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Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance

John D. Copeland

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Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance

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# Table of Contents

**Introduction** ...................................................... 238

I. **Performance Evaluations in General** ...................... 239
   A. *Formative and Summative Purposes* .................... 240
   B. *Types of Evaluations* ..................................... 240
   C. *Categories of Evaluation* .................................. 241
      2. *Teaching Effectiveness* .................................. 242
      3. *Service* .................................................. 243
      4. *Working Relationships* ................................... 244
   D. *Criteria and Standards* .................................... 244
   E. *Objective and Subjective Measurements* ............... 245

II. **The Traditional Judicial Role as to Reviewing Evaluations** .... 245
   A. *Academic Freedom* .......................................... 247
   B. *Tenure* ..................................................... 249

III. **Legal Challenges** .............................................. 252
   A. *Substantive Due Process* .................................. 252
      1. *Pretenure and Substantive Due Process Claims* ...... 252
         a. *Denial of Tenure and Property* ....................... 253
         b. *Tenure as an Entitlement* ............................ 254
         c. *Pretenure and Subjective Evaluations* ............. 255
EVALUATING FACULTY PERFORMANCE

2. Posttenure Review and "Just Cause" ............... 259
   a. Immorality .................................... 260
   b. Abusive Conduct ............................ 263
   c. Insubordination, Contract Breaches, and Violations of University Rules and Regulations ........ 266
   d. Incompetence ................................. 268
   e. Academic Dishonesty ......................... 268

3. Posttenure Review and Financial Exigency or Changes in Academic Programs .................. 270

B. Procedural Due Process ............................... 272
   1. Nontenured Faculty ........................... 273
      a. De Facto Tenure ............................ 274
      b. Liberty Interest ......................... 275
   2. Tenured Faculty ............................... 277

C. Other Constitutional and Statutory Challenges ............. 278
   1. First Amendment Claims (Free Speech) .......... 278
   2. Discrimination Claims ....................... 291
      a. Title VII in General ...................... 291
         1. Disparate Treatment .................... 293
             a. Nondiscriminatory Reason Defense ..... 294
             b. Bona Fide Occupational Qualification Defense .................. 298
         2. Disparate Impact ......................... 299
b. Sections 1981 and 1983 Claims .......................... 301

1. Eleventh Amendment .................................. 302

2. Eleventh Amendment and Community Colleges ......... 304

c. Rehabilitation Act of 1973 and Americans With Disabilities Act (ADA) .......................... 306

d. Age Discrimination in Employment Act of 1967 ........ 310

e. Equal Pay Act ........................................... 311

IV. CONFIDENTIALITY ...................................... 312

A. Confidentiality in General .............................. 312

B. Piercing the Veil of Confidentiality ....................... 315

V. REDUCING LIABILITY EXPOSURE ......................... 318

A. Developing a Performance Evaluation System ............... 318

B. Clearly Stated Purposes ................................ 319

C. Criteria and Standards .................................. 319

D. Use of Evaluators ....................................... 321

E. Documentation ........................................... 322

F. Informing the Employee .................................. 322

G. Additional Considerations in Performance Evaluations .... 323

   1. Contaminated or Deficient Appraisals .................. 323

   2. Halo Effect ........................................... 324

   3. Recency Effect ......................................... 324

   4. Past Record Anchoring .................................. 324
H. *Procedural Due Process* ........................................ 324
   1. *Faculty Acceptance* ........................................ 325
   2. *Simplicity* .................................................. 325
   3. *Fair Hearing* ............................................... 325
   4. *Power of Appeal Committee Clearly Delineated* .......... 325
   5. *Exhaustion of Remedies* .................................. 326

**SUMMARY** ....................................................... 326
Faculty performance constitutes the lifeblood of any college or university, for it is faculty who perform the important responsibilities of teaching, research, scholarship, and public service. Because of the importance of faculty to an institution, personnel decisions are critical, as retaining incompetent faculty members can do immeasurable damage to an institution’s reputation and severely hinder its ability to accomplish its educational mission. As a result, administrators have imitated private business in systematically collecting data to assist in making personnel decisions. Performance evaluations of faculty are now commonplace in educational institutions. Performance evaluations have become even more important in light of the increasing financial problems facing higher education and calls for increased accountability made by state legislators. Declining enrollments and budget constraints place a greater premium on retaining and promoting only the best academicians.

Obviously, faculty members have an equally important interest in the evaluation process. Nontenured faculty members are year-to-year employees and must be concerned about the nonrenewal of their contracts following a poor evaluation. In most institutions, tenure track faculty members who do not achieve tenure within a specified period of time are then given terminal contracts for only one more year of service. Those who are thus "tossed from


2. ARK. CODE ANN. § 6-61-219 (Michie 1995). Annual faculty performance review. (a) In order to promote a coordinated system of higher education in Arkansas and to assure an orderly and effective development of each of the publicly supported institutions of higher education, beginning with the 1990-91 academic year each state-supported college and university shall conduct a rigorous, consistently applied, annual review of the performance of all full-time faculty members. The evaluation by students shall be applicable to all teaching faculty, full-time, part-time and graduate teaching assistants and shall include an assessment of the fluency in English of the faculty member or graduate teaching assistant. This review shall include assessments by peers, students, and administrators and shall be utilized to insure a consistently high level of performance and serve in conjunction with other appropriate information as a basis for decisions on promotion, salary increases, and job retention. This review shall not be used to demote a tenured faculty member to a nontenured status.

(b)(1) The performance appraisal systems used by each institution shall be approved by the State Board of Higher Education prior to implementation. (2) The Department of Higher Education shall be responsible for monitoring the evaluation process and shall report its findings to the State Board of Higher Education each biennium.
the ivory tower" are denied not only the prestige, security, and financial benefits associated with tenure, but are also stigmatized as being "unworthy" faculty members. As "tainted goods," their prospects of employment at other institutions of higher learning may be very limited.

Given the widespread use of performance evaluations in education and their impact upon careers, it should come as no surprise that the entire evaluation process is filled with legal implications. In particular, the legality of the criteria and procedures used in evaluating faculty performance have been subjected to repeated legal challenges.

In addition, institutions of higher education are subject to an ever growing web of federal legislation, especially in the area of discrimination. This legal web can easily ensnare and entangle those colleges and universities whose administrators fail to develop and follow legally sufficient evaluation programs.

This Article examines some of the legal issues that permeate the performance review process in higher education and offers some suggestions for improving faculty evaluations. As will be apparent, the courts have generally given institutions of higher education great latitude in devising and administering performance review programs. However, colleges and universities do not have carte blanche with their performance reviews and there are critical constraints on what institutions of higher education can do. These constraints are rooted in principles of fundamental fairness and due process, as well as constitutional and statutory requirements.

I. PERFORMANCE EVALUATIONS IN GENERAL

A performance evaluation is the process of gathering, reviewing, and assessing information relative to the job performance of an employee.3 As a result, performance evaluations serve three primary functions—informational, developmental, and judgmental. Evaluations can facilitate communication and understanding between administrators and faculty members. They can be used to improve faculty effectiveness so that an individual's contributions are maximized. A good performance evaluation can also assist in identifying a faculty member's strengths and weaknesses, as well as future potential. And finally, performance appraisals are used in making judgments about retention, promotion, tenure, and salary increases.

A. Formative and Summative Purposes

Performance evaluations whose results are used to improve faculty performance are formative evaluations. Although formative performance evaluations are important to faculty development, their limited impact on individual careers makes these types of evaluations less susceptible to legal challenges. Performance evaluations used to make critical salary, retention, promotion, and tenure decisions are known as summative evaluations. Summative evaluations are judgmental in character, rather than just informative, and they give rise to the overwhelming majority of litigation as related to personnel decisions.

B. Types of Evaluations

In conducting performance evaluations, institutions have four methods from which to choose and will usually employ a combination of the following:

1. evaluations by supervisors;
2. assessment by peers;
3. self-evaluation; and,
4. student evaluations of instruction.

Of these, only self-evaluation is used primarily for formative purposes. As a consequence, self-evaluations tend to be free of legal issues.

The other three forms of evaluation, however, are often used for both formative and summative purposes. When used for summative purposes, a supervisor’s evaluation involves a faculty member being evaluated by an administrator according to a prescribed set of criteria. Besides observations of teaching techniques, the evaluation often includes a review of teaching materials, scholarly research and publication, as well as institutional, public, and professional service.

Peer reviews involve rating an employee in accordance with much of the same criteria as that found in supervisor evaluations. The difference is that the evaluation is conducted by a faculty member’s peers, who are believed to be best equipped to evaluate a faculty member’s performance.

4. Holley and Feild, supra note 1, at 428.
5. Holley and Feild, supra note 1, at 428.
6. ARK. CODE ANN. § 6-61-219, supra note 2, requires by way of example assessments by (1) peers, (2) students, and (3) administrators.
7. RAPP, supra note 3, at 6-153.
8. RAPP, supra note 3, at 6-152.1.
9. RAPP, supra note 3, at 6-152.1.
EVALUATING FACULTY PERFORMANCE

Student evaluations are based on the premise that students are in the best position to judge teaching effectiveness and involve student assessment of teaching methods. Although widely used for developmental purposes, student evaluations tend to be somewhat controversial and faculty and administrators resist them as the dominant means for assessing faculty performance for retention or dismissal purposes.  

Most faculty performance evaluation systems involve a combination of the four types just described, with peer and supervisor reviews being particularly important. However, student evaluations also factor into the evaluation process and their results are often referred to by the courts in their analysis of the legality of a particular performance evaluation system.

C. Categories of Evaluation

As previously stated, faculty members being considered for reappointment, promotion, or tenure are traditionally evaluated as to research, publications, and scholarship, teaching effectiveness, and public service. A faculty member's working relationship with others is also considered by many colleges and universities as part of the evaluation process.

1. Research, Publications, and Scholarship

Research, publications, and scholarship (hereinafter collectively referred to as scholarship) is the most important category of evaluation at many colleges and universities, especially doctoral granting institutions. The ongoing and often acrimonious debate over the importance of scholarship versus teaching is beyond the scope of this Article. But it seems quite clear that the academic reward structure is still heavily weighted toward scholarship.

Colleges and universities weigh a variety of factors in evaluating faculty scholarship. Publication in so-called "refereed" journals is often particularly important in evaluations. Manuscripts in refereed journals have been anonymously reviewed and accepted by scholars with specialized expertise in a particular discipline. The reviewers are either members of the journal's editorial review board or are selected on an ad hoc basis by the journal's editor.

10. RAPP, supra note 3, at 6-154.
11. See infra part I.C.2.
14. Id. at 70 n.24 (critique of refereed journals).
Faculty evaluators also seem to place greater weight on journals that have a scholarly, empirical, or quantitative focus than on those with a qualitative, theoretical, or practical orientation. Other relevant factors include the overall quality of journals in which a faculty member has published and the impact of a faculty member's scholarship on a discipline.

2. Teaching Effectiveness

Although teaching effectiveness is often second in importance to scholarship in retention, promotion, and tenure decisions, it remains an important formal criterion for faculty advancement. Teaching effectiveness is generally determined by the observations and evaluations of one's peers and students. While teaching effectiveness is admittedly a difficult skill to evaluate and is largely a measure of subjective judgment, a number of studies have suggested certain characteristics indicative of effective teaching. A good teacher should consider the rights and needs of students, contribute to student intellectual growth, fairly evaluate student performances, command her subject, clearly set forth course objectives, and effectively transmit the subject matter.

Student evaluations do not carry as much weight in the faculty evaluation process as supervisor or peer evaluations, but they can be decisive, especially when combined with other performance deficiencies. In Agarwal v. Regents of the University of Minnesota, a tenured associate professor's dismissal was upheld by the court in large part because of student evaluations finding him incompetent as a teacher and accusing him of frequently harassing students. The student evaluations, combined with a past incident of plagiarism and a poor working relationship with colleagues, were sufficient good cause for the termination of the professor's employment despite his tenured status.

In Conway v. Pacific University, poor student evaluations were the primary reason for denying tenure to a professor. The professor had taken a leave of absence from his tenure track teaching position at Central Oregon

15. Id. at 74.
16. Id. at 77-78 (today citation analysis is often utilized to determine the impact of scholarship).
17. Id. at 82.
18. Id. at 85.
19. 788 F.2d 504 (8th Cir. 1986).
20. Id. at 507-08.
Community College (COCC) to teach at Pacific University. During his year at Pacific University he received poor student evaluations.\textsuperscript{22}

While at Pacific, he applied for a permanent tenure track position in Pacific’s College of Arts and Sciences. Regardless of his poor student evaluations, he was offered a position at Pacific. Before giving up his tenure track position at COCC to accept Pacific’s offer, he inquired as to whether his poor student evaluations would affect his continued employment at Pacific or impede his chances to obtain tenure. The dean of the College of Arts and Sciences assured him that the student evaluations would not be a problem.\textsuperscript{23}

Unfortunately, the professor’s student evaluations did not improve during his first year on the tenure track at Pacific. In fact, his evaluations increasingly worsened. Based on those evaluations, the professor was only offered a "terminal" or nonrenewable contract for the following year.\textsuperscript{24}

Based on the dean’s previous assertions that poor student evaluations would not be a problem, the professor sued the university for fraud. The court held, however, that, in negotiating a contract with the professor, the university had no special relationship with the professor that would give rise to a duty to exercise due care regarding the representations it made.\textsuperscript{25}

### 3. Service

Faculty members are required to participate in university service, professional service, and community service. Service is part of the formal appraisal process but actually carries very little weight in personnel decisions at most colleges and universities, especially when compared to the weight given to scholarship and even teaching effectiveness.

Public service is given so little weight in personnel decisions that there are no reported cases where a faculty member’s public service deficiencies were the sole basis for denial of reappointment, promotion, or tenure. Such deficiencies have at times, however, been mentioned as a factor in denying a faculty member advancement.\textsuperscript{26}

\textsuperscript{22} Id. at 202.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 204; see also Brousard-Norcross v. Augustana College Assn., 935 F.2d 974, 976 (8th Cir. 1991), where negative student evaluations were held to be a legitimate, nondiscriminatory factor on which to evaluate tenure candidates.
\textsuperscript{26} See Ottaviani v. State University of New York at New Paltz, 875 F.2d 365, 375 (2nd Cir. 1989), \textit{cert. denied}, 493 U.S. 1021 (1990). See, however, Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988) and Carpenter v. Board of Regents of the University of Wisconsin System, 30 Fair Empl. Prac. Cas. (BNA) 1395 (W.D. Wis. 1983), \textit{aff'd}, 728 F.2d 911 (7th Cir. 1984), where black faculty members
4. Working Relationships

The ability of a faculty member to get along with her colleagues can be a factor in personnel decisions. Faculty members who chronically complain or clash with other faculty members over professional or personal issues can jeopardize their academic futures.\(^{27}\) \textit{Johnson v. Michigan State University}\(^{28}\) involved a medical school's denial of tenure to a faculty member who repeatedly complained about her office facilities and secretarial support.\(^{29}\) In addition, her colleagues described her as abrasive, intimidating, authoritarian, and incapable of accepting criticism.\(^{30}\) Her personality resulted in repeated clashes with students and colleagues.\(^{31}\) The court upheld her tenure denial.\(^{32}\)

While lack of collegiality and inability to work with others can be a legitimate basis for denial of promotion or tenure, it can also be a pretext for illegal discrimination.\(^{33}\)

\textit{D. Criteria and Standards}

Performance evaluations are based on criteria and standards. Criteria are those things which an institution deems important and which must be fulfilled if a faculty member is to be promoted or tenured (\textit{e.g.}, scholarly publications, research grants, teaching innovations, university and public service).\(^{34}\) Standards for promotion and tenure are the degree to which such criteria must be fulfilled (\textit{e.g.}, number of scholarly publications in refereed journals, savings in public service demands placed on them).

\(^{27}\) LEAP, \textit{supra} note 13, at 95.


\(^{29}\) \textit{Id.} at 434.

\(^{30}\) \textit{Id.} at 435.

\(^{31}\) \textit{Id.}

\(^{32}\) \textit{Id.} at 430.

\(^{33}\) The employment of a female faculty member in the social sciences department was terminated by Pace College on the grounds that she was "troublesome." Admittedly, the faculty member's relationship with other faculty was not amicable. But evidence established that lack of collegiality was not the real reason for her denial of promotion from associate professor to professor and later denial of tenure. The department head told the faculty member that he did not like women around because he could not use "four-letter" words in their presence. He also contended that he could not pay a woman as much as a man because it would demoralize the department. Pace College v. Commission on Human Rights, 339 N.E.2d 880 (N.Y. 1975). See also \textit{infra} III.C.2.a.-b.

\(^{34}\) LEAP, \textit{supra} note 13, at 61, 169.
amount received in research grants, types of teaching innovations, types of university and public service).\textsuperscript{35}

Criteria can be divided into two categories. The first is a faculty member's personal accomplishments and characteristics, such as her research and publications record, teaching effectiveness, collegiality, and service record. The second category includes whether a faculty member meets institutional needs as dictated by finances, departmental growth, or curricular needs. Of the two categories, personal criteria is usually the dominant consideration in determining reappointment, promotion, and tenure;\textsuperscript{36} it is because of the dominance of this first group of criteria that faculty performance evaluations are so critical.

\textbf{E. Objective and Subjective Measurements}

Criteria and standards involve objective and subjective measurements. Objective measurements can be readily counted. The type of degrees held by a faculty member, the number of published books and articles, committees served on, and the number of service activities performed are all objective measurements.\textsuperscript{37}

Subjective measurements are subject to varying degrees of interpretation. Members of peer review committees, department heads, deans, and others may have differing opinions as to the quality of an institution from which a faculty member received her degree, the prestige or importance of particular journals in which a faculty member published, the significance and quality of a faculty member's publications, the effectiveness of a member's teaching, and the ability of a professor to work with her colleagues.\textsuperscript{38}

\section*{II. THE TRADITIONAL JUDICIAL ROLE AS TO REVIEWING EVALUATIONS}

In many universities, the process of reappointment, promotion, and tenure is shrouded in secrecy. Those who cast votes in the decision-making process are rarely required to provide an account of their deliberations. And while adverse personnel decisions are usually justified on grounds of inadequate research or teaching, the criteria for promotion and tenure are often vaguely defined and subjectively applied.\textsuperscript{39}

\begin{thebibliography}{99}
\bibitem{35} LEAP, \textit{supra} note 13, at 169.
\bibitem{36} LEAP, \textit{supra} note 13, at 61.
\bibitem{37} LEAP, \textit{supra} note 13, at 61.
\bibitem{38} LEAP, \textit{supra} note 13, at 61.
\end{thebibliography}
Traditionally, the courts have been reluctant to interfere in what has been basically deemed an academic exercise. The courts recognize that the evaluation of faculty performance is a "defining act of singular importance" to academic institutions and have accepted the performance evaluation process as essential to the "lifeblood and heartbeat" of academic excellence and vital to the efficient functioning of colleges and universities. For the most part, the courts have viewed the evaluation of academic performance as an exercise outside the expertise of the courts and one better left to academicians. Also, the judiciary has generally behaved as though it believed that evaluations were made only after careful deliberation and with procedural due process protections. In short, the judiciary has tended to act as if colleges and universities could be trusted to act in good faith.

College and university administrators almost universally believe that reappointment, promotion, and tenure decisions are the prerogative of peer review committees, department heads, deans, and others in the institution’s administrative hierarchy. Judicial intrusions are not welcome.

Unfortunately, academic decisions are not always based on objective standards and procedural due process is not always supplied. Politics and personalities also play a part, as the courts are increasingly forced to recognize. Given the importance of reappointment, promotion, and tenure decisions, it is hardly surprising that disappointed faculty members have turned to the courts for relief. This is especially true given the secretive nature of institutional personnel decisions and the natural suspicion of wrongdoing which can accompany such proceedings. Disappointed faculty members can hardly be blamed for suspecting that their rejections have more to do with personal bias, discrimination, or favoritism toward others rather than an honest appraisal of a faculty member’s accomplishments and abilities.


41. Courts have been reluctant to intervene in higher education faculty decisions because they feel ill equipped to "micromanage" such institutions. "We have neither the competence nor the resources to undertake to micromanage the administration of thousands of state educational institutions." Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121, 124 (5th Cir. 1991).

42. LEAP, supra note 13, at 5.
Chairpersons, as well as promotion and tenure committees, may look for excuses to support adverse prejudgments. Discrimination on the basis of race, sex, or other questionable criteria may also be factors in the decision-making process.\textsuperscript{43} Claims of discrimination in particular have encouraged greater judicial review and activism as to judging faculty performance evaluations, especially in light of legislation passed to eliminate discrimination.

Two other factors, academic freedom and tenure, are also encouraging the judicial review of academic performance evaluations. The cases concerning the legality of academic performance evaluations cannot be fully appreciated without first recognizing how academic freedom and tenure rights color judicial scrutiny.

\textit{A. Academic Freedom}

Academic freedom is the right to engage in unfettered intellectual inquiry. It is the freedom to conduct independent research and to teach not only one’s own findings, but those of other scholars as well. Academic freedom guarantees educators independence from the interference of trustees, administrators, other faculty members, students, alumni, and public opinion.\textsuperscript{44}

\begin{itemize}
  \item[\textsuperscript{43}] Peter Seldin, \textit{Court Challenges to Tenure, Promotion and Retention Decisions}, IDEA PAPER NO. 12, 1 (Center for Faculty Evaluation and Development, Kansas State University, Sept. 1989).
  \item[\textsuperscript{44}] The American Association of University Professors (AAUP) has published a Statement of Principles as to academic freedom:
    \begin{enumerate}
      \item[(a)] The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
      \item[(b)] The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
      \item[(c)] The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.
    \end{enumerate}
\end{itemize}
It is a freedom deemed essential to protect scholarship and to preserve the integrity of the education process.\textsuperscript{45}

Although the courts have been reluctant to raise academic freedom to the level of a constitutional right, they have always given it great deference. In \textit{Sweezy v. New Hampshire},\textsuperscript{46} the United States Supreme Court stressed the importance of academic freedom to a free society. Sweezy, a college faculty member, claimed a First Amendment right to withhold information sought in a legislative inquiry into his classroom speech. Chief Justice Warren, commenting on the importance of academic freedom, stated:

To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate.\textsuperscript{47}

\textit{Sweezy} is the first case in which a majority of the Court mentioned academic freedom. The Court delineated four essential freedoms of a university. Those freedoms are the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."\textsuperscript{48}

Although academic freedom has not been universally recognized by the courts as a constitutional right, it is nonetheless an extremely important right which the courts have deemed must not be violated in the performance evaluation process. Also, academic freedom is closely associated with the First Amendment right of freedom of speech and some courts have deemed it to be a First Amendment right in and of itself. Academic freedom is a "special concern of the First Amendment, which does not tolerate laws that cause a pall of orthodoxy over the classroom."\textsuperscript{49} While the two rights are not necessarily the same, they often overlap and that alone is sufficient to

\begin{flushright}
27 AAUP BULL. 40 (1941), \textit{reprinted in Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education} 250 (1973).


47. \textit{Id.} at 250.

48. \textit{Id.} at 263.

\end{flushright}
trigger judicial scrutiny when the performance evaluation process threatens to impinge on the First Amendment.

But academic freedom consists not only of a robust and uninhibited exchange of ideas between a professor and students and the freedom of the individual professor to pursue her own ends without interference from the institution, but also in the educational institution’s own autonomous decision making. Often these two freedoms conflict.50 As explained in this Article, when a conflict occurs between the institution’s claim of academic freedom and that of the individual professor, the institution will prevail unless the institution is violating a constitutionally protected freedom. Nontenured faculty members are particularly vulnerable to dismissal by institutions when such conflicts occur because nontenured faculty members lack a property interest in their positions.

B. Tenure

Of course the right to academic freedom means very little if by exercising it the educator suffers, or runs the risk of suffering, financial consequences. To a large extent the tenure system grew out of the need to provide academicians with a certain amount of job security. In exercising academic freedom about controversial subjects, it is possible to raise the ire of administrators, fellow faculty, students, and the general public. Tenure preserves academic freedom by protecting educators from arbitrary dismissal.51 A tenured professor’s employment will not be terminated except


51. Along with its Statement of Principles as to academic freedom the AAUP set out its principles as to tenure:

   Academic Tenure

   (a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies.

   In the interpretation of this principle it is understood that the following represents acceptable academic practice:

   (1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
for stated and proven substantive causes, or for valid institutional financial exigencies.\(^{52}\)

To obtain tenure a professor must complete a probationary period in which her performance is evaluated by her peers. Tenure is granted only when the candidate's evaluators determine that she has achieved a certain

---

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education, but subject to the proviso that when—after a term of probationary service of more than three years in one or more institutions—a teacher is called to another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher, previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably *bona fide*.

27 AAUP BULL. 40 (1941), *reprinted in Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education* 250-52 (1973) (emphasis added).

52. "The purpose of tenure is to protect academic freedom—the freedom to teach and write without fear of retribution for expressing heterodox ideas..." Grimes v. Eastern Ill. Univ., 710 F.2d 386, 388 (7th Cir. 1983).
EVALUATING FACULTY PERFORMANCE

academic proficiency and is likely to continue with that proficiency. Increased prestige, compensation, and freedom accompany academic tenure.

Historically, courts have given institutions of higher education much greater discretion in dealing with nontenured faculty as opposed to tenured faculty. This difference in treatment arises out of the generally held belief of the courts that tenure, once granted, becomes a property right. However, as discussed later, the property interest does not attach prior to the granting of tenure.

In determining whether tenure should be granted, the courts recognize that there is no single determining factor, such as the achievement or failure to achieve a doctorate. Academic merit is made up of many factors, all of which go into the tenure equation.

The evaluation of an institution's denial of tenure is further complicated because simply meeting the basic requirements for tenure through teaching, research and scholarship, and public service does not guarantee tenure. The fact that a university sets up objective criteria to measure academic performance does not constrict its traditional discretion in granting tenure. Other factors, independent of qualifications, also go into the determination, such as university budget considerations, enrollment projections, course needs, the candidate's relationship to other professors, and the foreclosing of future tenure grants. Also, the existence of a formal tenure system does not, in the absence of unusual circumstances, confer a property interest on probationary employees. But, as seen in the cases set forth in this Article, the courts are not inclined to totally abrogate judicial review of the tenure process. In particular, courts are not reluctant to review the performance evaluation process once tenure has been granted and property rights have attached.

53. LEAP, supra note 13, at 36-41.
55. See infra part III.A.2.
56. See infra part III.1.A.
59. Mayberry, 663 F.2d at 519 n.37.
III. LEGAL CHALLENGES

Encouraged by laws against discrimination and a perceived increase in activism on the part of courts to protect academic freedom and tenure rights, a number of legal challenges have been made by faculty members regarding performance evaluations. These challenges basically break down into issues of substantive due process, procedural due process, First Amendment rights, and statutory protection from discrimination.

A. Substantive Due Process

Academicians who are denied continued employment, promotion, or tenure often claim that their substantive due process rights under the Fourteenth Amendment to the United States Constitution have been violated. Success under a claim of violation of substantive due process depends upon the complainant's ability to demonstrate that, as a result of state action, she has suffered the unlawful denial of an identified liberty or property interest protected by the Fourteenth Amendment's Due Process Clause.61

Not every property interest, however, is entitled to substantive due process protection. Only property rights denied under the Constitution, as opposed to state law, are entitled to protections of substantive due process.62 Substantive due process applies to those interests so rooted in the traditions and conscience of our people as to be characterized as fundamental, such as marriage, procreation, and family life.63

1. Pretenure and Substantive Due Process Claims

Substantive due process claims have repeatedly been made where faculty have been denied tenure. Candidates denied tenure have claimed a right of judicial review regarding the correctness of the decisions on the basis that the denial of tenure is the denial of a constitutionally protected property right.


a. Denial of Tenure and Property

The courts have universally rejected the idea that the denial of tenure affects a property right, even in the face of some rather novel arguments. In Scharf v. Regents of California, an assistant professor denied tenure following a probationary period claimed his property rights had been affected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Specifically, the professor contended that the denial of tenure prevented him from obtaining employment elsewhere, because under University of California policy any assistant professor denied tenure at one campus could not be hired at any other campus of the University.

The California Supreme Court, however, refused to depart from its previous case rulings that the denial of tenure does not deprive a person of the ability to seek other employment in his profession. The professor was still free to seek employment at other universities outside of the University of California system and thus was not deprived of a property right.

The court also rejected the professor’s argument that tenure denial by a prestigious university so stigmatizes the denied professor as to support a due process liberty interest claim under the Fourteenth Amendment. The court noted that an institution’s prestige is to a large extent a reflection of the eminence of its faculty and the standards it imposes in the process of academic peer review. The failure to achieve tenure at a university with exceedingly high standards of review is presumably less stigmatizing than the failure to achieve tenure at a less prestigious institution.

In a number of cases, candidates denied tenure have argued that the tenure review procedures themselves create a Fourteenth Amendment property interest. This claim is basically a circular one. The candidates argue that the institution’s detailed tenure procedures provide due process guarantees which in turn create the property interest protected by those guarantees. While such a clever argument has a certain appeal to it, the courts have rejected it as being conceptually unacceptable.

65. Id. at 236.
66. Id. See also Board of Regents v. Roth, 408 U.S. 564, 573 (1972).
67. Scharf, 286 Cal. Rptr. at 236; but see LEAP, supra note 13, at 4, 5 (arguing that the denial of tenure places a professor’s future academic employment in jeopardy because of the stigma attached to the denial and the academic community’s view that the professor is now “tainted goods”).
b. Tenure as an Entitlement

Although pretenure employment is not a vested property right, it can become an entitlement under appropriate circumstances. For example, in *Perry v. Sindermann*, the respondent's employment at a junior college was declared to be an entitlement because the college's official "Faculty Guide" stated that "the Administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work."  

The effect of the "Faculty Guide" in *Perry v. Sindermann* was to narrow the evaluation process to (1) satisfactory teaching services, (2) a cooperative attitude with coworkers and superiors, and (3) the personal happiness of the teacher. The "Faculty Guide" also constituted a contract between the faculty member and the college which transcended any other more formal evaluation process set up by the college.

Besides faculty guides and other written promises of continued employment, actions and verbal statements can result in the creation of a property interest protected under the substantive due process provisions of the Fourteenth Amendment. If an educational institution by its conduct creates an "expectancy of permanent employment" following the satisfactory completion of a probationary period, the expectancy may rise to the level of a property interest. When that happens, the courts are obligated to forgo their usual judicial deference to academic matters and to enforce the claimant’s property rights.

But, absent the creation of a property interest through promises made in a faculty handbook, or through the creation of an expectancy of permanent employment by some other means, courts have universally refused to

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of Trustees, 590 F.2d 470, 485 (3rd Cir. 1978) (professor said to have property interest in procedures established by college’s statement of policy), cert. denied, 444 U.S. 832 (1979).

69. 408 U.S. 593 (1972).

70. Id. at 600; contra Dunfey v. Roger Williams Univ., 824 F. Supp. 18, 21-22 (D. Mass. 1993) (college personnel manual did not create contractual rights since the manual specified it could be amended at any time); Spular v. Picker, 958 F.2d 103, 106 (5th Cir. 1992) (college handbook was not a written employment agreement); Marson v. Northwestern State Univ., 607 So. 2d 1093, 1096 (La. Ct. App. 1992) (policy handbook was not part of the employment contract).

71. Perry, 408 U.S. at 600-02.

recognize that a nontenured professor has a property interest in his continued employment.

c. Pretenure and Subjective Evaluations

The distinction made by the courts between the property rights of nontenured and tenured employees also directly affects the scope of judicial review as far as personnel decisions are concerned. Prior to the granting of tenure, courts are inclined to give great deference to what is basically an academic evaluation which may use primarily subjective standards.

The courts have repeatedly recognized that the questions of a faculty member's competence and qualifications for salary increases, promotion, retention, and tenure are highly subjective determinations that do not lend themselves to precise qualifications, mechanical measurements, or the use of standardized tests.\textsuperscript{73} The subjective nature of measuring a candidate's qualifications makes it extremely difficult for those outside the college or university to evaluate such decisions.\textsuperscript{74}

As a general rule, in claims of substantive due process violations, judicial review will not function de novo to determine whether the court would have denied a salary increase, promotion, retention, or tenure as to a faculty member based on the same evidence before an institution's evaluation committees. Instead, the court's role is limited to examining the institution's proceedings to determine if substantial evidence existed to support its determination.\textsuperscript{75}

An excellent example of this deference is found in \textit{Siu v. Johnson}.\textsuperscript{76} Siu, a Catholic nun of Oriental heritage, was an assistant professor from 1976 to 1982 at George Mason University, where she was the university's only East Asian faculty member. At the end of her sixth year of employment, which constituted her tenure track probationary period, Siu was eligible to be considered for tenure. The faculty handbook stated that faculty being considered for tenure would be evaluated on the basis of teaching performance, research, scholarship, and university service. The handbook specified sixteen evaluation criteria used to determine if a candidate would be granted tenure.\textsuperscript{77}

Like most universities, George Mason had several levels of review for tenure candidates. As detailed in the faculty handbook, candidates were first evaluated by departmental faculty in accordance with the stated substantive

\begin{itemize}
\item \textsuperscript{73} Mayberry v. Dees, 663 F.2d 502, 519 (4th Cir. 1981).
\item \textsuperscript{74} \textit{Id}.
\item \textsuperscript{75} Wood v. Strickland, 420 U.S. 308, 325-26 (1975).
\item \textsuperscript{76} 748 F.2d 238 (4th Cir. 1984).
\item \textsuperscript{77} \textit{Id} at 240-41.
\end{itemize}
criteria. The departmental chairman then transmitted his or her recommendation, along with the faculty recommendations, to the advisory committee on promotions and tenure for the relevant university college and its dean. The advisory committee then solicited input from the candidate and the candidate’s department and made its own recommendation. The vice president for academic affairs then reviewed the committee’s recommendation and made a recommendation to the university president, who ultimately rendered a final decision.\(^78\)

Siu received favorable tenure recommendations until she reached the higher administrative levels. At the graduate dean level and beyond it was recommended that she not be granted tenure because of a "clear lack of strong and consistent scholarship." The vice president for academic affairs also concluded that Siu had failed to establish excellence in teaching.\(^79\)

After being denied tenure, Siu filed a cause of action against the university and the administrators who denied her tenure on the basis that the denial violated the Fourteenth Amendment’s equal protection and due process clauses. She claimed discrimination by the university because of her national origin in violation of 42 U.S.C. §§ 1981 and 1983.\(^80\) Siu eventually dismissed the university as a defendant, but continued to seek injunctive relief as well as damages against the individual defendants.\(^81\)

The court quickly dismissed Siu’s claim under 42 U.S.C. § 1981 because she was unable to show that the defendants purposefully discriminated against her on racial grounds.\(^82\) The court then went on to examine Siu’s claim of denial of procedural due process in violation of 42 U.S.C. § 1983.\(^83\)

The court noted that the threshold question under a § 1983 claim is whether a constitutionally protected interest exists. Relying on \textit{Board of Regents v. Roth}\(^84\) and \textit{Megill v. Board of Regents},\(^85\) the Fourth Circuit Court of Appeals stated that "[G]iven the nature of the classic tenure track probationary appointment, there is a real question whether in that classic form it gives rise to a constitutionally protected property interest that survives the normal expiration of its term."\(^86\) Instead, it is no more than an employment at will that simply gives rise to a unilateral expectation that permanent

\(^78\) Id. at 240.
\(^79\) Id. at 240-41.
\(^80\) See \textit{infra} part III.C.2.b.
\(^81\) \textit{Siu}, 748 F.2d at 241; see also \textit{infra} part III.C.2.b.
\(^82\) \textit{Siu}, 748 F.2d at 241-42 (citing \textit{Washington v. Davis}, 426 U.S. 229, 239-45 (1976)).
\(^83\) Id. at 242.
\(^84\) 408 U.S. 564, 577 (1986).
\(^85\) 541 F.2d 1073, 1077 (5th Cir. 1976).
\(^86\) \textit{Siu}, 748 F.2d at 243.
employment will follow the probationary term if certain conditions and the employer's expectations are met by the employee.87

However, although the court rejected Siu's property right claim, the court assumed, for appeal purposes only, the existence of a protected property right in order to review the denial of due process claim. It was in reviewing the university's tenure process that the court delineated the difference between academic evaluations and disciplining or fact-finding dismissals. Pretenure decisions involve primarily subjective evaluations dependent upon the professional judgment of persons presumed to possess special competence in making such evaluations. "The procedures prescribed for making the tenure decision—including the decision not to award tenure, thereby 'terminating' whatever interest may have existed—plainly contemplate a subjective, evaluative decisional process by academic professionals rather than an objective fact-finding process by tribunals adapted to that quite different purpose."88

The court went on to state that this subjective decision-making process is not in essence an adversarial fact-finding procedure "for which fairly stringent judicial review to insure [sic] adequacy is both necessary and possible, but is one much more subjective and less susceptible, therefore, to fine-tuned judicial review."89

The court refused to inquire into the wisdom of the decision of administrators to deny Siu tenure despite Siu's favorable recommendations at the lower review levels because it is inappropriate for the courts to inquire into the wisdom, prudence, or informed nature of the decision finally made by academicians as to the conferring of academic tenure.90 Due process does not require that "administrators up the reviewing line defer to previous peer faculty evaluations, even if it is customary to do so."91

Siu had been denied tenure due to a perception that she lacked scholarly potential. The court held that the decision-making process used satisfied the demands of procedural due process guaranteed by the Fourteenth Amendment for the protection of whatever property interest she might have had in her expectation of continued employment beyond the probationary term.92

What Siu v. Johnson and similar cases establish is that the courts use a rather lenient standard in determining whether a college or university has violated the substantive due process rights of a nontenured faculty member in

87. Id.
88. Id. at 244.
89. Id. at 244-45.
90. Id. at 245.
91. Id.
92. Id. at 246.
denying promotion. The courts do not strictly scrutinize the performance evaluation process used regarding nontenured faculty.

Further, in reviewing nontenured faculty decisions, whether a performance evaluation process complies with substantive due process is usually judged by the courts under the arbitrary, capricious, and abuse of process standard. Courts retain their inherent reluctance to interfere in the evaluation process, and this reluctance extends to any promotion and termination decisions resulting from the evaluations. In passing upon the criteria used by educational institutions regarding substantive due process requirements, the courts look only to whether the evaluation decision was arbitrary, capricious, or an abuse of discretion. So long as there is competent and credible evidence to support the evaluator's decision, the final determination on promotion or termination will not be disturbed by the courts.

Although the case involved a secondary education institution as opposed to a college or university, and is a state supreme court case as opposed to a federal court case, Nordhagen v. Hot Springs School District93 is a good substantive due process example. In Nordhagen, a school board refused to renew a principal's contract. The decision was based upon the following evaluation made by the principal's superintendent:

1. Nordhagen lacked professional growth, leadership and conduct.
2. Nordhagen failed to perform evaluations on the teachers he supervised.
3. Nordhagen's skills as an educator were lacking. Nordhagen was negative to parents and grandparents in the area of public relations and understanding, took a rigid stand, and challenged the validity, jurisdiction and legality of the courts.
4. Nordhagen demonstrated an insensitivity to students' needs and feelings, and negatively approached developing the self-image of specific students.94

The South Dakota Supreme Court refused to overturn the school board's decision supporting the superintendent's recommendation not to renew Nordhagen's contract. The court noted that substantive due process only requires that decisions of nonrenewal be exercised unreasonably or arbitrarily, or be manifestly abused. Such decisions need only be supported by substantial evidence. The requirement of substantive due process is satisfied if a board bases its decision upon competent, credible evidence, which is what the board did regarding Nordhagen.95 There is a presumption of "good faith" as to a school board's decisions and the complaining party has

94. Id. at 511-12 n.1.
95. Id. at 513.
the burden of proof to overcome the presumption. Nordhagen failed to carry this burden of proof.\textsuperscript{96}

2. Posttenure Review and "Just Cause"

While the courts are reluctant to review personnel decisions regarding nontenured faculty, that reluctance no longer exists after tenure is granted. Once tenure is granted, the faculty member is vested with a property right protected under the substantive due process clause of the Fourteenth Amendment. As a result, courts no longer use a review standard based on arbitrary or capricious conduct, or on an abuse of discretion. Instead, the courts more closely examine the facts and evidence in each case to determine whether the evaluators had "just cause" for their decision. If a tenured faculty member is denied promotion or dismissed from the faculty, the action must be supported by "just cause."\textsuperscript{97} Because a fundamental property right is at stake, there is no presumption in favor of the action taken.\textsuperscript{98}

Also, in those cases where a nontenured faculty member raises questions concerning the nonrenewal of her employment or the denial of a promotion, the burden of proof lies with the nontenured individual to make a prima facie showing that the institution's conduct was based on constitutionally impermissible reasons.\textsuperscript{99} In comparison, once a faculty member has been awarded tenure, the burden of proof lies with the institution to establish that adverse decisions concerning continued employment or denial of promotion are supported by "just cause."\textsuperscript{100}

Because the actions taken by the administration in response to the performance evaluation must be supported by "just cause," specific and objective criteria which clearly measure academic performance become much more important. In cases involving constitutionally protected property rights, courts will not hesitate to overturn an academic decision which cannot be substantiated.

