983 claims and her Title VII claims. The clerk of

court is directed to enter judgment for defendants and close this case.

Entered this 16th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge