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LAW AND POLICY UPDATE FOR ACADEMIC PROVOSTS, DEANS AND DEPARTMENT CHAIRS: FACULTY EMPLOYMENT ISSUES

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Issues involving employment, salary, promotion, tenure, and termination of faculty and academic administrators command significant attention at all colleges and universities. This paper will discuss three topics that are discussed, debated, and litigated in the faculty/academic administrator arena: (A) Issues involving academic administrators; (B) The role of collegiality in higher education employment decisions; and (C) Dealing with complaining, critical, and disruptive employees.

A. ISSUES INVOLVING ACADEMIC ADMINISTRATORS

In most colleges and universities, academic administrators work at the will and pleasure of the chancellor or president of the institution. They do not hold a protected property interest or tenure in their administrative position.[1] They do, however, hold the right to have their contract of employment honored for its stated term and the corresponding expectation that they will not be removed during the term of the contract except for cause.

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[1] *See, e.g.,* Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1315 (9th Cir. 1984) (stating that California law confers no tenure rights upon administrators and no property interest in administrative position); Grimes v. Eastern Illinois Univ., 710 F.2d 386, 388 (7th Cir. 1983) (holding that administrative employee serving at will and pleasure of president does not have property interest under Fourteenth Amendment and noting that "tenure in universities has traditionally been limited to faculty and denied other university employees"); Jahannes v. Mitchell, 469 S.E.2d 255, 257 (Ga. Ct. App. 1996) (holding that college professor had no protected property right to position as dean, that president of college could remove him at will, and that there was no violation of due process when he was dismissed from administrative position without hearing); Mohammed v. Department of Education, University of Florida, 444 So. 2d 1007, 1008 (Fla. Ct. App. 1984) (upholding decision of dean not to reappoint tenured professor as department chair, saying: "[O]ne does not acquire tenure in the administrative position of department chairman. . . .").

Although the law seems well-settled regarding the at-will nature of administrative appointments, various challenges have been made to adverse employment decisions affecting administrators on a myriad of legal theories, including discrimination, denial of due process and equal protection, retaliation for exercise of protected rights of speech or grievance, breach of contract, and defamation. The cases have arisen from various factual contexts, such as removing academic administrators from the position of dean or department chair; refusing to appoint or to reappoint individuals to administrative positions; reducing salaries when administrative responsibilities end; and declining to provide summer employment. Illustrative cases follow:

(1) Removing Academic Administrators from Position

In *Soares v. University of New Haven*,[2] the court addressed a situation in which Dr. Louise Soares, a former director of education programs, sued the University of New Haven when the dean, the provost, and the president all agreed to remove her from her administrative position. The decision to remove her as director was made in July 1998. However, since Dr. Soares was away on vacation at the time, the decision-makers decided to make the effective date of her removal August 3rd of that year.

The dean met with Dr. Soares on August 3rd and told her of the decision. At that same meeting, Dr. Soares informed the dean for the first time that she was suffering from a serious illness that might require surgery.

When she was replaced by a younger man, Dr. Soares sued, contending violations of Title VII, the ADEA, the Equal Pay Act, the Rehabilitation Act, and the ADA. The court granted summary judgment to the University, holding that Dr. Soares failed to prove she was removed from her administrative position because of her disability and that the nondiscriminatory reasons proffered by the University for her removal were pretextual.[3] The court based its decision in large part on evidence the decision to remove Dr. Soares from her

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[2] 154 F. Supp.2d 365 (D. Conn. 2001).

[3] *Id.* at 376.

administrative position was made over a week before any of the decision-makers learned of her illness.[4]

In *Garvie v. Jackson*,[5] a professor who was removed as Head of the University of Tennessee's Department of Speech and Theatre (but who remained a tenured member of the faculty) sued the provost and former dean, alleging that his removal from that position without a hearing violated his rights to due process. The Sixth Circuit disagreed, noting the faculty handbook made it clear department head positions did not carry tenure: "The headship, like all other administrative offices, carries no tenure. It is renewed at the discretion of the Dean, Vice Chancellor, and Chancellor, in consultations with the faculty."[6] Likewise, the court found written correspondence appointing the plaintiff as department head stated he would serve at the pleasure of the chancellor. The court further found no merit in the plaintiff's claim he was deprived of a liberty interest since he returned to a tenured faculty position and could not demonstrate the kind of interference with career opportunities that would normally give rise to a liberty interest.[7]

Although unusual, there have been instances in which courts have declined to rule as a matter of law and have left for the jury the determination of whether an administrator held a property interest in his or her employment. These cases usually arise when there is an unwritten common-law practice in the workplace giving rise to the protected interest. For example, in *McLaurin v. Fischer*,[8] the Sixth Circuit, applying Ohio law, held a reasonable juror could find the plaintiff, a nationally recognized neurosurgeon, had a property interest in his position as head of the Division of Neurosurgery. First, the court noted that the plaintiff testified he had an understanding with the chair of the department that the position as director was permanent and that he would hold the position unless he became physically unable to perform his job or chose

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[4]*Id.* at 373.

[5]845 F.2d 647 (6th Cir. 1988).

[6]*Id.* at 651.

[7]*Id.* at 652

[8]768 F.2d 98 (6th Cir. 1985).

to resign. Second, the court observed that the plaintiff had held the director position for twenty-eight years and during that time no action had ever been taken inconsistent with his contention that the position was permanent. Furthermore, no other division director during the twenty-eight year period had ever been involuntarily removed. From that evidence, the court determined a reasonable juror could conclude a common law practice existed whereby the division director positions were treated as permanent. The Sixth Circuit reversed the district court's directed verdict for the defendant and remanded for trial on the property interest issue.

Frequently when administrators are removed from administrative positions, they contend the college or university took this action against them in retaliation for protected speech or conduct. For example, in *Jackson v. Leighton*,[9] a former Chair of the Department of Orthopedic Surgery at the Medical College of Ohio claimed his chairmanship was not renewed in retaliation for his outspoken opposition to a proposal by the President of the Medical College of Ohio to merge MCO with Toledo Hospital and his opposition to the appointment of Dr. Wassef Mikhail, an orthopedic surgeon, to be director of a joint diseases institute. Both the president and the dean of the medical college asserted that the plaintiff was removed as chair because of internal conflict within the department in conjunction with the hiring of Dr. Mikhail as a tenured full professor.

The Sixth Circuit found the plaintiff's comments regarding the merger proposal addressed a matter of public concern, since the merger threatened the very existence of MCO, a state-funded facility which provided medical services for the community. In contrast, the court found Jackson's statements opposing the appointment of Dr. Mikhail involved only internal office politics. In applying the *Pickering* balancing test, the court held that defendants' interests in effectively leading MCO and maintaining a harmonious workplace outweighed any interest of Jackson in commenting on the merger proposal. The court further stated the record did not indicate Jackson's comments regarding the merger proposal were a substantial or motivating factor in the decision not to renew his chairmanship.[10]

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[9]168 F.3d 903 (6th Cir. 1999).

[10]*Id.* at 912.

(2) Reducing Salaries When Administrative Duties End

A critical issue when administrative responsibilities end is whether there will be a corresponding reduction in salary. An Arizona court addressed this subject in *Franken v. Arizona Board of Regents*[11] and held a tenured professor who voluntarily resigned his administrative position as Chair of the Department of Optical Sciences to return to teaching and research was not entitled to retain his higher administrative salary. The professor, an internationally acclaimed figure in physics and optical sciences, had been recruited to the University of Arizona to chair the department. He argued that since his contract did not provide for any reduction in salary upon relinquishment of administrative duties, he was entitled to retain the full salary. The court disagreed, saying: "We can see no basis upon which to find that a voluntary return to teaching duties and the attendant relinquishment of administrative responsibilities . . . should result in retention of the administrative salary."[12]

A Florida appellate court dealt with a similar issue in *Kersner v. University of Miami*,[13] where a tenured faculty member based the argument his salary should not be reduced upon a letter the Dean of the College of Arts and Sciences had written him stating that in consideration of his resigning as department chair, his future salary as a faculty member would not be reduced even though he no longer performed administrative duties. The University responded the dean had no authority to make such a commitment and there was no consideration flowing to the University to bind it to the promise. The court decided in favor of the University and held that while the dean had authority to remove the professor as chair, he lacked actual, apparent, or implied authority to bind the University to his commitment. The professor's tenure as a faculty member did not affect the University's right to reduce that portion of salary paid to him for performing duties of a chair, "since tenure does not apply to administrative duties and positions."[14]

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[11]714 P.2d 1308 (Ariz. Ct. App. 1985).

[12]*Id.* at 1310.

[13]362 So. 2d 449 (Fla. Ct. App. 1978).

[14]*Id.* at 451.

On occasion, however, courts have denied an institution the right to reduce a professor's salary when he or she returned to only professorial responsibilities. For example, the Montana Supreme Court in *Keiser v. State Board of Regents of Higher Education*[15] determined that the Director of the School of Home Economics at Montana State University was entitled to retain her salary when she returned to full-time teaching. The court based its decision on certain facts: the University drafted the professor's contract of employment which stated that she held the rank of professor; defined her tenure status as "continuous tenure;" and set her salary at $30,000. No allocation of salary between her administrative and professorial duties appeared in her last contract, unlike those of the previous two years in which $2,000 of salary each year had been designated "for directorship."

The court noted the term "continuous tenure" was not defined in the contract of employment, although the meaning of the term was the "kernel of this case." While the University argued only the professorial status was tenured, the court disagreed. It determined that when the university and the professor negotiated her contract, they had in mind the goals of academic freedom and economic security. If, the court said, "continuous tenure" would permit the University to unilaterally reduce the professor's salary, tenure would mean little or nothing "and the goal of economic security, as important as the goal of academic freedom, no longer exists."[16]

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[15]630 P.2d 194 (Mont. 1981).

[16]*Id.* at 199. In a strongly worded dissent, one Justice noted in a previous case the Washington Supreme Court refused to extend tenure rights to departmental chairmen and commented that Montana State University had the right to refuse to reemploy the professor in a director's job, to refuse to give her a director's salary, or to hire her for a director's term. Since the professor held the position of director at the "discretion" of the president of the institution, she did not and could not acquire tenure to the position, salary, contract term, or any other privilege of the administrative office. When the professor ended her administrative responsibilities, "she once again became a tenured professor entitled to the salary accompanying that position." *Id.* at 201.

The Keiser decision has not been widely followed. In fact, one commentator has said: "It is fair to describe the Keiser holding as an aberration that has commanded little adherence in other courts and other contexts." Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members,* 44 SAINT LOUIS UNIV. L. J. 51, n.101 (2000).

A former Dean of Academic Affairs at Manchester Community College in Connecticut resigned his $50,321 per year job as dean and accepted a ten-month position as a nontenured, accounting professor at a salary of $39,585. He later sued, contending that in two prior situations deans had been appointed to full, tenured professorships at 83.33% of their previous year's salary. In the plaintiff's case, such an arrangement would have given him an annual salary of $45,304, and he would have been tenured. He argued the different treatment afforded him was a denial of equal protection. The College refuted his argument by pointing out that the administrators to which the plaintiff referred had already achieved tenure prior to their transfers to the faculty, which was not the plaintiff's situation. The court concluded that since the factual circumstances between the former dean and the other two administrators were different, the equal protection claim was not established.[17]

These cases demonstrate the importance of designating in the contract of employment the amount to be paid for administrative as opposed to professorial duties or of having a clearly stated policy regarding department chair salary conversion. Many institutions use both approaches to clarify the matter. For example, in addition to designating the amount to be paid for administrative duties and for teaching duties in the contract, the University of Mississippi has the following policy statement:

> **DEPARTMENT CHAIR SALARY CONVERSION**
> In most cases department chairs are provided salary increases for assuming chair positions. The amount is reduced if the department chair gives up the position. In cases when a faculty member on a 9-month contract becomes a department chair with a 12-month contract, the 9-month salary is converted by the application of a plus two-ninths formula, with the administrative supplement added after the conversion. The reverse procedure takes place if the faculty member gives up the chair position and returns to a 9-month contract.[18]

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[17] *See* Barde v. Board of Trustees of Regional Community Colleges, 539 A.2d 1000, 1004 (Conn. 1988).

[18] UNIVERSITY OF MISSISSIPPI, A HANDBOOK FOR FACULTY AND STAFF at III.0014. This policy can be found at <www.olemiss.edu/depts/HR/handbook/HB_sec3.html#chair_salary>.

(3) Reassigning and Reducing Administrative Responsibilities

There are occasions when a college or university may reassign and reduce administrative responsibilities while leaving intact the salary of the administrator. A Florida appellate court addressed a breach of contract claim arising from this situation in *Tuckman v. Florida State University.*[19] The contract in question specified the professor's salary and classified him as "dean and professor," but contained no description of his duties or responsibilities as dean. During the course of his contract year, the University informed the dean he was being relieved of responsibilities as dean. He continued to be employed as a tenured professor, retaining full salary and benefits for the remainder of the contract term. The court found as a matter of University policy and practice deans serve at the pleasure of the president and subject to his assignment of duties. Since the contract did not guarantee the professor any specific duties or responsibilities as dean and since he continued to serve as a faculty member at full salary, the court held the reassignment of his duties did not constitute a breach of the employment contract.[20]

(4) Refusing To Appoint to Administrative Position

When professors have been promised they will be appointed to an administrative position but are not, they have sued for breach of contract. In *McJamerson v. Grambling State University*,[21] the plaintiff held the "at will" position of director of planning and analysis. He was also a tenured faculty member. The president of the University proposed that the dean resign his administrative position, resume the position of a full-time faculty member, and draft a proposal for the a new scholars program which he (the president) would present to the board. If the program were approved, the president agreed to recommend the plaintiff as director of the new program, another "at will" position. The plaintiff agreed, resigned as director of planning, and submitted the scholars proposal. In the meantime, the president left and a new president was installed, who did not wish to move forward with the scholars project because he thought the

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[19]530 So. 2d 1041 (Fla. Ct. App. 1988).

[20]*Id.* at 1042.

[21]769 So. 2d 168 (La. Ct. App. 2000).

existing honors program was sufficient. He was also concerned about declining student enrollment, overstaffed programs, and a huge operating deficit. When the new president refused to appoint plaintiff to the "at will" administrative position of director of a scholars program or to reinstate him to the former "at will" position of director of planning, he sued alleging breach of contract.

Both the trial and appellate courts made short order of the plaintiff's claims, finding both positions about which he felt aggrieved were "at will" positions, terminable at the will and pleasure of the president. The court said: "We fail to see any basis to enforce an agreement to appoint an employee to an at will position from which he could be discharged at any time and without any reason."[22]

In *Murtagh v. Emory University,*[23] a federal district court in Georgia rejected a breach of contract claim brought by a tenured professor of medicine when Emory did not honor a promise to appoint him chief of the pulmonary division. The court found the division chief served at the will and pleasure of the Chair of the Department of Medicine. Since Georgia law specifically recognizes the employment-at-will doctrine, that allows for the termination of employment at the will of either party, the court said: "It simply would make no sense for plaintiff to have a cause of action when he was never appointed Chief of Pulmonary if he would have no claim had he been appointed, then demoted an hour later."[24]

(5) Declining to Provide Summer Employment

The Court of Appeals for the District of Columbia upheld summary judgment granted the University in *UDC Chairs Chapter, American Association of University Professors v. Board of Trustees of the University of District of Columbia*,[25] a case brought by thirty-three department chairs who claimed because the University had given them summer employment for the past ten years, they had a property interest in their summer pay. Faced with a serious financial crisis, the

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[22]*Id.* at 171.

[23]152 F. Supp. 2d 1356 (N.D. Ga. 2001).

[24]*Id.* at 1366.

[25]56 F.3d 1469 (D.C. Cir. 1995).

University had implemented a number of cost-saving measures, including not extending summer contracts to its department chairs. Although the University had a grievance procedure through which employees could challenge a decision or policy, the department chairs claimed utilizing the grievance process would have been futile. Both the trial and appellate courts disagreed and held the denial of due process and breach of contract claims brought by the chairs were barred by their own failure to exhaust administrative remedies.

(6) Alleging Defamation

In *Dodson v. Wright State University*,[26] a case containing both salary readjustment and defamation issues, a former Chair of the Department of Obstetrics and Gynecology sued when the University removed him as chair and reduced his salary. He claimed breach of contract, denial of due process, and defamation. The court first determined that Dr. Dodson's employment contract was a dual one, containing an academic appointment to the faculty and an administrative one as chair. The court further determined the administrative appointment was at the will and pleasure of the dean. Dr. Dodson argued since the contract was for a specific term of three years, the University could only remove him during that time for cause. Even assuming that were the case, the court found the Medical School had cause (failure of the chair to provide leadership in resolving departmental tensions and disputes).

Addressing the defamation claim, the court found that the plaintiff failed to prove the mere act of removing him as chair was defamatory or that any of the communications made by the University were untrue. The court held there was no defamation and said further that even if there had been, the defendants would have been covered by qualified privilege which protects a speaker against a charge of defamation in the employer/employee context unless the employer acts with actual malice.[27]

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[26] 697 N.E.2d 287 (Ohio Ct. Claims 1997).

[27] *Id.* at 293.

B. COLLEGIALITY IN HIGHER EDUCATION EMPLOYMENT DECISIONS[28]

Many academic administrators and faculty ask: "Can we consider a person's working relationship with his or her colleagues when we make tenure, promotion and termination decisions?" The answer is "Yes."[29]

While most institutions do not specify collegiality as a distinct criterion for tenure or promotion, many include within the teaching or service components a requirement that the candidate "work well with colleagues," "demonstrate good academic citizenship," or "contribute to a collegial atmosphere."[30] Faculty plaintiffs who have been denied tenure or promotion because of a lack of collegiality raise as their most persistent argument that the university's consideration of their personality or ability to "fit in" with colleagues violates either the employment contract or the tenure policy, when those factors (personality and fit) were not defined specifically as criteria for tenure. Courts have overwhelmingly rejected this breach-of-contract argument.

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[28]For a detailed discussion of the arguments in support of the use of collegiality as a factor in higher education employment decisions and those in opposition thereto, as well as a review of the case law addressing this subject, see Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Employment Decisions, 27* J.C.&U.L. 833 (2001). For an abbreviated version of this article, see *Does Collegiality Count?* 87 ACADEME 37 (Nov.-Dec. 2001).

[29]*See, e.g.,* Levi v. Univ. of Texas at San Antonio, 840 F.2d 277, 282 (5th Cir. 1988) (recognizing that "the future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty"); Curtis v. Univ. of Houston, 940 F. Supp. 1070, 1075 (S.D. Tex. 1996) (granting summary judgment for university and saying: "In considering a decision to grant that ultimate achievement [promotion] to a professor, the committee *must* take into account not only his quantifiable productivity but also his unquantifiable personality, collegiality, and future or projected performance. . . ."); McGill v. Regents of Univ. of Calif., 52 Cal. Rptr. 2d 466 (Cal. Ct. App. 1996) (concluding that collegiality is appropriate consideration for tenure review).

[30]For general overviews of the role of collegiality in tenure and dismissal situations, see Edgar Dyer, *Collegiality as a Factor in Faculty Employment Decisions at Public Colleges and Universities: A Selective Review of the Caselaw*, 152 EDUC. LAW REP. 455 (2001); Ralph D. Mawdsley, *Collegiality as a Factor in Tenure Decisions*, 13 J. OF PERSONNEL EVALUATION IN EDUC. 167 (1999); KENT M. WEEKS, *Contentious Professor and Collegiality*, in MANAGING DEPARTMENTS: CHAIRPERSONS AND THE LAW 78-86 (1997).

For example, a breach of contract argument was central to the plaintiff's case in *University of Baltimore v. Iz*.[31] Dr. Peri Iz, an assistant professor in the University's business school, was reviewed for tenure in 1993. The tenure and promotion policies of the University of Maryland System, the University of Baltimore, and the Merrick School of Business set forth the following criteria for tenure and promotion: teaching effectiveness; research/scholarship; and service to the University, the profession, and the community. During the course of her tenure review, colleagues raised concerns about Iz's collegiality. The department chair described her as inflexible, defensive, and unwilling to take constructive advice. A department faculty member said although she was a good teacher, had published, and was involved in professional activities, he was concerned about "her attitude and collegiality." The dean, provost, and president based their decision to deny Iz tenure in significant part on her difficulties with colleagues.[32]

Iz sued and argued that under her contract, the University was required to evaluate her for tenure and promotion solely upon the three explicitly stated criteria (teaching, research, and service) and was estopped from considering the issue of her collegiality since collegiality was not specifically included as a criterion for tenure in the relevant tenure policies. The University contended the concept of collegiality was inherently included in the criteria of teaching, research, and service and was, therefore, appropriate for consideration in the tenure and promotion review process.

After a three week jury trial, the jury rejected Iz's civil rights and constitutional claims, but determined that the University had breached her employment contract and awarded her $425,000 in compensatory damages. The University argued on appeal that the trial court erred in failing to rule as a matter of law that collegiality is a factor that may be considered in promotion and tenure review even though it is not expressly included in the university's tenure and promotion policies. The appellate court agreed with the University, saying: "We are persuaded that collegiality is a valid consideration for tenure. Although not expressly listed among the School's tenure criteria, it is impliedly embodied within the criteria that are specified.

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[31] 716 A.2d 1107 (Md. Ct. Spec. App. 1998).

[32] *Id*. at 1112-13.

Without question, collegiality plays an essential role in the categories of both teaching and service."[33] The court held the University did not breach Dr. Iz's contract when it considered her collegiality.[34]

Another good example of the views of courts on breach-of-contract claims concerning collegiality is *Bresnick v. Manhattanville College*.[35] Robert Bresnick sued when he was denied tenure in the College's dance and theater department. The College bylaws provided that tenure was to be awarded on the basis of teaching excellence, scholarship and service. At no place was collegiality or working well with one's colleagues mentioned.

Although the faculty review committee recommended that Bresnick be granted tenure, it expressed concern about the lack of interdisciplinary dance/theater productions. The provost recommended against tenure, noting Bresnick's difficulty working with colleagues. The president denied tenure, likewise expressing concern about the unwillingness of Bresnick to work with colleagues "in a sufficiently collegial and collaborative manner."[36]

The court rejected Bresnick's argument that since collegiality was not listed as a criterion for tenure, the College could not consider it in evaluating him for tenure. Instead, the court commented on how essential cooperation and collegiality are within a department called upon to work with other departments and to train students to collaborate in the difficult task of orchestrating dance and drama programs. Deciding in favor of the College, the court said:

> Tenure was denied, based upon what the College considered to be a deficiency in ability to work with other faculty members in an atmosphere of cooperation and collegiality so that dance and drama could be integrated with other activities. There is nothing in any contractual agreement preventing the institution from considering such matters in evaluating "service to the College." It

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[33]*Id.* at 1122.

[34]For a dissenting view of the *Iz* case, see Perry A. Zirkel, *The Personality Problem,* 80 PHI DELTA KAPPAN 662, 638 (Apr.1, 1999). Zirkel argues that the University should have factored the professor's personality into evaluations of her teaching, service, and scholarship, since collegiality was not stated as a separate criterion.

[35]864 F. Supp. 327 (S.D.N.Y. 1994).

[36]*Id.* at 328.

> is predictable and appropriate that in evaluating service to an institution, ability to cooperate would be deemed particularly relevant where a permanent difficult-to-revoke long-term job commitment is being made to the applicant for tenure.[37]

The plaintiff also raised a breach of contract claim in *Kirsch v. Bowling Green State University*.[38] The University denied Kirsch tenure in its College of Business Administration after receiving negative recommendations on him from the tenured faculty in his department, the dean, the University's review committees, and the vice president for academic affairs. The president agreed with the negative recommendations and denied tenure.

Kirsch sued, contending that the University breached his employment contract by using in his tenure review improper criteria, which were not contained in the University's academic charter. The charter provided that candidates for tenure would be granted or denied tenure solely on the basis of "teaching effectiveness, scholarly or creative work, service to the University, and attainment of the terminal degree or its professional equivalent."[39] Kirsch asserted that the University's consideration of his personality, collegiality, and his ability to "fit in" were additional criteria above and beyond those identified in the charter. The trial court disagreed, holding that Kirsch's collegiality and personality were properly considered by the University because they necessarily permeated his ability to contribute to teaching, research, and service.

The Ohio Court of Appeals upheld judgment for the University, saying: "[W]e conclude that the extent to which BGSU considered appellant's personality and/or collegiality was not such that it constituted an additional criterion but, rather, personality and collegiality was properly considered only as it affected appellant's performance with regard to teaching, research and service."[40] "While we do not endorse the use of a candidate's personality as a separate and

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[37]*Id.* at 329.

[38]1996 WL 284717 (Ohio App. May 30, 1996).

[39]*Id.* at *3.

[40]*Id.* at *4.

distinct criterion in a case like this, personality and collegiality, as they effect (sic) teaching, research and service, are proper considerations."[41]

Many people who oppose reliance on collegiality in faculty employment decisions argue that its use can easily become a mask for discrimination based on race, gender, age, religion, national origin, or disability.[42] They also claim that collegiality is such a vague and amorphous term that, even in the absence of intentional discrimination, its use can subtly and adversely affect the chances for tenure of women and minorities.

Even though academic critics of collegiality have expressed serious concerns about the possible discriminatory misuse of collegiality, courts have decided in favor of universities in almost every discrimination case in which collegiality has been raised.[43] In *Babbar v. Ebadi*,[44] Sunil Babbar, an assistant professor in the management department at Kansas State University,

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[41]*Id.* at *9. For other cases addressing the breach of contract issue, see McGill v. Regents of Univ. of Calif., 52 Cal. Rptr. 2d 466, 472 (Cal. Ct. App. 1996) (stating that "although not expressly listed as one of the tenure criteria, it is inescapable that collegiality is an appropriate consideration."); Romer v. Board of Trustees of Hobart & William Smith Colleges, 842 F. Supp. 703 (W.D.N.Y. 1994) (denying plaintiff's breach of contract claim and holding that faculty handbook did not limit or preclude Colleges' right to consider plaintiff's acrimonious relationship with colleague when evaluating him for tenure); Boyce v. Univ. of Alaska, 4FA-96-266 CIV and 4FA-95-2273 CIV (consolidated) (Alaska Sup. Ct., Jan. 3, 1997) (holding that even though University's criteria for tenure did not include professional conduct, it was reasonable for University to consider faculty member's ability to work with others and to demonstrate professional conduct as it evaluated candidates for tenure); Schalow v. Loyola Univ. of New Orleans, 646 So. 2d 502 (La. App. 1994) (finding language in handbook regarding evaluating suitability of faculty member as professional colleague to be broad enough to include collegiality).

[42]*See* John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 244 (Spring 1996) ("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.").

[43]*See, e.g.,* Fisher v. Vassar College, 70 F.3d 1420 (2nd Cir. 1995); Ogunleye v. State of Ariz., 66 F. Supp.2d 1104 (D. Ariz. 1999); Javetz v. Board of Control, Grand Valley State Univ., 903 F. Supp. 1181 (W.D. Mich. 1995).

[44]36 F. Supp. 2d 1269 (D. Kan. 1998), *aff'd* 216 F.3d 1086 (10th Cir. 2000) (unpublished opinion), 2000 WL 702428 (10th Cir., May 26, 2000).

was denied tenure because of inadequacies in his research and a lack of collegiality. The department faculty and chair described him as a "two-faced" person with "zero collegiality," who "will say one thing and do another." The University's advisory committee on promotion and tenure described Babbar's research as weak and found him to be a poor colleague within his department. The dean, the provost, and the president agreed, denying him tenure.

Babbar sued, alleging reverse discrimination based on sex, religion, and national origin. The court, however, found no evidence that Babbar's denial of tenure stemmed from his national origin or religion. It further found the record replete with evidence the University denied him tenure because of perceived deficiencies in his research and inability to get along with his colleagues.