However, tenure is not a guarantee of permanent employment and even a tenured faculty member's employment can be terminated for "just cause." Some states have by statute specified what constitutes "just cause" for the termination of the employment of tenured faculty members. For example, the state of Tennessee lists the following as "just cause" for termination of tenured state university or college faculty members:

\textsuperscript{96} Id. at 513-14. See also Jager v. Ramona Bd. of Educ., 444 N.W.2d 21, 25 (S.D. 1989); Jones v. Sully Buttes Sch., 340 N.W.2d 697, 700 (S.D. 1983).
\textsuperscript{97} Olswang & Fantel, \textit{supra} note 45, at 8.
\textsuperscript{98} Olswang & Fantel, \textit{supra} note 45, at 8.
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(1) Incompetence or dishonesty in teaching or research;
(2) Willful failure to perform the duties and responsibilities for which the faculty member was employed, or refusal or continued failure to comply with the policies of the board, institution or department, or to carry out specific assignments, when such policies or assignments are reasonable and nondiscriminatory;
(3) Conviction of a felony or crime involving moral turpitude;
(4) Improper use of narcotics or intoxicants which substantially impairs the faculty member's fulfillment of his department and institutional duties and responsibilities;
(5) Capricious disregard of accepted standards of professional conduct;
(6) Falsification of information on an employment application or other information concerning qualifications for a position; and
(7) Failure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department or division of the institution. 101

Tennessee also requires that adequate cause for termination be proved by clear and convincing evidence. 102

In the overwhelming majority of states, however, what constitutes "just cause" for termination of employment is left to the institutions to define. In addition, "just cause" for termination generally requires a lesser standard of proof than the highly restrictive "clear and convincing evidence" standard. As previously discussed, an employment termination decision involving a tenured faculty member will not be disturbed so long as there is substantial evidence to support the decision and, as is explained later in this Article, the reason given for the termination was not merely a pretext to hide discriminatory conduct. 103

The list of "just causes" for employment termination set forth in the Tennessee statute is indicative of valid grounds for termination of tenured faculty recognized by state courts. Some case examples of the termination of the employment of tenured faculty have already been set forth in this Article. 104 The following are additional examples:

a. Immorality

Immorality has served as a legitimate basis for the termination of the employment of tenured faculty, although it is an admittedly ambiguous

103. See infra parts III.C.2.a-e.
104. See supra parts I.C.1-4.
concept as to what constitutes "immoral conduct," "actions of moral turpitude," or "evident unfitness to teach." Yet, regardless of the inherent vagueness of the concept, dismissals have been upheld in a number of cases on charges of immorality. For example, the dismissal of a University of Illinois tenured professor was upheld on the grounds that he published in the student newspaper an essay which contained what the court described as a "liberal approach to the problems concerning morality on modern day university campuses."!

The dismissal of a tenured junior college professor was also upheld in the case of Palo Verde Unified School District of Riverside County v. Hensey on grounds of evident unfitness for service. The objectionable conduct consisted of the professor ripping out the college bell system speaker in his classroom because it sounded like a "worn out phonograph in a whorehouse," the frequent use of vulgarity in the classroom, and the making of disparaging and vulgar remarks in his classroom about the district superintendent.

Although the professor's conduct did not quite rise to the level of immorality, the court found his conduct to be inexcusable. The teacher had violated his duty to respect the feelings and sensibilities of his students and to conduct himself with a certain degree of rectitude.

Of course, the most common connotation of immorality involves sexual impropriety between faculty and students, as was the case in Board of Trustees of Compton Junior College District of Los Angeles County v. Stubblefield. A junior college teacher was dismissed after (1) he was found by a policeman to be parked in a school parking lot with a female student in a state of undress; and (2) he physically assaulted the policeman in an attempt to escape arrest.

The case of Lehmann v. Board of Trustees of Whitman College also involved the dismissal of a tenured faculty member for sexual impropriety. The professor's misconduct consisted of sexual advances to students, female staff, faculty members, and the wives of faculty and staff members.

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108. Hensey, 88 Cal. Rptr. at 572; Olswang & Fantel, supra note 45, at 15.
109. Hensey, 88 Cal. Rptr. at 576; Olswang & Fantel, supra note 45, at 15.
110. 94 Cal Rptr. 318 (Cal. Ct. App. 1971); Olswang & Fantel, supra note 45, at 15.
111. Olswang & Fantel, supra note 45, at 16.
112. 576 P.2d 397 (Wash. 1978); Olswang & Fantel, supra note 45, at 16.
In *Korf v. Ball State University*,\(^{114}\) a tenured professor's dismissal was upheld because the professor had made sexual advances toward his male students. Some current and former male students accused the professor, Korf, of sexual harassment. The harassment consisted of unwelcome sexual advances and also offers of quid pro quo exchanges in which good grades were offered to the students in exchange for sexual involvement.\(^{115}\) One student alleged that he received money and gifts from the professor in exchange for sexual acts, as well as a promise of good grades.\(^{116}\)

The university formed a committee to hear testimony as to the accusations made against Professor Korf. The committee found Korf guilty of unethical conduct in that he used his position and influence to exploit students for his private advantage. The evidence established a pattern of conduct in which Korf built friendly, personal relationships with students and then made sexual advances.\(^{117}\) The committee recommended that Korf be placed on three years probation instead of being discharged because it felt that Korf had not been provided "ample warning and opportunity for behavioral change."\(^{118}\)

The committee's report and recommendation were given to Ball State University's Board of Trustees for review. After hearing oral arguments from the university's counsel, as well as Dr. Korf's, the Trustees agreed with the committee's finding of unethical conduct. It refused, however, to accept the recommendation of probation and sent the report back to the committee for reconsideration. Upon reconsideration the committee recommended that Korf be discharged and the Trustees then terminated Korf's employment.\(^{119}\)

Korf filed suit against the university under 42 U.S.C. § 1983.\(^{120}\) He contended that the termination of his employment violated his constitutional

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114. 726 F.2d 1222 (7th Cir. 1984).
115. *Id.* at 1224.
116. *Id.*
117. Ball State University had adopted paragraph 2 of the American Association of University Professors ("AAUP") Statement on Professional Ethics which states that: "2. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of his students reflects their true merits. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom." *Id.* at 1224 n.2.
118. *Id.*
119. *Id.* at 1225.
120. *Id.; see infra* part III.C.2.b.
rights to substantive and procedural due process, equal protection, free speech, freedom of association, and privacy.\textsuperscript{121} The district court granted summary judgment in favor of Ball State University.\textsuperscript{122} On appeal, Dr. Korf argued summary judgment was inappropriate because a genuine fact issue existed as to whether he had adequate notice that Ball State prohibited consensual sexual relations between faculty members and students.\textsuperscript{123} Dr. Korf contended that Ball State’s policy did not clearly prohibit sexual relationships with students and that he further lacked adequate notice because he was the first Ball State faculty member ever disciplined for such conduct.\textsuperscript{124}

In affirming the district court’s ruling in favor of Ball State, the appellate court held that common sense, reason, and good judgment should have made him cognizant that his behavior could lead to his dismissal. The court also noted that one cannot claim it is somehow unfair to be the first person disciplined under a particular rule or regulation. To accept Korf’s argument would mean that no new law, rule, or regulation could ever be enforced.\textsuperscript{125}

The court also held that Korf’s conduct was not to be viewed in the same context as the conduct of an "ordinary person on the street." Instead, his conduct was to be judged in the context of the relationship between a professor and his students in an academic environment.\textsuperscript{126} Ball State’s action in dismissing Korf was "rationally related to its responsibility to establish and maintain high ethical standards within the University in order to maintain a proper academic environment."\textsuperscript{127}

\textit{b. Abusive Conduct}

The courts have also upheld the dismissal of tenured faculty who were abusive toward students and colleagues. In one instance, a tenured faculty member’s dismissal was upheld where the university showed that the professor (1) was a poor teacher who rarely prepared for classes; (2) had little interest in his students and failed to interact with them; (3) failed to keep office hours; (4) failed to advise students; (5) was uncooperative with colleagues and the

\textsuperscript{121} Dr. Korf also made state law claims for breach of his employment contract and infliction of emotional distress. \textit{Korf}, 726 F.2d at 1225.
\textsuperscript{122} \textit{Korf}, 726 F.2d at 1225.
\textsuperscript{123} Although Korf admitted that he was aware that Ball State University had adopted AAUP’s Statement on Professional Ethics, he contended that the statement could not reasonably be interpreted to include "consensual sexual relationships" with students. \textit{Id.} at 1226.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 1227.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 1229.
administration; (6) ignored his superiors' directives as well as the university policies and procedures; and (7) recklessly, and untruthfully, accused his superiors of incompetence and discriminatory practices against him. Although the professor's general incompetence was a factor in his dismissal, his abusive treatment of others played a significant role in the administration's decision.\(^{128}\)

In *Keen v. Penson*,\(^{129}\) a university professor was properly sanctioned with demotion and loss of salary due to his treatment of a student. The professor gave the student an unfair grade and then sent demeaning and insulting letters to the student.\(^{130}\)

An extreme example of a tenured professor abusing students is found in *San Filippo v. Bongiovanni*.\(^{131}\) Professor San Filippo, a member of Rutgers University's faculty of Arts and Sciences, was accused of abusing Chinese scholars brought to Rutgers to work with him. The Chinese scholars accused him of verbal abuse, harassment, exploitation, intimidation, fraud, deceit, and misrepresentation.\(^{132}\)

Over a period of several months, Rutgers took various administrative actions to investigate and dispose of the charges against Professor San Filippo.\(^{133}\) Eventually, the professor was charged with, and given notice of, the particulars against him, including such conduct as forcing the Chinese scholars to perform domestic work for him, deducting the cost of health benefits from their salaries without providing such benefits, threatening to send the scholars back to China, verbally abusing the scholars in front of others, and admitting Chinese scholars to the postdoctoral fellowship who lacked appropriate credentials.\(^{134}\)

At Professor San Filippo's request, he was provided with a formal hearing before five members of the University Senate (the panel).\(^{135}\) After 250 hours of testimony, Professor San Filippo was found guilty of most of the charges filed against him.\(^{136}\) The panel found that adequate cause existed to strip Professor San Filippo of his tenure and to dismiss him from Rutgers.

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129. 970 F.2d 252 (7th Cir. 1992).
130. *Id.* at 253.
132. *Id.* at 1128.
133. *Id.*
134. *Id.* at 1129-30.
135. *Id.* at 1130.
136. *Id.* at 1130, 1132.
in that he violated university regulation 3.94, which defines adequate cause as "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacity or conviction of a crime of moral turpitude."\textsuperscript{137}

Professor San Filippo brought an action under 42 U.S.C. § 1983. The district court held that the grounds set forth in the university regulations for dismissing tenured professors were void for vagueness and certified an appeal on the void for vagueness issue.\textsuperscript{138}

On appeal, the Third Circuit Court of Appeals held that, as a tenured professor, San Filippo had a property interest in his position which was protected under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{139} The court further noted that property interests protected by procedural due process go beyond actual ownership of real estate, chattels, or money, and include a person's good name, reputation, honor, or integrity.\textsuperscript{140} The court further found, however, that the issue of procedural due process had not been ruled upon by the district court and that only the void for vagueness issue was before the court.\textsuperscript{141} As to that issue, the Third Circuit held that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge.\textsuperscript{142} "Such standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge."\textsuperscript{143}

As to Rutgers' dismissal regulations, the court held that, although they were broad and general, they were not unconstitutionally vague.\textsuperscript{144} "It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior's directive, and to be truthful and forthcoming in dealing with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching."\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{137} \textit{Id.} at 1128, 1132-33.
\item \textsuperscript{138} \textit{Id.} at 1126 (citing San Filippo v. Bongiovanni, 743 F. Supp. 327, 329 (D. N.J. 1990)).
\item \textsuperscript{139} \textit{Id.} at 1134.
\item \textsuperscript{140} \textit{Id.} (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).
\item \textsuperscript{141} \textit{Id.} at 1135.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 1136 (citing Arnett v. Kennedy, 416 U.S. 134, 159 (1974)).
\item \textsuperscript{144} \textit{Id.} at 1137.
\item \textsuperscript{145} \textit{Id.}
\end{itemize}
c. Insubordination, Contract Breaches, and Violations of University Rules and Regulations

Although dismissals on grounds of insubordination are rare, it is a valid basis for dismissing even tenured faculty members. In one instance a tenured associate professor was dismissed for missing classes after he was expressly denied permission to miss classes. It had been determined that missing classes would adversely affect the students.146

In Gross v. University of Tennessee,147 the dismissal of two tenured professors was upheld after they violated university policy involving external activities and income.148 The professors were required to devote their full time and efforts to the university, yet they engaged in the unlimited private practice of medicine.149 The court refused to reinstate the professors on the grounds that (1) the professors did not have a constitutionally protected right to engage in outside activities; and (2) the outside income limits placed by the university upon faculty were rationally related to the legitimate goals of fostering full-time devotion to teaching duties.150

A tenured professor’s failure to complete work and reports required for projects under contract by the university and the failure to follow university rules and regulations led to a dismissal in Bates v. Sponberg.151 The court refused to accept the professor’s contention that his actions were actually a form of protest against the university’s accounting procedures.152

In comparison, in McConnell v. Howard University,153 the court held that a genuine fact issue existed as to whether a tenured university professor’s failure to teach an assigned class was neglect of his professional duties.154 A conflict arose between Professor McConnell, a white professor, and one of the forty black students in a math course entitled Elementary Functions I, a course similar to Algebra II.155 The conflict arose following a single question math quiz in which only five of the forty students correctly answered the question. After the poor performance of his students, Professor McConnell advised them to cut back on other activities and to concentrate on their studies. To emphasize his point, Professor McConnell told the fable of

146. Olswang & Fantel, supra note 45, at 17.
147. 448 F. Supp 245 (W.D. Tenn. 1978), aff’d, 620 F.2d 109 (6th Cir. 1980).
148. Id. at 248.
149. Id.
150. Id.; Olswang & Fantel, supra note 45, at 18.
151. 547 F.2d 325 (6th Cir. 1976); Olswang & Fantel, supra note 45, at 18.
152. Bates, 547 F.2d at 328; Olswang & Fantel, supra note 45, at 18.
154. Id. at 59.
155. Id. at 60.
EVALUATING FACULTY PERFORMANCE

a monkey who put his hand into a cookie jar and was unable to get it back out because he grabbed too many cookies and was unwilling to let any go.\textsuperscript{156}

One of the students took exception to McConnell's comments and called him a "condescending, patronizing racist." McConnell demanded that the student apologize and she refused.\textsuperscript{157} In subsequent class meetings, McConnell asked the student to apologize and she continued to refuse. After one refusal, McConnell dismissed class and told the students he would not return until the "right atmosphere" was created by either the student apologizing or removing herself from class.\textsuperscript{158}

McConnell then requested that the university take disciplinary action against the student. Instead, McConnell was instructed to resume teaching the class. Upon his continued refusal to teach the class he was warned by the vice president for academic affairs that action would be taken against him.\textsuperscript{159}

A grievance committee was convened to conduct a hearing and make findings and recommendations. The committee concluded that Professor McConnell did not neglect his professional responsibility. Although failure to teach an assigned class might ordinarily justify termination of employment, it did not warrant such action as to Professor McConnell given the mitigating circumstances.\textsuperscript{160} The committee also criticized the university's administration for not adequately supporting Professor McConnell.\textsuperscript{161}

Regardless of the committee's report, the Board of Trustees voted to terminate McConnell's employment. McConnell then filed suit claiming that Howard University had breached its employment contract with him.\textsuperscript{162}

The district court ruled in favor of the university and held that McConnell had violated the provision of the faculty handbook by neglecting his professional responsibilities.\textsuperscript{163} In overruling the district court's decision, the court of appeals held that the term "neglect" necessarily implied an assessment of McConnell's conduct in the factual context in which it occurred and whether his actions were within the acceptable range of conduct within his profession.\textsuperscript{164}

The court not only found Professor McConnell's actions to have been reasonable, but also concluded that a factual issue existed as to whether the
university breached its contract with McConnell.\textsuperscript{165} McConnell had argued that the faculty handbook created an implied obligation on the part of the university to rectify incidents such as the one which occurred in his class and, because it failed to do so, the university could not terminate his contract of employment.\textsuperscript{166} The appellate court sent the case back to the district court with the instruction that Professor McConnell was to be permitted to show that the university failed in its duty to protect McConnell’s professional authority. The court also noted that Professor McConnell had to prove that under the contract the university’s breach relieved him of his obligation to teach or that the breach was such a mitigating factor that the university could not terminate his contract.\textsuperscript{167}

\textbf{d. Incompetence}

Even a tenured professor can be dismissed for incompetence, as was done in the case of \textit{Chung v. Park}.\textsuperscript{168} Dr. Chung was dismissed because of negative faculty ratings, bad student ratings, and his refusal to cooperate with his colleagues to resolve the problems.\textsuperscript{169} The court made it clear that it would not inquire as to the wisdom of the decision whether to terminate Dr. Chung’s employment except as to whether the action taken was unreasonable, arbitrary, or capricious.\textsuperscript{170} Finding no such conduct on the part of the institution regarding the action taken against Dr. Chung, the court refused to reinstate his employment.\textsuperscript{171}

\textbf{e. Academic Dishonesty}

Just as a student can be expelled from a college or university for academic dishonesty, so can a tenured faculty member’s employment be terminated for academic dishonesty. In \textit{Agarwal},\textsuperscript{172} a tenured professor’s dismissal was based to a large extent on a past incident of plagiarism with three physics laboratory manuals for use in introductory courses.\textsuperscript{173} Although the professor was reprimanded for his plagiarism at the time of the

\begin{footnotes}
\item[165.] \textit{Id.} at 64.
\item[166.] \textit{Id.} at 65.
\item[167.] \textit{Id.} at 65-66.
\item[168.] 514 F.2d 382 (3d Cir.), \textit{cert. denied}, 423 U.S. 948 (1975).
\item[169.] \textit{Id.} at 384, 387.
\item[170.] \textit{Id.} at 387.
\item[171.] \textit{Id.}
\item[172.] \textit{See supra} part I.C.2.
\item[173.] \textit{Agarwal} v. Regent of the Univ. of Minn., 788 F.2d 504 (8th Cir. 1986).
\end{footnotes}
incident, the plagiarism was still a factor in a subsequent termination action.\(^{174}\) In upholding the professor’s dismissal, the court rejected the professor’s claim that his constitutional rights were violated because his plagiarism had already been punished. The court held that neither state law nor the university’s regulations precluded consideration of his past offense in the context of proceedings for his discharge.\(^{175}\)

\textit{Yu v. Peterson}\(^{176}\) is another plagiarism case which resulted in the dismissal of a tenured faculty member at the University of Utah College of Engineering. The professor plagiarized a joint research project by failing to give credit to his co-author.\(^{177}\) He also claimed credit for two publications of which ninety percent was prepared by two of his students.\(^{178}\)

An unusual aspect of the case involves the professor’s use of the grievance committee. He was originally given an extensive hearing before the University of Utah’s Academic Freedom and Tenure Committee.\(^{179}\) The Committee found the professor guilty of plagiarism and recommended that he be suspended for one year without pay. The university president concurred and issued the order of suspension.\(^{180}\)

The professor then appealed his suspension in accordance with the university’s grievance process. He won his appeal and the case was remanded to the Committee to cure procedural defects and to take further evidence. It was after the remand and subsequent hearing that the professor was discharged from the university.\(^{181}\)

The professor then brought an action in federal court against the university’s president and grievance committee members.\(^{182}\) He claimed that the imposition of a greater sanction after his case was remanded deprived him of due process of law.\(^{183}\)

In upholding the dismissal, the court noted that valid nonvindictive reasons existed for the enhanced penalty. At the second hearing, new, probative evidence against the professor was introduced to support a stricter penalty than first imposed.\(^{184}\)

\(^{174}\) Id. at 505-06.
\(^{175}\) Id. at 507.
\(^{176}\) 13 F.3d 1413 (10th Cir. 1993).
\(^{177}\) Id. at 1414.
\(^{178}\) Id.
\(^{179}\) Id.
\(^{180}\) Id.
\(^{181}\) Id. at 1414-15.
\(^{182}\) Id. at 1415.
\(^{183}\) Id. at 1417.
\(^{184}\) Id.
3. Posttenure Review and Financial Exigency or Changes in Academic Programs

Both tenured and nontenured faculty are subject to having their contracts of employment terminated because of financial exigency. Dismissal for financial exigency is not the same as dismissal for "just cause." Even a tenured professor with an outstanding professional record of scholarship, teaching, and public service can have her contract terminated during a retrenchment process.

*Krotkoff v. Goucher College*185 is a good example of a financial exigency case. Krotkoff, a tenured professor in the German section of Goucher College's modern language department, had her employment terminated when the college went through a retrenchment process. Prior to retrenchment, the college experienced six years of deficit spending with the total deficit exceeding $1.5 million dollars. During that same period of time the college also experienced a yearly reduction in enrollment, resulting in reduced tuition and fee revenues.186

Because of the retrenchment, Krotkoff's contract was not renewed, along with the contracts of three other tenured faculty members. Eleven other nontenured faculty members were also dismissed. Many of the faculty reductions occurred in the classics department, which was discontinued.187 Although Krotkoff lost her position in the modern language department, another tenured German professor retained her job. The college explained that there was a greater need to retain the other professor, who taught primarily introductory language courses, including French, while Krotkoff taught mostly advanced literature courses.188

Krotkoff brought suit claiming the dismissal breached her tenure contract. She claimed that the college bylaws provided that tenured faculty members could only be dismissed for good cause (e.g., incompetency, neglect of duties, or moral turpitude) and that financial exigency was not good cause.189

The college conceded that the bylaws did not mention financial exigency.190 It also conceded that financial exigency is not considered to be a ground of dismissal for cause. The college also acknowledged Krotkoff to be a fine teacher and that her termination of employment was not related to her performance.191

185. 585 F.2d 675 (4th Cir. 1978).
186. *Id.* at 677.
187. *Id.*
188. *Id.* at 677-78.
189. *Id.* at 678-79.
190. *Id.* at 678.
191. *Id.* at 677.
The college contended, however, that the national academic community understood that the concept of tenure incorporates the right of an institution to refuse to renew a tenured faculty member’s contract because of financial exigency so long as its actions are demonstrably bona fide. To bolster its claim, the college provided expert testimony from the director of the Office of Academic Affairs of the American Council on Education. The college’s expert based his opinion in part on the 1940 Statement of Principles on Academic Freedom and Tenure developed by the Association of American Colleges and the American Association of University Professors, which states: 

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies. In the interpretation of this principle it is understood that the following represents acceptable academic practice...: 
5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

At trial, the jury returned a verdict in favor of Krotkoff and awarded her damages of $180,000. The trial judge, however, set aside the verdict and granted a new trial. On appeal, the appellate court affirmed the trial judge’s decision favoring the college. The appellate court noted that whether or not a faculty member’s contract contains an explicit reference to financial exigency, a number of previously reported cases support the conclusion that tenure is not understood to preclude a demonstrably bona fide dismissal for financial reasons. "In whatever way the courts have chosen to view the quality of the right or interest the tenured faculty member holds, there is little

192. Id. at 678.
193. Id. at 678-79.
194. This provision is no longer valid, see infra part III.C.2.d.
196. Id. at 677.
doubt that tenure is not enforceable if financial exigency is claimed and supported.\(^\text{198}\) Similarly, an institution of higher education has an implied contractual right to terminate the employment of a tenured member of the faculty when her position is eliminated as part of a change in an academic program. So long as the institution acts in good faith and the termination is unavoidable, there is no due process violation under the Fourteenth Amendment of the tenured professor's property rights.\(^\text{199}\)

**B. Procedural Due Process**

Just as the Fourteenth Amendment guarantees substantive due process protection of vested property rights, it also provides procedural due process protection.\(^\text{200}\)

A person cannot be deprived of property or liberty by a state or its officials without adhering to procedural due process. As determined by the U.S. Supreme Court, the essential elements of procedural due process include: (1) a hearing; (2) before an impartial decision-maker; (3) after reasonable notice of charges; and (4) an opportunity to prepare and present a defense.\(^\text{201}\)

However, the procedural due process required to be provided by colleges and universities is not the same as that demanded in judicial proceedings. Judicial proceedings are adversarial in nature and therefore demand a more restrictive process. For example, in making tenure decisions a faculty member involved in the evaluation process might also legitimately be involved in making the ultimate recommendation as to the granting or denial of tenure. The courts have refused to force those involved in the initial evaluation procedure, such as department chairpersons, to recuse themselves from further tenure consideration proceedings for the candidate. To do so would unnecessarily expose the institution to turmoil and expense.\(^\text{202}\) Recusal will only be required where it can be demonstrated that the faculty member participating in the evaluation process has lost objectivity and has personalized

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198. *Id.* at 679 (quoting from M. Mix, *Tenure and Termination in Financial Exigency* 10 (1978)).

199. Jimenez v. Almodovar, 650 F.2d 363 (1st Cir. 1981); Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976); Browzin v. Catholic Univ. of Am., 527 F.2d 843 (D.C. Cir. 1975); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), aff'd without opinion, 510 F.2d 975 (7th Cir. 1975).

200. The due process clause of the Fourteenth Amendment says that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.


the evaluation process. In other words, the faculty member is no longer performing a task from the university's perspective, but is involved in a personal vendetta.  

1. Nontenured Faculty

Although the due process required by the Fourteenth Amendment as to academic decisions is not as rigorous as that for judicial proceedings, it is still a valuable and substantial right. Unfortunately, a nontenured faculty member cannot claim a right to procedural due process under the Fourteenth Amendment unless she can establish a property interest in her teaching position or a liberty interest which a lack of procedural due process threatens.


204. Fortunately for nontenured faculty members, some institutions of higher learning have adopted the following AAUP recommended Statement of Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments:

1. Criteria and Notice of Standards. Probationary faculty members should be advised, early in their appointment, of the substantive and procedural standards generally accepted in decisions affecting renewal and tenure. Any special standards adopted by their particular departments or schools should be brought to their attention.

2. (a) Periodic Review. There should be provision for periodic review of a faculty member's situation during the probationary service.

(b) Opportunity to Submit Material. Probationary faculty members should be advised of the time when decisions affecting renewal and tenure are ordinarily made, and they should be given the opportunity to submit material that they believe will be helpful to an adequate consideration of their circumstances.

3. Notice of Reasons. In the event of a decision not to renew an appointment, the faculty member should be informed of the decision in writing, and, upon request, be advised of the reasons which contributed to that decision. The faculty member should also have the opportunity to request a reconsideration by the decision-making body.

4. Written Reasons. If the faculty member expresses a desire to petition the grievance committee..., or any other appropriate committee, to use its good offices of inquiry, recommendation, and report, or if the request is made for any other reason satisfactory to the faculty member alone, the reasons given in explanation of the nonrenewal should be confirmed in writing.

5. Petition for Review Alleging an Academic Freedom Violation or Improper Discrimination. Insofar as the petition for review alleges a
a. De Facto Tenure

As previously explained, a nontenured faculty member does not have a property interest in her position.205

In a limited number of cases, the courts have required that colleges and universities provide even nontenured faculty members with procedural due process prior to dismissal. These cases normally involve unusual circumstances, as evidenced by Perry v. Sindermann.206

The case involved a professor, Sindermann, who was employed by Odessa Junior College under successive one-year contracts. After ten years of employment, Sindermann’s contract was not renewed. Sindermann filed an action claiming that his First and Fourteenth Amendment rights of freedom of expression, association, petition, and due process had been violated. Prior

violation of academic freedom or improper discrimination, the functions of the committee that reviews the faculty member’s petition should be the following:

(a) To determine whether or not the notice of nonreappointment constitutes on its face a violation of academic freedom or improper discrimination.
(b) To seek to settle the matter by informal methods.
(c) If the matter remains unresolved, to decide whether or not the evidence submitted in support of the petition warrants a recommendation that a formal proceeding be conducted in accordance with [appropriate institutional regulations], with the burden of proof resting upon the complaining faculty member.

6. Petition for Review Alleging Inadequate Consideration. Insofar as the petition for review alleges inadequate consideration, the functions of the committee which reviews the faculty member’s petition should be the following:

(a) To determine whether the decision of the appropriate faculty body was the result of adequate consideration, with the understanding that the review committee should not substitute its judgment on the merits for that of the faculty body;
(b) To request reconsideration by the faculty body when the committee believes that adequate consideration was not given to the faculty member’s qualifications (in such instances, the committee should indicate the respects in which it believes that consideration may have been inadequate);
(c) To provide copies of its report and recommendation to the faculty member, the faculty body, and the president or other appropriate administrative officer.


205. See generally infra part III.A.1.a.
206. 408 U.S. 593 (1972); see supra part III.A.1.b.
to his dismissal, Sindermann was not notified of any charges against him and was not given an opportunity to be heard. 207

Both the Fifth Circuit Court of Appeals 208 and the United States Supreme Court 209 remanded the case to the lower court for additional findings as to Sindermann’s claims in light of the institution’s policies and practices which created an expectancy of continued employment. 210 The institution had created a de facto interest for Sindermann in the employment relationship.

Procedural due process cases such as Perry are analogous to the substantive due process cases previously discussed, wherein a property right was created through a faculty manual or some other means which engendered an expectancy of continued employment. 211 Unless the court has some basis for finding a de facto property right created by the words or deeds of an institution’s administration, there is no basis for Fourteenth Amendment claims of substantive or procedural due process. 212

b. Liberty Interest

Even if a nontenured faculty member lacks a property interest in her position, her dismissal or disciplining may give rise to a liberty interest requiring she be provided procedural due process before any action is taken against her. The U. S. Supreme Court’s decision in Board of Regents v. Roth 213 identifies when a liberty interest is implicated.

In Roth, an assistant professor of political science claimed a denial of his First and Fourteenth Amendment rights when his contract of employment was not renewed. He did not receive an explanation or a hearing on the action. 214 In reversing a lower court decision in the professor’s favor, the

207. Perry, 408 U.S. at 595.
208. Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
209. Perry, 408 U.S. at 603.
210. Id.
211. See supra III.A.1.b.
212. Even where procedural due process under the Fourteenth Amendment is not an issue, an institution of higher learning must follow its own established procedures. In Ganguli v. Univ. of Minn., 512 N.W.2d 918 (Minn. Ct. App. 1994), a professor who was denied tenure was able to force the university to reconsider her tenure application. Although she failed to properly raise her claims of violations of substantive and procedural due process, she did establish that the university had used improper procedures in denying her tenure and had acted in an arbitrary and capricious manner. Id. at 919 and n.1.
214. Id.
Supreme Court held that Roth, as a nontenured professor, did not have a constitutional right to either an explanation for his discharge or to a hearing. Due process protection under the Fourteenth Amendment is involved only where a person has a constitutionally protected liberty or property interest, which Roth, as a nontenured professor, did not possess.\textsuperscript{215} According to the Supreme Court, essential liberty rights arise "where a person’s good name, reputation, honor, or integrity are at stake because of what his government is doing to him," or where the state "imposed a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."\textsuperscript{216} The Court found that Roth was not stigmatized because of his dismissal without a notice of charges and a hearing: "It stretches the concept too far to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains free to seek another."\textsuperscript{217}

Not all negative information provided as to a faculty member implicates a liberty interest. The information must involve allegations of dishonesty, moral turpitude, criminal activity, or serious character defects\textsuperscript{218} and the statements must be false.\textsuperscript{219} In addition, the stigmatizing information must foreclose other employment opportunities.\textsuperscript{220} The courts have recognized the following statements regarding faculty as stigmatizing remarks which give rise to a liberty interest: abuse of students, alcoholism, criminal conduct, dishonesty, inability to get along with others or hostility toward authority, mental or emotional illness or instability, improper personal behavior outside of the classroom, racism, sexual misconduct, suicidal tendencies, theft, and unethical conduct.\textsuperscript{221}

But not all negative information about an employee is sufficiently stigmatizing to give rise to a liberty interest and the courts are not always consistent in what information they consider to be stigmatizing. Courts have failed to find the following comments sufficient to raise a liberty interest: dress or appearance, reduction in work force due to economics, general concerns about an employee, hostile attitude, immoral behavior, incompetence, ineffectiveness, insubordination, problems in teaching, profanity, poor

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 564.
\item \textit{Id.} at 573.
\item \textit{Id.} at 575 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895-896 (1960)).
\item RAPP, supra note 3, at 6-308.
\item RAPP, supra note 3, at 6-308.
\item RAPP, supra note 3, at 6-308.
\item RAPP, supra note 3, at 6-308-10 nn.238-249.
\end{enumerate}
\end{footnotesize}
judgment, problems in relationships with students, strike and union activities, and unprofessional conduct.\textsuperscript{222}

But even in those cases where stigmatizing comments are made about an employee, no liberty interest is raised unless the information is made public or "likely to be disseminated widely enough to damage the discharged employee’s standing in the community or foreclose future job opportunities."\textsuperscript{223}

2. Tenured Faculty

While the courts have frequently allowed colleges and universities to dismiss nontenured faculty without complying with procedural due process, such is not the case once tenure has been granted. Procedural due process is critical to protecting a public institution’s faculty from arbitrary dismissals.\textsuperscript{224} This is largely due to the property interest a teacher possesses in continued employment after tenure has been granted. Prior to termination of employment, the tenured faculty member has the right to be fully informed of the reasons for dismissal. A hearing must be provided, wherein the charges are more fully stated, and the professor is given an opportunity to challenge their sufficiency.\textsuperscript{225}

But even this constitutionally protected right can be waived by an individual. It can also be waived on behalf of an individual by a collective bargaining unit. An example of such a waiver is \textit{Antinore v. State of New York}.\textsuperscript{226}

In \textit{Antinore}, a tenured public employee was suspended without pay pending removal proceedings on charges of misconduct. The employee contended that the collective bargaining agreement illegally denied him a presuspension hearing. The court held that parties to a collective bargaining agreement can waive constitutionally guaranteed rights and procedures and establish dispute resolution procedures that do not provide employees with full constitutional protection.\textsuperscript{227}

\textsuperscript{222} RAPP, \textit{supra} note 3, at 6-310.2-.4 nn.266-80.
\textsuperscript{223} RAPP, \textit{supra} note 3, at 6-310 (citing Brandt \textit{v.} Board of Co-op. Educ. Servs., 820 F.2d 41, 44 (2d Cir. 1987) \textit{[Brandt I]}, \textit{sub. opinion}, 845 F.2d 416 (2d Cir. 1988) \textit{[Brandt II]}).
\textsuperscript{224} Olswang & Fantel, \textit{supra} note 45, at 5.
\textsuperscript{227} \textit{Id.}; Matthew W. Finkin, "A Higher Order of Liberty in the Workplace:" \textit{Academic Freedom and Tenure in the Vortex of Employment Practices and Law}, 53 \textit{LAW & CONTEMP. PROBS.} 357 (Summer 1990); William H. Daughtrey, Jr., \textit{The Legal
However, unless the procedural due process requirements for tenured faculty have been clearly waived, the procedures must be strictly complied with before any adverse employment action can be taken against the tenured faculty member. Failure to comply with procedural due process requirements can result in an immediate reversal of any action taken by the institution against the faculty member.\textsuperscript{228}


228. The AAUP recommends the following Statement of Procedural Standards in Faculty Dismissal Proceedings to protect the rights of tenured faculty members:

\begin{itemize}
  \item \textbf{1. Preliminary Proceedings Concerning the Fitness of a Faculty Member}
  When reasons arise to question the fitness of a college or university faculty member who has tenure or whose term of appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with the faculty member in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, a standing or \textit{ad hoc} committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment if possible, and, if none is effected to determine whether in its view formal proceedings to consider the faculty member’s dismissal should be instituted. If the committee recommends that such proceedings should be begun, or if the president of the institution, even after considering a recommendation of the committee favorable to the faculty member, expresses the conviction that a proceeding should be undertaken, action should be commenced under the procedures which follow. Except where there is disagreement, a statement with reasonable particularity of the grounds proposed for the dismissal should then be jointly formulated by the president and the faculty committee; if there is disagreement, the president or the president’s representative should formulate the statement.

  \item \textbf{2. Commencement of Formal Proceedings}
  The formal proceedings should be commenced by a communication addressed to the faculty member by the president of the institution, informing the faculty member of the statement formulated, and informing the faculty member that, at the faculty member’s request, a hearing to determine whether he or she should be removed from the faculty position on the grounds stated will be conducted by a faculty committee at a specified time and place. In setting the date of the hearing, sufficient time should be allowed the faculty member to prepare a defense. The faculty member should be informed, in detail or by reference to published regulations, of the procedural rights that will be accorded. The faculty member should state in reply whether he or she wishes a hearing, and, if
so, should answer in writing, not less than one week before the date set for
the hearing, the statements in the president’s letter.

3. Suspension of the Faculty Member
Suspension of the faculty member during the proceedings is justified only
if immediate harm to the faculty member or others is threatened by the
faculty member’s continuance. Unless legal considerations forbid, any such
suspension should be with pay.

4. Hearing Committee
The committee of faculty members to conduct the hearing and reach a
decision should either be an elected standing committee not previously
concerned with the case or a committee established as soon as possible after
the president’s letter to the faculty member has been sent. The choice of
members of the hearing committee should be on the basis of their
objectivity and competence and of the regard in which they are held in the
academic community. The committee should elect its own chair.

5. Committee Proceeding
The committee should proceed by considering the statement of grounds for
dismissal already formulated, and the faculty member’s response written
before the time of the hearing. If the faculty member has not requested a
hearing, the committee should consider the case on the basis of the
obtainable information and decide whether the faculty member should be
removed; otherwise the hearing should go forward. The committee, in
consultation with the president and the faculty member, should exercise its
judgment as to whether the hearing should be public or private. If any facts
are in dispute, the testimony of witnesses and other evidence concerning the
matter set forth in the president’s letter to the faculty member should be
received.

The president should have the option of attendance during the hearing. The
president may designate an appropriate representative to assist in developing
the case; but the committee should determine the order of proof, should
normally conduct the questioning of witnesses, and, if necessary, should
secure the presentation of evidence important to the case.

The faculty member should have the option of assistance by counsel, whose
functions should be similar to those of the representative chosen by the
president. The faculty member should have the additional procedural rights
set forth in the 1940 Statement of Principles on Academic Freedom and
Tenure, and should have the aid of the committee, which needed, in
securing the attendance of witnesses. The faculty member or the faculty
member’s counsel and the representative designated by the president should
have the right, within reasonable limits, to question all witnesses who testify
orally. The faculty member should have the opportunity to be confronted
by all adverse witnesses. Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as the statements of the witness, should nevertheless be disclosed to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence should be duly recorded. Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure.

6. Consideration by Hearing Committee
The committee should reach its decision in conference, on the basis of the hearing. Before doing so, it should give opportunity to the faculty member or the faculty member’s counsel and the representative designated by the president to argue orally before it. If written briefs would be helpful, the committee may request them. The committee may proceed to decision promptly, without having the record of the hearing transcribed, where it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing if its decision would be aided thereby. It should make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable. Publicity concerning the committee’s decision may properly be withheld until consideration has been given to the case by the governing body of the institution. The president and the faculty member should be notified of the decision in writing and should be given a copy of the record of the hearing. Any release to the public should be made through the president’s office.

7. Consideration by Governing Body
The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee’s decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. only after study of the committee’s reconsideration should the governing body make a final decision overruling the committee.

8. Publicity
Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements about the case by either the faculty member or administrative officers should be avoided as
C. Other Constitutional and Statutory Challenges

While the success of substantive and procedural due process claims under the Fourteenth Amendment are dependent upon whether the claimant has a vested property right or liberty interest, such is not the case as to other constitutional and statutory challenges to the legality of performance reviews. With increasing frequency, faculty members who are denied continued employment, salary increases, promotion, or tenure are basing their complaints on grounds other than substantive or procedural due process claims. The following constitutes the more prevalent claims being made today. These claims are not dependent upon the existence of vested property rights and claimants are finding that the courts are much more receptive to hearing these cases on their merits.