Stein v. Kent State University[45] is another case in which a court upheld a University's reliance on collegiality, finding it was not a pretext for discriminatory treatment of a faculty member. The plaintiff, Ramona Stein, alleged that her contract as an assistant professor of audiology was not renewed because of gender discrimination and in retaliation for her having filed an internal grievance and an external charge with the Equal Employment Opportunity Commission (EEOC). The University maintained that Stein was not reappointed because she demonstrated only average performance in teaching and research, and because she demonstrated a lack of collegiality by filing charges and suits that both the EEOC and the courts found frivolous.

The district court granted summary judgment for the University, writing: "The ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions. Plaintiff Stein makes no showing that the lack of collegiality was a pretext."[46] The Court of Appeals for the Sixth Circuit affirmed, also finding the University's reasons for nonrenewal legitimate and nondiscriminatory.

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[45]994 F. Supp. 898 (N.D. Ohio 1998), *aff'd*, 181 F.3d 103 (6th Cir. 1999).

[46]Stein, 994 F. Supp. at 909.

Likewise, the court in *Jawa v. Fayetteville University*[47] upheld the termination of a tenured professor against his claim of discrimination. Although the professor contended the University dismissed him because of his race and national origin, the court found Jawa, a professor of education and psychology, was a poor teacher unwilling to prepare for class; had difficulty interacting with students; was uncooperative with colleagues; was unwilling to follow appropriate directives of his superiors or to comply with university policies and procedures; and recklessly, and with little regard for the truth, accused his superiors of incompetence and discriminatory practices against him.

In particular, Jawa demonstrated unprofessional conduct toward his department chair when he stopped speaking to the chair except in meetings, where he frequently caused a disturbance. On one occasion, he burst into the chair's office; on another, he called the chair a liar; and on yet another, he refused to come to the chair's office when requested to do so, responding that he "was not an office boy." These incidents, said the court, "clearly reflect unprofessional conduct and a continuing pattern of noncooperation on the part of the plaintiff."[48]

While there are legitimate and long-recognized expectations that professors will cooperate with their colleagues in the best interests of the institution[49] and while courts have consistently supported institutional expectations of cooperation among faculty, there are those inside and outside the academy genuinely concerned about the increased emphasis on collegiality in faculty employment decisions. These critics worry that relying on collegiality in such decisions chills faculty debate and stifles dissent on campus. One critic, Edgar Dyer, Professor of Politics and University Counsel at Coastal Carolina University, argues the term collegiality is so vague and ambiguous that it does little to provide specific guidelines for behavior. He asks pointedly, "What does 'collegiality' mean?" He is concerned that its use is so

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[47]426 F. Supp. 218 (E.D.N.C. 1976).

[48]*Id.* at 223.

[49]*See, e.g.,* Watts v. Board of Curators, Univ. of Mo., 495 F.2d 384, 389 ("A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration.").

subjective that there is no way to evaluate whether it is being used fairly or whether it is being used to punish faculty who disagree with those in control of the tenure process.[50]

Another critic, Perry A. Zirkel, Professor and former Dean of Education at Lehigh University, questions whether colleges and universities have equated collegiality with personality.[51] He notes that using personality as a criterion in tenure evaluations is a serious threat to individual academic freedom and can become a smokescreen for punishing unpopular ideas or behavior.[52]

The AAUP also advances such concerns in *On Collegiality as a Criterion for Faculty Evaluation*.[53] While recognizing that collegiality is an important aspect of faculty performance, it asserts that to isolate collegiality as a distinct criterion for tenure poses a "potential danger to academic freedom" and "should not be added to the three traditional areas of faculty performance."[54] According to the Association, in the heat of making important decisions regarding hiring, promotion, and tenure, it would be easy to confuse collegiality with the expectation that a faculty member display "enthusiasm" or evince "a constructive attitude" that "will foster harmony." In the AAUP's view, such expectations are contrary to basic principles of academic freedom and will contribute to a college or university "replete with genial Babbitts."[55] The Association takes the position that collegiality should not be assessed

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[50]Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of* Pickering *and* Connick *for Public Higher Education*, 119 EDUC. L. REP. 309 (1997).

[51]Perry A. Zirkle, *Personality As A Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. STATE L. REV. 223 (1984-85).

[52]*Id.* at 235.

[53]AAUP, *On Collegiality as a Criterion for Faculty Evaluation*, 85 ACADEME 69-70 (Sept.-Oct. 1999). The statement may also be found at <www.aaup.org/S099CRpt.htm>.

[54]*Id.*

[55]*Id.* at 70.

independently of teaching, research, and service but should be understood instead as a "virtue whose value is expressed in the successful execution of these three functions."[56]

Despite such concerns within the academic community, courts have affirmed at every turn the use of collegiality as a factor in faculty promotion, tenure, and termination decisions. The first case to discuss tenure and collegiality in depth was *Mayberry v. Dees.*[57] Robert Mayberry sued East Carolina University, alleging he was denied tenure in retaliation for his criticisms during the year of his tenure review of the department chair. The University defended by producing evidence the chair had expressed serious reservations about granting Mayberry tenure before he (Mayberry) made any of the criticisms at issue and that the chair was unaware of the criticisms when he voted on Mayberry's tenure. The Fourth Circuit upheld the tenure denial for these reasons.