1. First Amendment Claims (Free Speech)

Regardless of whether a faculty member has obtained tenure, a state employee cannot be discharged, or denied promotion, for any reason that intrudes on the employee’s First Amendment right to free speech.229 Before the protection of the First Amendment can be invoked, it must be demonstrated that the employee was engaged in constitutionally protected speech. The parameters of what constitutes constitutionally protected speech are set out in the case of Pickering v. Board of Education.230

In Pickering, the United States Supreme Court delineated between speech protected by the First Amendment from retaliatory actions of employers and that speech which is not protected by the Constitution. A teacher wrote a letter to a newspaper criticizing the Board of Education’s allocation of school funds and, in particular, the school superintendent’s failure to disclose the reason why additional tax revenues were needed. This public criticism led to the teacher’s dismissal.231 The Supreme Court held that the teacher’s First Amendment rights were violated by her dismissal because she spoke out on matters of legitimate public concern.232

231. Id. at 566-67, 575-78.
232. Id. at 571.
**Pickering** extends First Amendment protection to employees who speak on matters of public concern, but denies it to those who address matters of purely personal interest. What constitutes a matter of public concern can only be determined by the content, form, and context of a given statement as revealed by the whole record.\(^{233}\) Absent the most unusual circumstances, federal courts will not review the wisdom of personnel decisions taken against employees who speak out not as citizens upon matters of public concern, but instead as employees upon matters of purely personal interest.\(^{234}\)

Regardless of the doctrine of academic freedom and First Amendment claims and tenure rights, faculty members of state supported colleges and universities are public employees and their institutions are public employers. In determining a public employee’s rights of free speech, a balance must be struck between the interests of the employee as a citizen commenting on matters of public concern and the state’s interest as an employer in promoting the efficiency of the public services it performs through its employees.\(^{235}\)

The key to First Amendment analysis of government employment decisions, then, is this: The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.\(^{236}\)

The government as employer has far greater power in restricting employees’ speech than does the government as sovereign.\(^{237}\) Examples of restrictions government as employer may place on employees’ speech include barring employees from being rude to customers, barring employees from making offensive or vulgar utterances to the public or coworkers, prohibiting an employee from counseling her coworkers to do their jobs contrary to

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233. Connick v. Myers, 461 U.S. 138 (1983) (assistant district attorney’s constitutionally protected right of free speech was not violated when she was discharged after circulating an intra-office questionnaire concerning office transfer policy, office morale, the need for a grievance committee, and level of confidence in supervisors).
237. Id. at 1886 (citing Pickering, 391 U.S. at 568; Civil Service Comm’n v. Letter Carriers, 413 U.S. 548, 564 (1973), superseded by statute as stated in Bavers v. Cornett, 865 F.2d 1517 (8th Cir. 1989); Connick, 461 U.S. at 147).
management's instructions, and firing an employee for criticizing management's policies.238

Even constitutionally protected speech can be a legitimate basis for denying tenure or even disciplining a tenured faculty member. A professor whose speech constantly disrupts the harmony of a university and which destroys the collegiality of a department could find that conduct forms a basis for the termination of employment or disciplinary action.239 A few courts have gone so far as to conclude that remarks which are merely disruptive, or constitute "hate speech," are not entitled to First Amendment protection.240

Parate v. Isibor241 is an excellent example of the application of the balancing test established in Pickering. The case revolved around a conflict between Natthu S. Parate, a nontenured associate professor in the engineering department of Tennessee State University (TSU), Edward I. Isibor, TSU's dean of the School of Engineering and Technology, and Michael Samuchin, who served as head of the Department of Engineering.242

In his first semester at TSU, Parate taught the course "Groundwater and Seepage." Under the course's grading scale, students who earned ninety to one hundred percent of the total classroom points received an "A" grade and students who earned eighty to ninety percent received a grade of "B." Parate also had a policy of upgrading an individual student's grade in light of an individual student's extenuating circumstances. Two students, identified as X and Y, received grades of eighty-six in Parate's class. The grade of Student X was raised from B to A because Student X had been involved in a serious legal matter during the course. Parate refused, however, to raise the grade of Student Y because Student Y cheated on the final examination. Student Y had also presented false medical excuses as to his class absences.243

238. See generally Churchill, 114 S. Ct. at 1886 and cases cited therein; Damrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993) (coach's locker room speech in which he used racial epithets was not on a matter of public concern, and thus the university's decision not to renew his employment contract did not violate the First Amendment).

239. Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981); but see Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991) (free speech and tenure rights of professor who expressed controversial views on blacks and the commission of crimes were violated when college: (1) created shadow sections to which students were encouraged to switch; (2) created ad hoc committee of faculty to investigate professor's writings and not his conduct), modified, 966 F.2d. 85 (1992).


241. 868 F.2d 821 (6th Cir. 1989).

242. Id.

243. Id. at 823-24.
Student Y, a Nigerian, told Parate that he would get Dean Isibor, a fellow Nigerian, to change the grade. After Student Y contacted Isibor, the dean began pressuring Parate to change Student Y’s grade to an A. Isibor instructed Parate to change the grade and to prepare a memorandum to the effect that course grading distribution had been changed to make eighty-six an A. Parate refused and Isibor insulted Parate by questioning his teaching ability and where Parate got his degree. The department head, Samuchin, also began to pressure Parate to change Student Y’s grade and Parate finally gave in, especially because he feared future reprisals from Isibor.244

Even after Parate changed Student Y’s grade, Samuchin and Isibor harassed Parate. They challenged Parate’s grading criteria in other courses, sent letters critical of his teaching methods, and gave him low performance evaluations. Parate was even denied authorization for professional travel and appropriate reimbursements.245

On a number of occasions Isibor and Samuchin interrupted a class taught by Parate and criticized Parate in front of the students. Isibor went so far as to take over the instruction of a class and to order Parate to attend the class as a student.246

Parate was eventually dismissed from his position at TSU. He filed an action against Isibor and Samuchin, individually and in their official capacities, as well as against TSU and the Board of Regents of the State University and Community College system of Tennessee.247 In his cause of action, Parate asserted claims for violations of his right to academic freedom under the First Amendment, and his liberty and due process rights under the Fourteenth Amendment. In addition, he filed state claims for defamation, interference with his property right to work, retaliatory discharge, and intentional infliction of emotional distress. Parate sought preliminary and injunctive relief, as well as damages.248 The district court eventually dismissed all of Parate’s claims and granted the defendants’ motions for summary judgment.249

On appeal, the Sixth Circuit Court of Appeals affirmed the district court’s ruling except as to Parate’s claim that his First Amendment rights had been violated when he was forced to change Student Y’s grade from B to A. As to that issue, the appellate court remanded the case for a determination of

244. Id. at 824.
245. Id.
246. Id. at 825.
249. Id. at 826.
damages and whether Parate was discharged due to the exercise of his First Amendment right to academic freedom. 250

In its opinion, the Sixth Circuit stressed that United States public education is committed to the control of local and state authorities. As a result, courts cannot intervene to resolve educational conflicts that do not involve basic constitutional values. 251

In Parate's case, the court found that most of the actions taken against Parate by Isibor and Samuchin did not violate constitutional values. As a nontenured faculty member, his classroom activities were subject to review in determining whether to grant or deny tenure. TSU was free not to renew Parate's contract as a nontenured professor if his pedagogical attitude and teaching methods failed to conform to institutional standards. The court held that the First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself. Possibly even more importantly, the court noted that a university may dismiss a nontenured professor for any reason, or no reason, and the professor has no recourse unless the dismissal abridges a constitutionally protected right. 252

Although the court found Isibor and Samuchin's disruption of Parate's classes to be unprofessional, their conduct did not violate Parate's First Amendment right as they were free to attend, observe, and criticize the way Parate conducted his classes. 253 Also, the removal of Parate as the teacher in a specific class did not violate his substantive due process rights because he had no constitutional right to teach a specific class. 254 The decision not to renew Parate's contract also was not actionable because he was a nontenured professor and had no property interest in his job. The court also noted that Parate was not being denied a choice of career given that he could seek employment at another university. 255

As to forcing Parate to change Student Y's grade, however, the court held that Parate's First Amendment rights had been violated. The assignment of a letter grade is symbolic communication which sends a specific message to the student as to the student's skills, ability, and knowledge. The freedom to assign grades is of substantial importance to a professor and is entitled to protection under the First Amendment. 256

250. Id. at 833.
251. Id. at 830 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
252. Id. at 827.
253. Id. at 830-31.
254. Id. at 832; see also Sullivan v. Brown, 544 F.2d 279 (6th Cir. 1976).
255. Parate, 868 F.2d at 831; see also infra part III.A.1.a.
256. Parate, 868 F.2d at 827-28.
Another good example of the overlap of academic freedom and the First Amendment is *Cohen v. San Bernardino Valley College*. Cohen, a tenured professor, taught English and film studies at San Bernardino Valley College (SBVC). He also taught a remedial English class.

In his English course, Cohen admittedly used a confrontational style of teaching designed to "shock" his students into thinking and writing about controversial subjects. He assigned provocative essays, including Jonathan Swift's "A Modest Proposal." Cohen brought up such subjects as obscenity, cannibalism, and consensual sex with children. He often used vulgarities and profanities in his classroom.

During one of his English classes, Cohen read aloud some articles from *Hustler* and *Playboy*. At the end of class he assigned to his students the task of writing essays defining pornography. One female student, Murillo, asked for an alternative assignment, but Cohen refused her request.

Murillo stopped attending the English class and received a failing grade for the semester. Murillo filed a complaint with the English department asserting that Cohen had sexually harassed her. According to Murillo, in addition to the frequent use of profanity and sexual topics in the class, Cohen would look down Murillo's shirt and the shirts of other female students. She also claimed that Cohen offered to help her get a better grade if Murillo would meet him in a bar.

The SBVC Faculty Grievance Committee held a hearing to determine the validity of Murillo's complaint. After hearing witnesses called by Murillo and Cohen and reviewing relevant documents, the Committee found that Cohen had violated the Community College District's policy against sexual harassment by creating a hostile learning environment. The Committee recommended to the district's president that disciplinary action be taken against Cohen.

The president concurred with the Committee's findings and Cohen appealed the decisions to the San Bernardino Community College Board of Trustees ("Board"). The Board upheld the previous two decisions and as disciplinary action ordered Cohen to:

258. Id. at 1410.
259. Id.
260. Id.
261. Id.
262. Id. at n.4.
263. Id. at 1411.
1. Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines;
2. Attend a sexual harassment seminar within ninety days;
3. Undergo a formal evaluation procedure in accordance with the collective bargaining agreement; and,
4. Become more sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students’ ability to learn.264

Cohen responded by filing suit under 42 U.S.C. § 1983 against SBVC’s Board, chancellor, president, his department head, and members of the Faculty Grievance Committee. The § 1983 claims were dismissed by the district court on the grounds of immunity under the Eleventh Amendment.265

The court did consider Cohen’s assertion that SBVC’s sexual harassment policy violated the free speech provisions of the First Amendment.266 He further argued that his right to academic freedom prevented SBVC from punishing him for his classroom behavior.267

The court ruled against Cohen and held that SBVC’s sexual harassment policy did not violate Cohen’s First Amendment rights or impinge on academic freedom. In its decision, the court noted that the rhetoric in cases upholding academic freedom is often broader than the holdings. Many cases restrict the government from regulating the nonclassroom conduct of teachers, such as those cases striking loyalty oath requirements, attempting to punish teachers for so-called "treasonable" or "seditious" words or actions, or attempting to speak out on matters of public concern.268

As to classroom conduct, the courts have protected the rights of teachers and placed restrictions on the state’s control of classroom discussion, but only to a limited extent. For example, the use of an obscenity for demonstrated educational purposes, the discussion of controversial topics, or the assignment

264. Id.
265. Id.; A detailed explanation of § 1983 claims and the immunity doctrine can be found infra parts III.C.2.b.1.-2.
266. Id. Cohen also claimed that the policy violated the free speech provisions found in the California Constitution. Id. at 1412 n.6.
267. Id. at 1412.
268. Id. at 1412 (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952) (loyalty oaths or attempts to force teachers to disclose their allegiance to "subversive" groups)); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (unconstitutionally vague statute forbid "treasonable" or "seditious" words)).
of a controversial novel are all rights protected by academic freedom and sometimes by the First Amendment as well.269

But the courts have not ceded all classroom control to teachers. The courts have repeatedly held that colleges and universities have broad control over such core concerns as course content, homework, and grading policies.270 Courts have also found that colleges and universities retain substantial control over pedagogical methods.271

The court concluded that Cohen's invocation of academic freedom did not adequately address the case's complex issues. It therefore refused to hold SBVC's disciplinary action violative of academic freedom.272

In scrutinizing Cohen's First Amendment claims, the court quickly dismissed Cohen's claim of the right to use profanity. The court held that profanity is not speech on a matter of public concern and therefore is not protected by the First Amendment.273

The court took a different view, however, as to Cohen's assignment of sexually focused topics and his commentary on those topics. The court found such actions and words to relate to matters of public concern. As a result, SBVC had the duty to show that its legitimate interests outweighed Cohen's First Amendment interests.274

This balancing test requires a court to consider the manner, time, place, and context of the offending expressions, along with "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."275

In applying the balancing test to Cohen's conduct and speech, the court found that SBVC had brought forth substantial, uncontroverted evidence


273. Id. at 1416.

274. Id. at 1417.

275. Id. at 1417 (citing Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968)).
establishing that Cohen had disrupted the educational process.\textsuperscript{276} Furthermore, his methods, while effective as to some students, had created a hostile learning environment which hampered the learning process for other students.\textsuperscript{277} The court concluded that the restrictions placed on Cohen by SBVC were not onerous.\textsuperscript{278}

A controversial case decided in 1994 by the Second Circuit Court of Appeals, \textit{Jeffries v. Harleston},\textsuperscript{279} has clarified the issue of when an institution of higher education can discipline a tenured professor for the professor’s public remarks without violating the professor’s academic freedom or First Amendment rights.

Professor Jeffries was chairperson of the black studies department at City College of New York ("City College"), which is part of the City University of New York ("CUNY") system. In the summer of 1991 he was the keynote speaker at an off-campus symposium on black culture. In speaking on perceived bias in New York State’s public school curriculum, Jeffries made several derogatory remarks about Jews.\textsuperscript{280} As a result of the speech and the controversy it ignited, CUNY officials voted to reduce Jeffries’ term as department chairperson to one year, even though the normal term was three years.\textsuperscript{281}

Jeffries brought suit against the university officials alleging that his First Amendment rights had been violated.\textsuperscript{282} Jeffries sought reinstatement and punitive damages.\textsuperscript{283}

Based on the jury’s answers to interrogatories, the trial court judge concluded that university officials had violated Jeffries’ First Amendment rights because his speech was substantially on matters of public concern and did not harm the university.\textsuperscript{284} In addition to ordering Jeffries to be reinstated as chairperson, the court awarded Jeffries $360,000 in punitive damages.\textsuperscript{285}

On appeal, the Second Circuit Court of Appeals upheld the order to reinstate Jeffries, but vacated the punitive damages award because of the jury’s

\textsuperscript{276} \textit{Id.} at 1418.
\textsuperscript{277} \textit{Id.} at 1419.
\textsuperscript{278} \textit{Id.} at 1420.
\textsuperscript{280} \textit{Jeffries}, 52 F.3d at 11.
\textsuperscript{281} \textit{Id.}
\textsuperscript{282} \textit{Id.;} Jeffries also claimed a violation of 42 U.S.C. § 1983.
\textsuperscript{283} \textit{Jeffries}, 52 F.3d at 11.
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} \textit{Id.;} See also the lengthy trial court’s opinion at 828 F. Supp. 1066.
inconsistent responses to the special verdict questions regarding punitive damages. The case was remanded for trial on the issue of punitive damages.286

The United States Supreme Court granted the defendant’s petition for certiorari, vacated the Second Circuit’s judgment, and remanded the case with instruction to the court to reconsider its opinion in light of the Supreme Court’s decision in Waters v. Churchill.287

In Waters, a four-justice plurality held that the government could fire an employee for disruptive speech even where there was no proof of actual injury. Instead, the government need only prove that the speech threatened to interfere with government operations.288

The Second Circuit interpreted the Waters plurality opinion to hold that "the closer the employee’s speech reflects on matters of public concern, the greater must be the employer’s showing that the speech is likely to be disruptive before it may be punished."289 But Waters does permit the government to fire an employee for speaking on a matter of public concern if: "(1) the employer’s prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech."290

The court concluded that Jeffries’ First Amendment rights were not violated because those university officials who voted to reduce Jeffries’ term as chairperson did so because they reasonably expected that his speech would harm the university.291 In addition, Jeffries’ academic freedom was not violated because the position of chairperson at CUNY is ministerial and provided no greater contact with the public than an ordinary professorship.292 The university had made no effort to silence Jeffries, to limit his access to the marketplace of ideas in the classroom, or to affect his status as a tenured professor.293

286. Jeffries, 52 F.3d at 11-12; see also Jeffries v. Harleston, 21 F.3d 1238, 1249-50 (2d Cir. 1994).
287. Jeffries, 52 F.3d at 12.
288. Id. (citing Waters v. Churchill, 114 S. Ct. 1878, 1887, 1890 (1994)).
289. Id. at 13.
290. Id.
291. Id. at 14.
292. Id.
293. Id. at 14, 15.
2. Discrimination Claims

An ever burgeoning body of federal and state laws and regulations prohibits certain types of discrimination in such personnel decisions as hiring, firing, discipline, promotion, and compensation. These laws place an ever greater premium upon institutions being able to justify their personnel decisions and to clearly demonstrate that the decisions were made in accordance with legally permissible criteria and procedures. Many of the personnel litigation cases taking place in education today are rooted in such statutes which prohibit discrimination. These cases can be brought regardless of whether a faculty member has obtained a vested property right in her employment. The following is a brief summary of some federal legislation which is particularly applicable to higher education and the personnel decision-making process.

a. Title VII In General

Of all the statutes prohibiting employment discrimination, probably the most significant is Title VII of the Civil Rights Act of 1964, as amended. Certainly, the majority of civil rights claims are filed under Title VII. Title VII prohibits employers from discriminating against any person as to hiring, firing, discipline, promotion, and compensation on the basis of race, color, religion, sex, or national origin. Title VII originally excluded educational institutions from its coverage. This exemption, however, was repealed in 1972.

A Title VII violation can be proven by the presentation of direct evidence. In a tenure case, for example, direct evidence can be used to establish that the votes of specific members of the decision-making body were influenced adversely by the tenure applicant’s race or national origin.

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294. RAPP, supra note 3, § 6.04(1) (6-34.3).
Evidentiary examples of discrimination could consist of racial epithets made by tenure board members or remarks of racial stereotyping. The faculty member denied tenure must still establish causation showing that race or national origin was a determinative factor in the negative employment decision. He must also be able to prove he would have been voted tenure except for discrimination against his race or national origin.299

Title VII violations can also be proven by circumstantial evidence. For example, if a tenure committee had a history of denying tenure to qualified African-American applicants, while granting tenure to less qualified white applicants, then in an individual case of denying tenure to a qualified African-American it seems more likely than not that the applicant was rejected because of race.300

Although Title VII applies to discrimination based on race and religion as well as sex, claims of sex discrimination now constitute a fertile area of litigation in the tenure and promotion process, especially under claims of disparate impact. Sex discrimination consists of imposing barriers to employment which affect one gender but not the other. A form of sex discrimination recently recognized by the Supreme Court is "hostile environment" sexual harassment. This form of discrimination arises when sex discrimination becomes sufficiently severe or pervasive "to alter the conditions of employment and create an abusive working environment."301

In the past, some courts followed a hands off policy as to educational institutions and personnel decisions, even where claims of sex discrimination were made. Such courts followed the long established doctrine that they should not substitute their judgments for those of the academic evaluators, so long as judgments are made in accordance with prescribed procedures.302

Today, however, courts are increasingly less inclined to take a hands off approach regarding sex discrimination claims in education, especially where highly subjective criteria are used in the evaluation process. As a result, the Equal Employment Opportunity Commission (EEOC) found reasonable cause to believe that a medical school's tenure program, which used highly subjective criteria and was applied almost exclusively by male faculty members, discriminated against female faculty members in violation of Title

299. Id.
VII. The Commission described the criteria set out in the faculty handbook as "amorphous." 303

The EEOC also found that a university's tenure process discriminated against females because the evaluation process was too dependent upon subjective evaluations. The criteria for tenure and promotion included: knowledge of subject matter, ability to communicate, organization and planning, self-criticism and improvement, interest in the students, professional development, research and writing, "the Life of the Mind," service to the university, and Christian faith and professional life. 304

Of course, not all claims of sex discrimination are legitimate claims. Female faculty members who are incompetent or lack adequate teaching or research skills are no more entitled to tenure or promotion than their male colleagues with similar deficiencies. 305 In one case, a female faculty member's continued disagreements with members of the academic community and refusal to accept valid teaching assignments constituted sufficient grounds to deny her tenure. 306

There are two common forms of discrimination that an employer can be guilty of committing under Title VII in using performance evaluations. Each form is distinguished by the way in which the discriminatory conduct is implemented.

1. Disparate Treatment

Disparate treatment is an employer's intentional treatment of some persons less favorably than others because of their race, color, religion, sex, or national origin. Proof of a discriminatory nature is demonstrated by a showing that the employment practice in issue (e.g., hiring, pay scale, promotion) is deliberate and not accidental. 307 In Title VII cases, the complainant has the burden of proof of establishing a prima facie case of discrimination in employment. In a disparate treatment case, this means only that the complainant must demonstrate that she (1) is a member of a class of persons protected by Title VII; (2) is qualified for the position sought or, if already an employee, is entitled to a pay increase or promotion; (3) is rejected despite the qualifications; and (4) the employer sought applications from, or


rewarded, individuals who possessed no greater qualifications than the complainant.\textsuperscript{308}

Disparate treatment cases can be proven by direct evidence of a discriminatory motive, such as statements made by the person engaging in unlawful employment acts, or by circumstantial evidence, by comparing the treatment of the person claiming discrimination with other persons similarly situated. Finally, statistical evidence showing a pattern or practice of disparate treatment can be used.\textsuperscript{309}

\textit{a. Nondiscriminatory Reason Defense}

Once the complainant establishes a prima facie case, the burden shifts to the employer to articulate a nondiscriminatory reason for the conduct. If an employer can demonstrate that, regardless of the discriminatory employment practice, the same action would have been taken for nondiscriminatory reasons, an employer can escape an action filed under Title VII.\textsuperscript{310} In a number of education cases, employers have been able to establish that, regardless of certain discriminatory conduct such as nonrenewal of employment, other legitimate reasons existed for the action.\textsuperscript{311} Even after the employer articulates such a reason, the complainant may still prevail if she can demonstrate that the employer’s reasons are a mere pretext for discrimination.\textsuperscript{312}

A good example of a disparate treatment case involving Title VII violations, as well as violations of the Equal Pay Act,\textsuperscript{313} is demonstrated in the class action lawsuit of \textit{Wilkens v. The University of Houston}.\textsuperscript{314} The University of Houston established a pay plan for professional and administrative staff. The plan allocated jobs among nine job levels, with level one the lowest and level nine the highest. Each job level was assigned a salary range and each job level was further divided into four pay quartiles, with the first quartile being the lowest and the fourth quartile the highest. A salary range was then assigned to each quartile within a job level.\textsuperscript{315}

\begin{itemize}
  \item \textsuperscript{308} \textit{Fed. Reg. Empl. Serv.} (Law Co-op), Job Discrimination § 2:141.
  \item \textsuperscript{309} \textit{Perham}, 436 F. Supp. at 1105.
  \item \textsuperscript{310} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
  \item \textsuperscript{312} \textit{Burdine}, 450 U.S. at 253.
  \item \textsuperscript{313} 29 U.S.C. § 201 (1994).
  \item \textsuperscript{314} 725 F. Supp. 331 (S.D. Tex. 1989).
  \item \textsuperscript{315} \textit{Id.} at 334.
\end{itemize}
The plan failed to cure already existing pay inequities between male and female employees. As a result, a class action lawsuit was filed against the university by the female employees alleging gender-based discrimination.\textsuperscript{316}

The court found that the female employees established a prima facie case of employment discrimination which the university failed to successfully refute. Using statistical analysis, the female employees established that of the sixty-eight people in the academic division covered under the pay plan, thirty-four were male and thirty-four were female. Of the sixty-eight persons, twenty were being paid below the first quartile for their job levels. It was to be expected that roughly half would be men and half would be women. In actuality, however, three men and seventeen women were being paid salaries below the first quartile for the job levels. The complainants proved that the probability of such gender-based imbalance occurring by chance is four in 10,000. The court held that such a remote possibility eliminated chance as a factor in explaining the pay disparity and the university failed to rebut the inference that the disproportion was gender based.\textsuperscript{317}

An example of egregious Title VII violations involving sex discrimination and sexual harassment can be found in \textit{Jew v. University of Iowa}.\textsuperscript{318} The court’s decision also explicitly explains the proof necessary in education cases to establish a discrimination claim.

The plaintiff was a tenured associate professor of medicine at the University of Iowa and was in the College of Medicine’s department of anatomy. She came to the University of Iowa with the head of the department of anatomy when he was hired.\textsuperscript{319}

Faculty members opposed to the department head began a systematic campaign of sexual harassment against the plaintiff which lasted for thirteen years. She was falsely accused of having an affair with the department head and of using sex to gain influence with him. Her professional accomplishments were denigrated and rumors were spread that her accomplishments rested on sexual achievements rather than merit.\textsuperscript{320} Sexually suggestive cartoons were posted on the door and wall outside the plaintiff’s laboratory. Faculty members also initiated a pattern of sexually denigrating speech about the plaintiff and referred to the plaintiff as a "shit," "bitch," and "whore" in the presence of faculty, graduate students, and department staff members.\textsuperscript{321}

\begin{flushright}
316. \textit{Id.}
317. \textit{Id.} at 334-35.
318. 749 F. Supp. 946 (S.D. Iowa 1990)
319. \textit{Id.} at 947.
321. \textit{Id.} at 948.
\end{flushright}
In finding for the plaintiff on her Title VII sexual harassment claim, the court noted that Title VII is not limited to "economic" or "tangible" discrimination. By using such words as "terms, conditions, or privileges of employment," Congress intended to strike at the entire spectrum of disparate treatment of men and women. A plaintiff may establish a Title VII violation by proving that a hostile or abusive work environment was created because of the plaintiff's sex. To be actionable, the sexual harassment must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." To prevail in a hostile work environment sexual harassment claim, the plaintiff must prove:

1. She belongs to a protected group;
2. She was subject to unwelcome harassment;
3. The harassment was based on sex;
4. The harassment affected a term, condition, or privilege of employment; and,
5. The employer knew or should have known of the harassment in question and failed to take proper remedial action.

The court concluded that the plaintiff in *Jew* had proven, by a preponderance of the evidence, all five elements of her hostile work environment sexual harassment claim against the University of Iowa.

The court also held that the evidence supported the plaintiff's claim of a discriminatory failure to promote. A failure to promote, or otherwise reward, a qualified employee because of sex discrimination can be proven by circumstantial evidence as well as direct evidence. In a circumstantial evidence case, courts use the formula articulated in *McDonnell Douglas v. Green*. Under the *McDonnell Douglas* analysis, the plaintiff always retains the burden of proof. The plaintiff must first make a prima facie case of sex discrimination using a flexible formula tailored to the particular type of discrimination challenged and the employment decision at issue. This is often accomplished by comparing the plaintiff's academic accomplishments with those faculty members in comparable positions and length of service who did receive raises or promotions. Once a plaintiff makes a prima facie case,
the employer must articulate a legitimate nondiscriminatory reason for the employment decision. If an employer states such a reason, the plaintiff must prove that the purported reason is merely a pretext for discrimination. In considering the employer's articulated reason and the circumstantial evidence suggesting a discriminatory motive, the court must determine whether the employer's explanation is worthy of credence, or if the employer's intent was discriminatory.\footnote{329}

In a direct evidence case of discriminatory motive relating to an adverse employment decision, the *McDonnell Douglas* analysis need not be used. Instead, courts can apply the "mixed motive" construction set out in *Price Waterhouse v. Hopkins*.\footnote{330} Under the "mixed motive" construction, if the plaintiff uses direct evidence (e.g., statements of racial or sex bias by those evaluating the employee for a raise or promotion) to establish discrimination, the employer must do more than articulate a legitimate reason for the adverse employment decision. The employer must prove, by a preponderance of the evidence, that the same decision would have been justified and made absent the discriminatory factors, and that the outcome was not influenced by discrimination.\footnote{331}

In *Jew*, the court found that on several occasions the plaintiff was denied promotion to full professorship because of the sexual bias of some male members of the evaluation committee. The plaintiff had been evaluated on the basis of: (1) her teaching, (2) research and publications, and (3) service to the institution and the profession. All of the eight evaluators agreed that the plaintiff had fulfilled the teaching and service criteria. Five of the eight evaluators, however, voted against promoting the plaintiff because she had not established her "independence" in the area of research and publications.\footnote{332}

\footnote{329} *Id.* (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 248 (1981)). In Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1155 (D. Mass. 1980), the court set out a modified version of the McDonnell Douglas analysis applicable to tenure cases in order to determine whether the plaintiff had established a prima facie case of discrimination: "[T]he court concludes that the elements of a prima facie showing for the case at bar consists of proof of the following elements: (1) that plaintiff is a member of a racial or national origin minority; (2) that plaintiff was a candidate for tenure and was qualified under Smith College standards, practices or customs; (3) that despite his qualifications plaintiff was rejected; and (4) that tenure positions in the Department of English at Smith College were open at the time plaintiff was denied tenure in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure."


\footnote{331} *Jew*, 749 F. Supp. at 960; *see* Fields v. Clark Univ., 966 F.2d 49 (1st Cir. 1992), for a discussion of the McDonnel Douglas and Price Waterhouse standards.

\footnote{332} *Jew*, 749 F. Supp. at 953.
The sex bias of the five evaluators who voted against the plaintiff was established by remarks made before and during the evaluation process. Two of the professors doing the evaluation had previously referred to the plaintiff as a "whore" and had made other denigrating remarks about the plaintiff. During the deliberation, other committee members voting against the plaintiff's promotion commented on the advantages given women and blacks. The five committee members voting against the plaintiff paid scant attention to the plaintiff's extensive publication record in prominent research journals or her record of obtaining grants. Instead, they permitted sex bias to influence their votes.333

b. Bona Fide Occupational Qualification Defense

Like any other employer, higher education institutions can raise the bona fide occupational qualification (BFOQ) defense to a disparate treatment claim. Title VII permits an employer to employ an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 334 Obviously, a BFOQ defense will be successful in only very limited circumstances and can never be used as a defense to racial discrimination. 335 A higher education case in which the BFOQ defense was successfully used is Pime v. Loyola University of Chicago. 336

Loyola University of Chicago is a large Catholic university with a long tradition in the Roman Catholic religious order of the Society of Jesus, whose members are more commonly referred to as Jesuits. 337

To preserve the Jesuit presence in Loyola's philosophy department, Loyola decided to replace three retiring tenured faculty members with Jesuit philosophers and passed a resolution to that effect. 338 Pime, a Jewish man, who had been employed in Loyola's philosophy department for a number of years as a part-time lecturer, was informed that a full-time tenure track position would not be available to him for three or four years because non-Jesuits would not be considered for the three faculty openings. 339

Pime filed suit under Title VII claiming religious discrimination. The district court granted judgment in favor of Loyola after finding that being a

333. Id.
336. 803 F.2d 351 (7th Cir. 1986).
337. Id. at 352.
338. Id. at 352-53.
339. Id.
Jesuit was a BFOQ.\textsuperscript{340} On appeal, the Seventh Circuit Court of Appeals affirmed the district court's ruling.\textsuperscript{341}

The court held that there was evidence of a relationship between Loyola and the Society of Jesus and that a Jesuit "presence" was important to the successful operation of the university: "It appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained."\textsuperscript{342}

2. Disparate Impact

Disparate impact discrimination involves employment practices that are facially neutral in their treatment of different groups, but fall more harshly on one group than another. Proof of discriminatory motive is not necessary. To establish a prima facie case of adverse impact, a victim need only show a causal connection between the facially neutral employment practice and the disproportionate exclusion of a protected group from the work force. As in disparate treatment cases, statistical evidence is commonly used to establish disparate impact cases.\textsuperscript{343}

In response to a disparate impact claim, the employer must show that the employment practice is both a business necessity and is job-related. Business necessity is determined by inquiring into whether the job criteria arise out of a manifest business need. The job-related standard addresses whether there is a correlation between the criteria used and job performance.\textsuperscript{344}

An example of an adverse impact case would be an employer's rule that an "unwed pregnancy" is grounds for termination of employment. Such a rule obviously does not have the same impact on all employees given that men cannot get pregnant. It does not even affect all single female employees the same way because it penalizes only those sexually active female employees who become pregnant. Despite the invidious discriminatory impact,


\textsuperscript{341} Pime, 803 F.3d at 354.

\textsuperscript{342} Id. at 353-54 (the court noted that seven of the 31 faculty positions in the department of Philosophy would be filled by Jesuits).


\textsuperscript{344} Id. at 1015.
employers, including educational employers, have at times enacted such a rule for reasons based on morality, embarrassment, or religious issues.

There are a number of cases involving public schools where school boards enacted policies requiring the automatic disqualification of unwed parents from employment in the districts. The policies were all justified on the grounds that the students should not be exposed to such immoral conduct. In all of the cases, the policies were stricken by the courts because the courts found no rational relationship between the "unwed pregnancy" policies and the normal school operations.345

An interesting disparate impact claim involving an institution of higher learning can be found in Ray v. Peabody Institute of Johns Hopkins University, Conservatory of Music.346 The Conservatory had a compensation system under which faculty salaries were affected by students' studio choices. The more students a professor enrolled and retained in his study, the greater his salary.347

A black music professor claimed that his studio contained a disproportionate number of minority-group students. He further argued that these students were at a greater risk to drop out, thus resulting in a reduction in the professor's salary. He therefore concluded that the compensation system, although facially neutral, had a disparate impact on him.348

The court ruled against the professor. It found no evidence of disparate impact or treatment. Students were free to choose their professors and no student assignments were made by the Conservatory. Furthermore, the complaining professor dedicated himself to recruiting minority students for his studio and should not have been surprised that a disproportionate number of minority students ended up in his studio.349 Finally, the court characterized the compensation system as a sound educational policy resulting in salary reductions for faculty members of diverse races and ages.350

Another example of a disparate impact claim arises out of the case of EEOC v. Francis W. Parker School.351 The school had a policy of linking wages to experience. A claim was made that the policy had a disparate impact on older applicants because their level of experience would command higher

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346. 11 F.3d 31 (1993).
347. Id.
348. Id.
349. Id. at 34.
350. Id. at 33.
351. 67 F.3d 1470 (7th Cir. 1994).
salaries than the school's range allowed. It was further contended that the entire policy was a subterfuge for the belief that older teachers were less effective than younger teachers. In rejecting the discrimination claim, the court held that linking wages with experience is an economically feasible and a reasonable means of determining salaries.\textsuperscript{352}

Examples of promotion and tenure policies which could conceivably have an adverse impact on certain classes of people would be terminal degree requirements or requirements that faculty members possess a certain proficiency in speaking English. Although the terminal degree requirement would apply to all faculty members, it could have a greater adverse impact on African-American professors who, because of past discriminatory practices, may proportionally have fewer terminal degrees than white professors. Similarly, the English proficiency requirement could have an adverse impact on foreign born and trained professors for whom English is a secondary language.

Regardless of the potential adverse impact of such requirements, they are not unlawful so long as institutions can establish that the requirements arise out of a business necessity and are job-related.

In \textit{Scott v. The University of Delaware},\textsuperscript{353} for example, a black professor unsuccessfully pursued a class action suit on behalf of the university's black faculty. He claimed that the university's requirement that tenure candidates hold a terminal degree discriminated against racial minorities because they were underrepresented as holders of doctoral degrees. The appellate court, however, upheld the the lower court's ruling that the disparate impact of the terminal degree requirement was "justified by the legitimate interest of the university in hiring and advancing persons who are likely to be successful in adding to the fund of knowledge in their chosen disciplines and effective in the teaching of graduate students in those disciplines."\textsuperscript{354}

\textit{b. Sections 1981 and 1983 Claims}

As previously seen in this Article in such cases as \textit{Siu v. Johnson}\textsuperscript{355} and \textit{Cohen v. San Bernadino College},\textsuperscript{356} performance evaluations can also give rise to actions under the civil rights provisions of 42 U.S.C. §§ 1981 and 1983. Although useful in determining the validity of performance evaluations, both sections have inherent limitations in their application.

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\textsuperscript{352} \textit{Id.}
\textsuperscript{354} \textit{See Scott v. Univ. of Del.}, 455 F. Supp. 1102, 1126 (D.Del. 1978).
\textsuperscript{355} \textit{See supra} part III.A.1.C.
\textsuperscript{356} \textit{See supra} part II.A.
Section 1981 provides that all persons in the United States shall have the same rights as "white citizens." Section 1981 was passed to address the problem of the slavery of African-Americans and the vestiges of slavery, but under its provisions all persons, regardless of race, are protected from racial discrimination.

In comparison, § 1983 prohibits discrimination not only on the basis of race, but also as to sex, religion, national origin, or color. Section 1983 also prohibits acts of retaliation by employers. Retaliation involves employment-related decisions which are made on the basis of an employee's opposition to conduct which may be in violation of the 1964 Civil Rights Act, or on the basis of an employee's participation in a Title VII enforcement action. An employer is prohibited from discriminating against employees who protest discriminatory conditions of employment. The most common forms of retaliation include failures to promote or to give wage increases.

Section 1983, however, is limited in its application to performance reviews and personnel decisions because its application requires the existence of a property right. A faculty member who contests a personnel decision under 1983 usually claims that the action complained of has deprived her of property rights without process of law as required by the Fourteenth Amendment. But, as already explained, absent some contractual arrangement, a professor does not have a vested property right in a teaching job before receiving tenure.

1. Eleventh Amendment

Section 1981 and 1983 claims against institutions of higher education are further complicated by the Eleventh Amendment, which grants states qualified

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
359. RAPP, supra note 3, at 604[2][h].
immunity from suits filed by the citizens of other states\textsuperscript{361} and from suits filed by its own citizens.\textsuperscript{362}

The Eleventh Amendment prohibits damage claims against state officials acting in their official capacities.\textsuperscript{363} It also bars federal courts from granting relief against state officials whose conduct violates only state law.\textsuperscript{364} A state university, as an arm of the state, is entitled to the same qualified immunity for purposes of the Eleventh Amendment.\textsuperscript{365}

The Eleventh Amendment cloak of immunity extends to all government agencies, commissions, or boards which have such a close relationship with the state that suits against such entities are, in reality, suits against the state.\textsuperscript{366} The individuals who comprise such agencies, commissions, and boards, including state university educators, administrators, and board members, are entitled to the protection of the Eleventh Amendment so long as they are acting within their official capacities.\textsuperscript{367}

Although the Eleventh Amendment often effectively insulates state officials from lawsuits, it is not without its limitations. It does not bar a suit to enjoin as unconstitutional a state official’s action.\textsuperscript{368} This exception to the immunity doctrine is based on the premise that an unconstitutional state enactment is void. As a result, action purportedly authorized by such an enactment cannot be taken in an official capacity because the underlying state authorization for the action is a nullity.\textsuperscript{369}

\textsuperscript{361} The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI.


\textsuperscript{365} Lewis v. Midwestern State Univ., 837 F.2d 197 (5th Cir.), cert. denied, 488 U.S. 849 (1988); Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987); Cannon v. Univ. of Health Sciences/The Chicago Medical School, 710 F.2d 351, 357 (7th Cir. 1983).

\textsuperscript{366} Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985); "It is not necessary that the state be named as a party, only that the named party is, in actuality, the alter ego of the state." Blake v. Kline, 612 F.2d 718, 721 (3d Cir. 1979), cert. denied, 447 U.S. 921 (1980).

\textsuperscript{367} WILLIAM A. KAPLAN, THE LAW OF HIGHER EDUCATION 75 (1989).

\textsuperscript{368} Ex parte Young, 209 U.S. 123 (1908).

\textsuperscript{369} Papasan, 478 U.S. at 276.
Damages also may be awarded when a state official is sued and held liable in his individual capacity.\textsuperscript{370} Individual-capacity suits involve actions taken by government agents outside the scope of their official capacities.\textsuperscript{371}

A good example of a lawsuit being successfully pursued under section 1983 regardless of the immunity doctrine of the Eleventh Amendment can be found in \textit{Dube v. State University of New York}.\textsuperscript{372} An assistant professor of African studies brought suit claiming violations of both Fourteenth and First Amendment rights when he was denied tenure as well as a promotion to associate professor. The assistant professor claimed that the denial of promotion resulted from his controversial teachings that Zionism in Israel was a form of racism.\textsuperscript{373}

The Second Circuit Court of Appeals ordered the district court to dismiss the assistant professor's Fourteenth Amendment claim because, as a nontenured faculty member, he lacked a protected property interest.\textsuperscript{374} The court, however, determined that it was not appropriate to dismiss the assistant professor's First Amendment claim because a factual issue existed as to whether school officials had retaliated against the assistant professor for his controversial views by denying him tenure and a promotion.\textsuperscript{375}

As to the defendant's claims of qualified immunity, the court held that the defendant individuals were not entitled to qualified immunity under section 1983 on the assistant professor's First Amendment claim. Regardless of the court's usual deference to academic decisions, it stated that the First Amendment does not tolerate laws or other means of coercion or intimidation which have a chilling effect upon the free exchange of ideas in the classroom.\textsuperscript{376}

2. Eleventh Amendment and Community Colleges

A community college sued by a faculty member as to a promotion or tenure decision is not necessarily entitled to the immunity protection of the Eleventh Amendment, even if a four-year state-supported college or university could successfully plead the Eleventh Amendment as a bar to a lawsuit under the same factual situation. A college is not entitled to Eleventh Amendment immunity in a suit alleging the denial of tenure and a promotion.
immunity if it has a significant degree of autonomy from the state,\textsuperscript{377} a situation common to community colleges.

A good example of a community college's inability to claim immunity under the Eleventh Amendment can be found in \textit{Parsons v. Burns and NWACC Board of Trustees}.\textsuperscript{378} The case involved the dismissal of the division chair of the science, mathematics, and physical education department of Northwest Arkansas Community College. The dismissal was the result of a conflict between the division chair, Parsons, and NWACC's president, Burns, over Parsons' political activities in which he criticized certain legislature bills proposed by the Arkansas Teachers' Association (ATA).\textsuperscript{379}

Burns ordered Parsons to stay out of potentially controversial political issues. Parsons then announced that he would run for the state senate. NWACC's Board of Trustees then passed a political leave policy, placed Parsons on leave, and removed his belongings from his office. In response, Parsons held a press conference concerning his treatment by NWACC.\textsuperscript{380}

Although Parsons had received satisfactory evaluations, he was notified that his contract with NWACC would not be renewed. Burns accused Parsons of insubordination and of using school time and resources to further his political activities. After the Board of Trustees unanimously voted not to renew Parsons' contract, he filed suit, claiming that his First Amendment rights of peaceful assembly and free speech had been violated. He sought reinstatement and damages for himself and his wife, including punitive damages.\textsuperscript{381}

NWACC raised the Eleventh Amendment as a bar to Parsons' lawsuit. The court held that the Eleventh Amendment is applicable only if an educational entity is an "arm-of-the-state," a decision which must necessarily be made on a case by case basis.\textsuperscript{382}

Typically, the determination of whether a given entity is an arm-of-the-state is made by resort to a number of factors including the following: the state-law characterization; the degree of state control and supervision over the entity; whether the entity has authority to sue and be sued in its name; the source of funds for the entity including the ability of the entity to issue bonds and levy taxes on its own behalf; the degree of local autonomy the entity enjoys; whether the entity is concerned primarily with local, as opposed to statewide, problems; whether the entity has the right to hold and

\textsuperscript{377} Appeal of Community College of Delaware County, 254 A.2d 641 (1969).
\textsuperscript{379} \textit{Id.} at 1374-75.
\textsuperscript{380} \textit{Id.} at 1375.
\textsuperscript{381} \textit{Id.} at 1376.
\textsuperscript{382} \textit{Id.} at 1378.
use property; and whether the entity performs governmental or proprietary functions.\textsuperscript{383}

The court noted that Amendment 52 to the Arkansas Constitution invested the general assembly with authority to establish districts to furnish community college instruction and technical training.\textsuperscript{384} Although the districts receive general operation funds from the state, they are empowered to spend more funds than those provided by the state and can levy taxes to provide for additional operation funds.\textsuperscript{385}

In addition, local control of each community college is vested in a local board of nine members which has broad authority over the administration of the college.

The local board is empowered, \textit{inter alia}: (1) to select its officers; (2) to develop, with the advice of the State Community College Board, the educational program; (3) to appoint, with the advice of the State Community College Board, a president and fix the compensation and terms of office of the president who shall be the executive officer of the local board and the college; (4) to appoint, upon nomination of the president, members of the administrative and teaching staffs and to fix their compensation and terms of employment; (5) to enter into contracts; (6) to accept grants or contributions of money to be used for any of its purposes; (7) to acquire, own, lease, use, and operate property; and (8) to exercise the right of eminent domain.\textsuperscript{386}

The court concluded that NWACC had taken full advantage of the autonomy available to community colleges under Arkansas law. As a result, it was structured more like a school district or political subdivision rather than an arm-of-the-state and was not entitled to Eleventh Amendment immunity.\textsuperscript{387}

c. \textit{Rehabilitation Act of 1973 and Americans With Disabilities Act (ADA)}

Protection against employment discrimination for otherwise qualified persons with any of a broad range of physical and mental disabilities is


\textsuperscript{384} Id. at 1379.

\textsuperscript{385} Id.

\textsuperscript{386} Id. at 1379-80.

\textsuperscript{387} Id. at 1380.
provided under the Rehabilitation Act of 1973 and the Americans With Disabilities Act of 1990. Colleges and universities are subject to the provisions of both acts.388

One of the most important pieces of civil rights legislation to be enacted in recent years is the Americans With Disabilities Act (ADA), which was signed by President Bush on July 26, 1990.389

The ADA protects the 43,000,000 Americans with one or more disabilities.390 Under the ADA, disability means:

1. a physical or mental impairment that substantially limits one or more of an individual's major life activities;
2. a record of such impairment; or
3. being regarded as having such an impairment.391

The ADA protects not only those with obvious mobility impairments, but also the mentally retarded and those with such hidden disabilities as epilepsy, cancer, heart disease, or AIDS.392 Even those persons with mental disturbances may be protected.393

Employment discrimination is prohibited under Title I of the ADA. Title I states the following policy goal:

(a) General rule - No covered entity shall discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement of or discharge.394

A covered entity includes any employer with 25 or more employees. Since July 26, 1994, an employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year...395

390. Id. § 12101(a).
391. Id. § 12102(2).
394. Id. § 12112(a).
395. Id. § 12111(5)(A).
A qualified person with a disability is defined as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position." 396

The ADA requires employers to make a "reasonable accommodation" to an applicant's or employee's known physical or mental limitations. Employers must modify work environments to make existing facilities readily accessible and usable by disabled employees. The ADA prohibits discrimination against disabled people in the same manner that Title VII prohibits discrimination against other protected groups. 397

To avoid discriminating against a "qualified person with a disability" an employer must be careful to define the "essential functions" of a position. An employer must be able to explain why any function is listed as essential. It is suggested that an employer itemize and prioritize all duties of a particular position and write the job description in clear, concise, and accurate language. 398

The federal regulations describe "essential function" as:

[T]he fundamental job duties, of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include marginal functions of the position. 399

Factors which can be considered in determining whether a job function is essential include: employer judgment, time necessary to perform a function, work experience of current and past employees in that position, limited number of employees available to perform the function, consequences of not requiring a certain function, and the fact that the position exists to perform the function. The forgoing factors are just some that can be taken into consideration. Each case is decided on its own merits. 400 Once the employer has defined the essential functions of a job, the employer must design hiring and advancement procedures which are nondiscriminatory toward the disabled. 401

To establish a prima facie case of discrimination, a "qualified person with a disability" need only show that she was discriminated against and that a reasonable accommodation could have been made by the employer to

396. Id. § 12111(8).
399. 29 C.F.R. § 1630.2(n) (1995).
400. Ryan, supra note 398, at 15.
accommodate the complainant's disability. "Reasonable accommodation" includes: (1) making existing facilities readily accessible and usable to disabled persons; (2) restructuring jobs, such as modifying work schedules; (3) modification of equipment or devices, or even the acquisition of new equipment or devices; (4) modification of examinations, training materials, or policies; (5) hiring qualified readers or interpreters, and (6) similar modifications for disabilities.402

To defend a prima facie case of discrimination under the ADA, the employer must prove that a reasonable accommodation would be an "undue hardship." Undue hardship is determined on a case by case basis, but the following factors may be taken into consideration: the facility's financial resources; the number of persons employed; the overall size of the operation; the impact of the expense on the business; and the type of business, its structure, and its functions.403

The significance of the ADA to performance evaluations lies in the fact that a candidate for employment, promotion, retention, or tenure cannot have her disabilities taken into consideration as to job performance, at least in most circumstances. For example, if a professor's scholarship activities are limited by the professor being legally blind, the university would have an obligation to make reasonable accommodations to resolve the professor's difficulties, such as by hiring readers or furnishing research materials written in Braille. Only after the university reasonably accommodated the professor as to her disability, and the professor failed to meet the institution's publication guidelines, could the institution deny promotion or tenure to the professor.

Just as importantly, in making the initial hiring decision the institution could not make a determination that the candidate's disabilities would prevent the candidate from meeting teaching, research, scholarship, and public service requirements. Only if the institution could prove that a reasonable accommodation would constitute an undue hardship could it lawfully deny employment to a disabled person based on the person's disabilities.

Tyndall v. National Education Centers404 is a good example of the application of the ADA in education. Tyndall was an instructor at a business college who suffered from lupus erythematous, an autoimmune system disorder that causes joint pain and inflammation, fatigue, and urinary and intestinal disorders. The college's administration accommodated Tyndall's medical condition by permitting her to take sick leave, to come into work late or leave early, and to take breaks from ongoing classes whenever she felt ill.

403. Id. § 12111(10)(A)&(B).
404. 31 F.3d 209 (4th Cir. 1994).
It was not until Tyndall's work absences increased that the college's administration terminated her employment.\textsuperscript{405}

After her employment was terminated, Tyndall filed an ADA action against the college. Tyndall contended that she was qualified for her job because she could perform all of her teaching duties and received "good" and "excellent" performance evaluations.\textsuperscript{406}

The court held, however, that Tyndall's dismissal did not violate the ADA. Regardless of her performance evaluations, Tyndall was not a qualified person protected by the ADA as she could not meet the job's attendance requirements. Tyndall failed to meet her scheduled classes and spend time with her students. In a seven-month period she missed more than forty days of work. She also twice missed the crucial beginning of an instructional cycle and indicated to the college she would miss a third. Tyndall's attendance record was poor even with the college's extensive accommodation of her medical condition.\textsuperscript{407}

\textit{d. Age Discrimination in Employment Act of 1967}

The Age Discrimination in Employment Act of 1967 (ADEA) requires employers to evaluate persons age forty or older on their qualifications or ability to competently perform their jobs, and not on their age.\textsuperscript{408} Like any other employer, colleges and universities are prohibited from considering a faculty member's age in making decisions as to employment, salary increases, promotion, tenure, and retention. In \textit{Fisher v. Vassar College},\textsuperscript{409} for example, Vassar College was found to have violated the ADEA and provisions of the Equal Pay Act when it denied tenure to a female biology professor. The senior faculty members of the biology department recommended that Fisher be denied tenure on the grounds that she did not demonstrate "the outstanding quality called for in the Guidelines for Appointment, Reappointment and Promotion of Faculty at Vassar College as set forth in the Faculty Handbook." The committee denigrated Fisher's scholarship, teaching ability, and service.\textsuperscript{410}

The evidence, however, including a review of Fisher's record by three outside evaluators, strongly supported Fisher's contention that she should have been granted tenure. In particular, the court noted that Vassar, while denying

\begin{itemize}
  \item \textsuperscript{405} \textit{Id.} at 211-12.
  \item \textsuperscript{406} \textit{Id.} at 212-13.
  \item \textsuperscript{407} \textit{Id.} at 213-14.
  \item \textsuperscript{408} 29 U.S.C. § 621(b) (1994).
  \item \textsuperscript{409} 852 F. Supp. 1193 (S.D.N.Y. 1994).
  \item \textsuperscript{410} \textit{Id.} at 1197.
\end{itemize}
Fisher tenure, granted tenure to three male faculty members whose publication records in prestigious journals were inferior to Fisher's.\textsuperscript{411}

Also, in \textit{Karlen v. City Colleges of Chicago},\textsuperscript{412} an early retirement plan offered to faculty members was found to violate the ADEA. The court held the plan to be a mere subterfuge to discriminate against older faculty.\textsuperscript{413}

\textbf{e. Equal Pay Act}

In \textit{Fisher}, Vassar College was found to have violated the provisions of the Equal Pay Act as well as the ADEA.\textsuperscript{414} The Equal Pay Act requires that female employees receive pay comparable to male coemployees if the employees are performing work substantially equal in skill, effort, and responsibility under similar working conditions.\textsuperscript{415}

To establish a prima facie case under the Equal Pay Act, the plaintiff must show that she received less pay than a male coemployee performing work substantially equal in skill, effort, and responsibility under similar working conditions.\textsuperscript{416} The comparison must be made against a particular male and not against some hypothetical male with a composite average of a group's skill, effort, and responsibility.\textsuperscript{417}

Once a plaintiff makes a prima facie case under the Equal Pay Act, the burden shifts to the employer to prove by a preponderance of the evidence that the pay differential is justified. Justification can be established by one of four statutory exemptions: a seniority system, a merit system, a system that measures earnings by quantity or quality, or any other differential system based on factors other than sex.\textsuperscript{418}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1192, 1203, 1205.
\item 837 F.2d 314 (7th Cir. 1988).
\item Id. at 320. Before 1994, the ADEA did not prohibit the compulsory retirement of any higher education employee who had attained 70 years of age even if the employee was tenured. Since the end of 1993, however, such mandatory retirements have been prohibited. \textit{See} 29 U.S.C. § 631(d) (1994).
\item Fisher, 852 F. Supp. 1193.
\item Broussard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 979 (8th Cir. 1991); Spaulding v. Univ. of Wash., 740 F.2d 686, 696-97 (9th Cir. 1984).
\item Houck v. Virginia Polytechnic Institute and State Univ., 10 F.3d 204, 206 (4th Cir. 1993) (citing EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1076-78 (4th Cir. 1982)).
\item Id. at 207 (citing Aetna Ins. Co., 616 F.2d 719, 724 (4th Cir. 1980)).
\end{enumerate}
\end{footnotesize}
IV. CONFIDENTIALITY

Permeating the legal challenges to the performance review process is the question of confidentiality. How much information should be revealed to candidates as to their reviews? In particular, are candidates entitled to know their evaluators' identities?

A. Confidentiality in General

Some universities have voluntarily adopted a policy of openness in the academic review process. Many universities will supply tenure candidates with the names of evaluators as well as the text of their views.\(^\text{419}\) The performance review boards of many institutions, however, prefer to conduct their business in private. The reasoning is that open and public forums chill deliberations and inhibit the free and open exchange of opinions and information that is necessary to the deliberative process.

Of course, those whose careers are under review often view confidential proceedings as matters of secrecy. They suspect that the cloak of secrecy permits their enemies and critics to conduct vendettas and affect careers with impunity.

The issue of confidentiality is further complicated by state open meeting laws. Many states have enacted legislation forcing certain actions and deliberations to be conducted in public. Much litigation has occurred in recent years over whether higher education institutions are subject to open meeting laws, and in particular whether any or all processes of performance reviews are subject to such laws.

A case which illustrates this conflict of openness versus privacy, especially in light of a state open meeting law, is *Donahue v. State of Iowa, Board of Regents, and University of Iowa.*\(^\text{420}\)

Donahue, an associate professor of law at the University of Iowa, was denied promotion to full professor. She appealed her denial through the university's departmental and college decision making process.\(^\text{421}\)

The university operations manual set forth four procedural stages for denial of promotion: (1) informal discussions; (2) requests for a written


420. 474 N.W. 2d 537 (Iowa 1991).

421. Id. at 537.
statement of reasons; (3) investigation by and, when deemed appropriate, a hearing before a faculty judicial panel; and (4) the president’s decision.\textsuperscript{422}

The plaintiff alleged that an open meeting violation occurred at the third procedural stage of a hearing before the faculty judicial panel. The faculty judicial panel was formed through the university’s faculty senate, which was elected by the faculty at large. Under university rules all documents used in the investigation were deemed confidential; therefore, either party could prevent the dissemination of documents deemed unsuitable.\textsuperscript{423} Prior to the hearing, the plaintiff demanded that the hearing be an open one. She wanted a local newspaper reporter to be present, as well as a member of a national association of college educators. The panel, however, rejected her requests on grounds of confidentiality.\textsuperscript{424}

Iowa has an open meeting law. Section 21.3 of the Iowa Code provides that the meetings of governmental bodies are to be in open session, unless closed sessions are expressly permitted by law, and the law covers both informal and formal sessions. Section 21.6(3)(c) of the law provides that action taken in violation of the statute is void.\textsuperscript{425} The Iowa Code includes in its definition of governmental bodies multi-membered bodies to which the Board of Regents or university president has delegated management and control.\textsuperscript{426}

Previously, in \textit{Greene v. Athletic Council of Iowa State University},\textsuperscript{427} the Iowa Supreme Court held a university athletic council subject to open meeting laws. However, at that time, the definition of governmental bodies referred to "authorized" governmental bodies and the court took that phrase to mean that the law applied to any governmental body regardless of whether the body had any policy-making power.\textsuperscript{428} After \textit{Greene}, the Iowa Code was amended and the term \textit{authorized} was deleted.\textsuperscript{429}

Given the change in wording, the Iowa Supreme Court refused to apply the open meeting law in \textit{Donahue}. The court held that the faculty judicial panel was essentially an advisory board without any policy-making power. As such, its decisions were not binding on the Board of Regents and the judicial panel was separated from the regents by layers of university officials.\textsuperscript{430} The court further stated that it was up to the legislature to set the parameters

\textsuperscript{422} Id.
\textsuperscript{423} Id. at 537-38.
\textsuperscript{424} Id. at 538.
\textsuperscript{425} Id.
\textsuperscript{426} See \textsc{Iowa Code} § 21.3(a)(b)(c)(d) (1995).
\textsuperscript{427} 251 N.W.2d 559, 562 (Iowa 1977).
\textsuperscript{428} Id. at 562.
\textsuperscript{429} Id. at 538-39.
\textsuperscript{430} Id. at 539.
of the open meeting law and to weigh efficient administration against a measure of confidentiality. Although the court might or might not set some boundaries differently, it had a responsibility to apply those set by the legislature.\textsuperscript{431}

In addition to the problem of conducting peer reviews in private, there is the additional question of the confidentiality of the sources involved in the process. Should those being reviewed by their peers be able to discover who said what about them? Peer reviews consist of gathering letters of evaluation or other statements from faculty members, especially tenured members, about those being evaluated. If a faculty member up for promotion or tenure receives negative evaluations, it is only natural to want to know not only the substance but the source of the evaluation. It is also just as natural for the party making the negative evaluation to want to remain anonymous. This conflict of complete access to records versus confidentiality was recently litigated in the case of \textit{Scharf v. Regents of the University of California}.\textsuperscript{432}

In an action brought by six present or former members of the University of California faculty denied tenure or promotion, the American Federation of Teachers, and the University Council, a California court had the opportunity to rule on these conflicting rights.

The University of California's tenure and promotion process begins with the department chairperson notifying a potential candidate that a determination will be made and requesting pertinent information. The chairperson solicits letters from qualified individuals, including a reasonable number nominated by the candidate. The solicitations include the opinions of departmental colleagues and "distinguished extramural informants." Candidates have the right to identify persons they contend will not objectively evaluate the candidates' qualifications or performance. This information is preserved in each candidate's file.\textsuperscript{433}

Before a decision on tenure or promotion is made, the chairperson must provide the candidate with an opportunity to review her file. The candidate, however, receives only an oral or written "comprehensive summary" of the evaluations, and the identities of the evaluators are kept private. The confidentiality of the evaluators is maintained throughout the review process, including the appeal of any adverse determinations.\textsuperscript{434}

The petitioners contended that the requirement of confidentiality deprived them of a meaningful opportunity to respond to criticism resulting in adverse determinations in violation of their constitutional rights to privacy and due

\textsuperscript{431} Id.
\textsuperscript{433} Id. at 230.
\textsuperscript{434} Id.
process of law.\textsuperscript{435} The university argued that confidential evaluations are necessary to an effective review process. It contended that without confidentiality there is a substantial likelihood that qualified evaluators would refuse to provide evaluations. The university contended that the procedures were fully in accord with the standards advocated by the American Association of University Professors.\textsuperscript{436}

The court sided with the university. It held that the university’s need for confidentiality, combined with the privacy rights of the evaluators, outweighed the disclosure rights of the employees being evaluated.\textsuperscript{437}

California courts have been so protective of the confidentiality of faculty evaluators that they have even refused to permit promotion and tenure candidates to inquire into the motives of known or suspected evaluators. In \textit{Kahn v. Superior Court},\textsuperscript{438} a candidate denied a permanent appointment at Stanford filed a defamation and tortious interference with an advantageous business relationship suit against a tenured professor. The candidate, who contended that a particular professor persuaded the department to deny tenure on nonacademic grounds, sought to take the professor’s deposition. The trial court ordered the deposition for the sole purpose of inquiring into the professor’s statements, motives, and conduct in connection with the review and evaluation of the candidate’s application.\textsuperscript{439}

The court of appeals, however, set the deposition order aside. It concluded that, even though academic freedom could be used to shield nonacademic and insidious motives for denying tenure, in California the fostering of academic excellence finds support in the constitutional right to privacy.\textsuperscript{440}

\textbf{B. Piercing the Veil of Confidentiality}

It is important to note that the complainant in \textit{Kahn} did not make a claim of discrimination. To pierce the veil of confidentiality, a candidate deprived of retention, promotion, or tenure must make a claim of illegal discrimination against the college or university and its evaluators. It is only through a discrimination claim that full discovery can be obtained because some courts, especially California state courts, are so enamored with the confidentiality of the evaluation process so as to deny discovery even in those cases where the motives for denying tenure are highly questionable.

\begin{table}[h!]
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\begin{tabular}{l}
\textbf{435.} Id. at 229. \\
\textbf{436.} Id. at 231. \\
\textbf{437.} Id. at 237. \\
\textbf{439.} Id. at 665. \\
\textbf{440.} Id. at 674. \\
\end{tabular}
\end{table}
In discrimination cases, however, courts may require that performance evaluations be fully disclosed to an affected person. In *Stone v. University of Maryland Medical Sys. Corp.*, 441 a state university medical professor was able to obtain full disclosure of his peer review materials. The professor, a surgeon at the University of Maryland School of Medicine, was the target of malpractice actions. Following peer review committee investigations, the professor resigned from his position at the medical school. He then filed an action under 42 U.S.C. § 1983 against the university and a number of individuals.442

One of the issues in the case was the discoverability of the medical review records. The medical school and other defendants contended that under a Maryland state statute, the records were not discoverable.443 According to the defendants, the applicable state law preserved the confidentiality of peer review records in order to foster effective, thorough, frank, and uninhibited exchange among peer review committee members in order to ensure quality patient care.444

In overruling the trial court's decision to seal the records, the Fourth Circuit Court of Appeals held that the Maryland law in question had no application to a civil proceeding initiated by a physician who was the subject, or party to, the proceedings of the medical review committee.445 In such limited circumstances medical review committee records are not insulated from discovery and, furthermore, the records can be admitted into evidence in the civil action.446

The issue of the confidentiality of peer review documents has now been clarified by the United States Supreme Court. In *University of Pennsylvania v. EEOC*, 447 the court held that such documents are not protected by a common-law evidentiary privilege or a First Amendment academic freedom privilege.448

The case involved Rosalie Tung, a Chinese-American woman, who was hired in 1981 as an associate professor in the University of Pennsylvania's Wharton School of Business. She was a tenure candidate during the 1984-85 academic year. Although her colleagues in the management department

441. 948 F.2d 128 (4th Cir. 1991).
442. *Id.* at 129.
444. *Stone*, 948 F.2d at 130.
445. *Id.*
446. *Id.*
448. *Id.* at 195-202.
recommended her for tenure, the personnel committee refused Professor Tung’s tenure request and gave her no explanation for the denial.\textsuperscript{449}

Professor Tung subsequently learned that the committee justified its decision by contending the school of business was not interested in China-related research. Believing the committee’s justification to be a pretext for discrimination, Professor Tung filed a complaint with the Equal Employment Opportunity Commission claiming racial and gender discrimination.\textsuperscript{450}

To investigate Professor Tung’s claim, the EEOC requested all documents related to Professor Tung’s tenure denial. The university agreed to provide the requested documents, except for the confidential peer reviews.\textsuperscript{451}

The dispute between the EEOC and the university eventually reached the United States Supreme Court.\textsuperscript{452} The university claimed that the release of the confidential peer review material would have a chilling effect on the tenure process. To protect the material from the EEOC’s scrutiny, as well as the scrutiny of others, the university claimed that the information contained in the confidential peer review was protected from disclosure by 1) an evidentiary privilege\textsuperscript{453} and 2) academic freedom.\textsuperscript{454}

As to the university’s privilege claim, the Court noted that Congress, in enacting the 1972 amendments to Title VII, recognized discrimination within universities to be a compelling problem. The 1972 amendments brought tenure decisions under the same scrutiny as the decisions of employers in other fields. As a result, the EEOC’s authority to obtain any evidence relevant to a discrimination claim applied to faculty tenure decisions.\textsuperscript{455}

As to the academic freedom argument, the Court observed that previous cases affirming academic freedom involved government attempts to directly regulate the content of academic speech. The Court held that the EEOC was not attempting to regulate the content of academic speech or to provide academic hiring criteria. Rather, the EEOC was investigating whether nonacademic criteria had been used in the hiring process. The Court characterized the university’s argument that disclosure of the confidential peer review would harm academic freedom as being "extremely attenuated" and "speculative."\textsuperscript{456}

\textsuperscript{449} Id. at 185.  
\textsuperscript{450} Id.  
\textsuperscript{451} Id. at 186.  
\textsuperscript{453} University of Pennsylvania, 493 U.S. at 188-89.  
\textsuperscript{454} Id. at 195.  
\textsuperscript{455} Id. at 489-495.  
\textsuperscript{456} Id. at 198-200; see also Peterson v. City College of the City Univ. of N. Y.,
V. REDUCING LIABILITY EXPOSURE

Recognizing that performance evaluations are filled with legal pitfalls, one question naturally arises: What can institutions of higher education do to lessen their liability exposure? Fortunately, a wealth of information is available to assist colleges and universities in devising legally acceptable evaluation programs. The widespread use of performance evaluations in and out of education and a long line of court decisions on the validity of numerous performance evaluation programs have led to some well-defined principles over the years.

As explained in this Article, faculty members being considered for salary increases, retention, promotion, or tenure are usually judged in four broad categories: (1) scholarship, (2) teaching, (3) service, and (4) ability to work with others. The courts have approved the use of these traditional categories for evaluating faculty performance. The courts have also acknowledged that evaluating faculty performance sometimes involves an assessment of intangible qualities that cannot always be measured by objective standards.

Past leniency by the courts in reviewing so-called "academic decisions," however, is not a guarantor of future leniency. As the cases cited in this Article indicate, the courts are already inclined to make a much more critical appraisal of performance reviews, especially where claims of discrimination and constitutional violations are raised. There is absolutely no reason to believe that this trend of increased judicial scrutiny of traditional academic decisions will not continue. As a result, colleges and universities must be much more careful in developing, administering, and using performance evaluations. In particular, they should strive for objectivity and fairness in performance evaluations.

A. Developing a Performance Evaluation System

Good beginnings often lead to good results, and performance evaluation systems are no different. No performance evaluation system should be developed without adequate consultation among administrators, board members, faculty, and legal counsel. In many, if not most instances, expert assistance may be needed in designing the system. Certainly, a complete review of the available literature on designing performance evaluation systems would be advisable. However, some general guidelines can be given:


evaluations should be conducted by the committee charged with the obligation to formulate an evaluation system. This literature review must be done before a design is attempted. The following constitutes a checklist of some other actions to be taken before a performance evaluation system is designed or revised:

1. Those responsible for developing the plan are given a clear charge that clearly defines their task.
2. The prior knowledge and attitudes about evaluation of those affected by the plan are determined.
3. Those being evaluated are made aware of the value of performance evaluation.
4. Persons representative of those being evaluated are involved in the development of the plan.
5. Supervisory persons responsible for implementing the system are involved in the development of the plan.
6. Development of the evaluation plan has the support and commitment of appropriate upper administrative personnel.
7. The evaluation plan is designed to fit the organization’s current mission and goals.
8. Clear, written position descriptions of those whose performance will be evaluated are in writing and are well known.460

B. Clearly Stated Purposes

Clearly stated purposes constitute the most basic component of an evaluation system.461 All elements to be included in an evaluation system must be tailored to fit their intended purposes.462 Clearly stated objectives are critical to gaining acceptance of an evaluation program.463 Also, knowing and understanding the objectives of the evaluation program are vital to determining which appraisal factors to use.464

C. Criteria and Standards

The appropriate criteria by which faculty are evaluated should be determined and stated in writing. It is only by clearly setting out the criteria

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461. Id. at 1.
462. Id.
463. Id.
464. Id. at 2.
that faculty can determine the performance expected of them and evaluators can reliably judge performance. To facilitate this, criteria should be stated as objectively as possible.\(^{465}\)

Furthermore, criteria must actually measure job responsibilities and performance. The following checklist serves as a useful guide in developing criteria:

1. Criteria used in the appraisal program are clearly stated in writing.
2. Evaluation criteria are specific and objective.
3. Evaluation criteria are related directly to the responsibilities of the person being evaluated.
4. To the extent possible, evaluation criteria are based upon observable job behaviors or measurable results.
5. Evaluation criteria do not rely solely on vague personal traits such as commitment, initiative, and aggressiveness and do not include them at all unless they are defined in terms of overt observable behavior.
6. Evaluation criteria include achievement of previously agreed to objectives.
7. Criteria appraise the methods (means) employees use as well as the results achieved.
8. Evaluation criteria are flexible enough to allow for differences in specific responsibilities when two or more individuals perform similar jobs.
9. Adequate attention is given to both qualitative and quantitative criteria.
10. The weighting of various criteria in relation to the overall assessment is made known to the employee at the beginning of the evaluation cycle.

The establishment of appropriate standards is just as critical to the success of a performance evaluation system as the selection of appraisal criteria.\(^{466}\) Standards must be reduced to writing, provide a basis for measuring success, and designate acceptable performance levels.\(^{467}\) All standards should be objective and the same standards should be applied to all persons with comparable responsibilities.\(^{468}\)

A source of frustration for faculty members facing reappointment, promotion, and tenure decisions is the proverbial "moving target." A faculty member labors for years under one set of criteria and standards and believes he has met those only to find that his performance is now being measured by a newer and more stringent set of criteria and standards. This can be especially frustrating when the faculty member knows that other professors in similar disciplines have been granted tenure under the old criteria and some

\(^{465}\) Id. at 7, 8.
\(^{466}\) Id. at 14, 15.
\(^{467}\) Id. at 15.
\(^{468}\) Id.
of those persons, who themselves could not meet the new criteria, now sit in judgment on the faculty member's future with the institution.

Regardless of how unfair this "moving target" may be to the faculty member undergoing evaluation, the courts have given colleges and universities wide latitude in this area. For example, in *Hooker v. Tufts University*, a Tufts female physical education instructor was denied tenure because of a lack of scholarly activity. Previously, however, the university had waived scholarship requirements for physical education faculty including the university's football coach. Regardless of the appearance of unfairness, a United States district court upheld Tufts' right to change standards.

In a number of cases, faculty members have been denied tenure because they lacked terminal degrees, even though the possession of a terminal degree had not previously been a requirement for tenure. In such instances, disappointed faculty members have filed discrimination actions against their colleges and universities claiming denial of equal protection, arbitrary and capricious conduct by their institutions, and due process violations under the Fifth and Fourteenth Amendments to the United States Constitution. In each instance, the courts have denied the complaints and have upheld the right of institutions of higher education to modify and heighten their standards for promotion and tenure, even as to those faculty members who began their employment under lesser standards.

**D. Use of Evaluators**

Evaluators, or raters, are those persons responsible for conducting the evaluations. Administrators should not simply assume that almost anyone can serve as a competent evaluator. Nor should administrators give any person the responsibility of evaluating another's job performance without adequate training and preparation. The following suggestions on evaluators were made by an expert witness during a discrimination trial concerning a number of black teachers who were denied reappointment. Although the trial took place in 1975, the suggestions are even more relevant today:

1. Each evaluator should be trained in personnel evaluation generally and specifically in the use of the particular evaluative instrument.

470. *Id.* at 114-16.
2. Several of these trained evaluators should be employed for each criteria or characteristic.
3. There should be several evaluations with respect to each characteristic over a continuum of time.
4. The several evaluators should reach and record their conclusions independently.
5. All evaluating should be based on first-hand observations of that which is being evaluated.
6. All evaluations should be recorded without delay along with supporting evidence to justify the results.\(^{472}\)

**E. Documentation**

Documentation should provide an audit trail that adequately reconstructs the basis for any personnel decisions that are made.\(^{473}\) The following factors should govern the documentation of any employee’s personnel file as to performance evaluations:

1. Sufficient evidence is systematically obtained to adequately assess performance.
2. Unnecessary and unused data are not required to be furnished.
3. Data are required from a variety of independent sources each of whom is in a position to make a valid evaluation.
4. Data are collected and scored under standardized conditions.
5. Procedures spell out the responsibilities of both supervisors and those being evaluated in assembling necessary documentation.
6. Data are obtained only from those persons who have frequent opportunities to evaluate the employee’s performance.
7. Data required includes self-evaluation by the employee.\(^{474}\)

**F. Informing the Employee**

A formal written report must be prepared for each faculty member evaluated. The report should contain a summary of the faculty member’s strengths, weaknesses, and suggestions for correction along with a time frame for taking corrective measures.\(^{475}\) It is extremely important that faculty members be given specific and valid reasons as to any adverse

\(^{474}\) Id.
\(^{475}\) Hammons, supra note 460.
recommendations concerning promotion and tenure. The results of a performance evaluation should be given to a faculty member within a reasonable amount of time and before any final action is taken as to retention, pay increases, promotion, or tenure.

All faculty members should be required to sign their report, indicating that they have seen the document. The signature should not constitute an approval of, or agreement to, the findings in the report. Also, prior to final decisions being made, faculty members should be given the opportunity to file a written response to the findings in the report as to accuracy, relevance, and completeness.

Faculty members should be given appraisal interviews. The interviews should be conducted by supervisors with specific training in conducting such interviews. These interviews may focus on either developmental needs to avoid problems or judgmental decisions. However, evaluators should not attempt to accomplish both purposes in one interview. An appraisal interview should not be a monologue. Faculty members should be given an opportunity to verbally express their opinion as to the evaluation.

Of paramount concern in the entire process is the protection of the faculty member’s privacy. If a report contains erroneous material, the dissemination of that material to the public, either directly or indirectly, could expose university personnel to libel and slander lawsuits. Regardless of the accuracy or truthfulness of the information, the dissemination of such information beyond those who have a "need to know" can result in invasion of privacy lawsuits.

G. Additional Considerations in Performance Evaluations

Besides following the suggestions already set out in this Article, there are some additional considerations about which administrators and faculty members need to be aware in developing and using performance evaluations.

1. Contaminated or Deficient Appraisals

Performance evaluations should be job relevant and should accurately account for the tasks, duties, and responsibilities of the faculty member’s job. An appraisal addressing factors outside a faculty member’s job description is said to be contaminated. Examples of contamination include such factors

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476. Hammons, supra note 460.
479. LEAP, supra note 13, at 176.
as a faculty member’s lifestyle, religious practices, or other non-job-related conduct.  

Conversely, an appraisal should take into account all aspects of a faculty member’s job performance. Failure to do so results in a deficient appraisal. It can be argued that an evaluation which fails to give credit to a faculty member’s service, while listing it as a category of evaluation, is perilously deficient.  

2. Halo Effect

An inappropriate halo effect may occur where one aspect of a faculty member’s evaluation dominates her other job performance aspects. For example, the winning of a prestigious research award may result in a favorable evaluation for a faculty member who is an inept teacher or who neglects service.

3. Recency Effect

The recency effect can cause evaluators to overlook an otherwise inadequate academic career and grant advancement to an undeserving faculty member. The recency effect occurs when evaluators are swayed by a flurry of academic achievement just prior to an evaluation causing them to overlook the faculty member’s overall lack of achievement.

4. Past Record Anchoring

While a faculty member’s most recent accomplishments should not obscure an overall lackluster record, neither should a faculty member’s past record of achievement, or lack of achievement, distort a current performance evaluation. A faculty member’s overall productivity, including recent accomplishments or lack of accomplishments, should be evaluated.

H. Procedural Due Process

Finally, the entire process must afford the faculty member with procedural due process. Some procedural due process is inherent in the already suggested procedures for preparing judgmental criteria, the method of

480.  LEAP, supra note 13, at 176.
481.  LEAP, supra note 13, at 177.
482.  LEAP, supra note 13, at 177.
483.  LEAP, supra note 13, at 177.
484.  LEAP, supra note 13, at 177.
evaluating job performance, documenting the decision-making process, and informing the faculty member of the recommendation. But, procedural due process is not complete without a formal appeal system. A performance evaluation system that does not afford a faculty member at least one level of appeal for an objective review of adverse decisions is deficient and subject to legal attack.

An effective appeal procedure contains the following:

1. Faculty Acceptance

The appeal process must be known by and accepted by faculty. An appeal procedure must not be a real or perceived rubber stamp for the decisions of department heads, deans, or other administrators. The objectivity of the appeal process is extremely important if a wrongful discharge or employment discrimination case reaches the Equal Employment Opportunity Commission or the courts. 485

2. Simplicity

The appeal procedure must be simple and easy to use. The effectiveness of an appeal procedure can be diminished by complex procedures, excessive paperwork, unnecessary delays in the system, and other mechanisms which discourage use of the system. 486

3. Fair Hearing

A good appeal procedure provides both sides with a fair hearing. Faculty and institutional representatives should have adequate time to fully develop their cases, including ample time for fact finding, presentation of evidence and arguments, and an opportunity for rebuttal of each side’s contentions. 487 Naturally, the entire process must be free of internal bias and external pressures to achieve a predetermined result. 488

4. Power of Appeal Committee Clearly Delineated

The appeal procedure must clearly delineate the power of the appeal committee. Will the committee have the authority to pass judgment over reappointment, promotion, and tenure decisions and overrule those decisions

485. LEAP, supra note 13, at 177.
486. LEAP, supra note 13, at 179-80.
487. LEAP, supra note 13, at 180.
488. LEAP, supra note 13, at 180.
believed to have been erroneously made, or will it merely make recommendations to college and university officials about the proper course of action?\textsuperscript{489} An appeal committee which merely makes recommendations that officials are free to accept or ignore may do little to resolve personnel decisions and may actually increase faculty frustration if the committee’s recommendations are often ignored. Of course, the process whereby appeal committee members are appointed or elected becomes extremely important if the appeal committee has the power to make final decisions.

5. Exhaustion of Remedies

The appeal procedure should specify when faculty members are required to exhaust the internal appeals procedure before pursuing litigation in a state or federal agency or court. In some states, state law may make this determination.\textsuperscript{490}

Under the principle of comity, courts will usually require a complainant to exhaust all administrative remedies before applying to a court for relief. However, a court is not required to defer to administrative proceedings and may accept a case if the court feels that the available remedies are inadequate.\textsuperscript{491}

**Summary**

Courts still retain a certain reluctance to review college and university personnel decisions. This is especially true as to nontenured faculty members who are treated as at-will employees serving at an institution’s discretion, absent some special circumstance such as a faculty policy manual establishing a de facto property right in a teaching position. But, as a general rule, nontenured faculty members are not entitled to procedural or substantive due process when retention, promotion, and compensation decisions are made. Institutional decisions regarding nontenured faculty are reviewed by the courts under a very lenient standard. A court will disturb a personnel decision only

\textsuperscript{489} LEAP, \textit{supra} note 13, at 180.

\textsuperscript{490} LEAP, \textit{supra} note 13, at 180; see also Ashley v. Univ. of Louisville, 723 S.W.2d 866, 868 (Ky. Ct. App. 1986) (nontenured professor’s suit over being denied tenure was dismissed as premature because professor failed to first exhaust administrative remedies).

\textsuperscript{491} McDowell v. Napolitano, 895 P. 2d 218, 222-23 (N.M. 1995); see also, Pritchett v. Marshall, 375 S.W.2d 253, 257 (Ky. Ct. App. 1964) (courts will intervene without requiring an exhaustion of administrative remedies where there is a claim that constitutional rights are being violated).
if the decision-making body acted in an arbitrary and capricious manner or abused its discretion.

Tenured faculty members, however, must be afforded both procedural and substantive due process when those same personnel decisions are made about them because tenured faculty members have a vested property right. Procedural due process requires that, before a tenured faculty member’s vested property interest in her job be negatively impacted, the faculty member must be provided a hearing before an impartial decision maker after an adequate notice of charges and an opportunity to prepare a defense.

Substantive due process demands that actions affecting the rights of tenured faculty members be supported by "just cause." This is especially true as to a decision to terminate a tenured member’s employment. "Just cause" normally involves questions concerning a faculty member’s competence, relationships with students and colleagues, morality, and honesty. Judicial intervention is always appropriate when an adverse employment decision about a tenured faculty member cannot be supported by "just cause."

But regardless of whether a faculty member is tenured, judicial intervention can be expected when important personnel decisions are made in violation of a teacher’s right to free speech as protected by the First Amendment. The courts will also intervene when faculty decisions are made on the basis of race, sex, religion, national origin, disability status, or other factors protected by federal or state law.

Colleges and universities are not required by law to make intelligent personnel decisions, any more than a business is required to do so. Sometimes institutional decisions are well-reasoned, reward meritorious performance, and reflect institutional needs. But institutions also at times make ridiculous, short-sighted decisions, almost totally lacking in careful reasoning and judgment. Colleges and universities are free to make bad personnel decisions, but they are not free to make illegal personnel decisions which violate the constitutional and statutory rights of their faculty.

Hopefully, by instituting sound performance evaluation systems, colleges and universities will make personnel decisions as to both nontenured and tenured faculty members that are both wise and legal.492

492. LEAP, supra note 13, at 7.