The important aspect of *Mayberry* is the attention the court gave to the role of collegiality in tenure decisions. While noting the importance of finding sufficient evidence of a professor's scholarship, accomplished pedagogy, and able service to the university, the court also added evidence of "developed collegiality–the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests"[58] before granting an award of tenure. With these words, the court introduced into higher education case law, seemingly with approval, the defined concept of collegiality as a distinct fourth criterion in tenure decisions. This point in the court's opinion spawned considerable comment and consternation among those fearful of the effect the use of civility and collegiality in tenure decisions would have on academic freedom and free speech.[59]

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[56]*Id.* at 69.

[57]663 F.2d 502 (4th Cir. 1981).

[58]*Id*. at 514.

[59]*See*, Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 EDUC. L. REP. 1053, 1059 (1983) (criticizing the court's reasoning and arguing that the court's opinion will encourage uncritical use of collegiality thus "threatening from the inside the protected tradition of the robust exchange of ideas at public institutions of higher education."). For discussion of recent disputes over the use of collegiality, see Piper Fogg, *Do You Have to Be a Nice Person to Win Tenure?* CHRON. HIGHER EDUC., Feb. 5, 2002, at A8.

Further discussion of cases in which courts have balanced First Amendment claims of faculty plaintiffs against contentions of universities that the behavior in question was not collegial and caused disharmony in the workplace will be found in the following section. To conclude this discussion of the role of collegiality in higher education employment decisions, colleges and universities should be aware that courts have consistently approved the use of collegiality as a factor in making decisions concerning faculty employment, promotion, tenure, and termination, usually because of the recognition that collegiality is an important factor in the ability of colleges and universities to fulfill their mission. Given the strength and unanimity of the case law, institutions of higher learning can feel confident from a legal standpoint in considering collegiality in faculty employment decisions, even if collegiality is not specified as a separate and distinct criterion.[60]

C. DEALING WITH COMPLAINING, CRITICAL, AND DISRUPTIVE EMPLOYEES

For years, we in higher education tried to hide–or to deny–conflict within our ranks. We referred to our college or university as the "Ivory Tower," a place immune from the stress, tensions, and turmoil of the everyday workplace. We defined conflict as "something that happens in someone else's department."[61] When conflict arose, we tried not to discuss it; when faculty did not get along with each other, we tried shifting one person to another department or even dividing departments. We managed conflict by avoidance.[62]

During the last thirty years, the myth of the "Ivory Tower" has dissipated as academic administrators have acknowledged conflict and tension within their departments and institutions arising from matters such as annual evaluations, tenure denials, lack of salary increases, teaching assignments, office location, working conditions, accusations and filing of charges against colleagues, and generally disruptive behavior on the part of some faculty. Most conflict within the academy manifests itself through words–criticism, complaint, accusation, bickering, or

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[60] *See* Connell & Savage, *supra* note 30 at 858.

[61] ALLAN TUCKER, CHAIRING THE ACADEMIC DEPARTMENT 217 (American Council on Education/Macmillan Publ. Co., 2nd ed. 1984).

[62] *See* MENDING THE CRACKS IN THE IVORY TOWER: STRATEGIES FOR CONFLICT MANAGEMENT IN HIGHER EDUCATION at v (Susan A. Holton, ed., Anker Publ. Co. 1998).

denigration of colleagues. What can and should an academic administrator do about a faculty member or a student whose speech or conduct causes disruption, disharmony, and an inability on the part of the department to manage its affairs in a responsible and efficient manner?

There are no magic words of wisdom to answer this question. However, recognizing the problem early on, confronting the problem rather than wishing it away, and providing fair opportunity for the protagonists to be heard form the basic foundation for successful management of conflict that arises from the troublesome, critical, and bickering employees.[63]

There are numerous cases addressing complaints, criticisms, accusations, bickering, and a lack of collegiality on the part of faculty and other academic personnel that have led to adverse employment actions such as termination or a denial of tenure, of salary increase, of requested teaching assignments, or of office space. This section of the paper will discuss representative cases in these areas.

(1) Denial of Tenure or Promotion

Curtis v. University of Houston[64] involved a sociologist denied promotion to full professor. The University said he lacked the national visibility to be a full professor, had not published a treatise in his field, and had a long interruption from producing academic materials. Throughout his time at the University, Curtis had been vociferous in his denunciation of the management of his department and of the institution. He spoke against the insular power structure in his department; he opposed the tenure and appointment of various faculty members; and he complained about nepotism and racism in the department. When he was denied promotion, he sued claiming the denial was in retaliation for speech criticizing his superiors.

While finding his speech involved matters of public concern and was, therefore, protected, the court nevertheless concluded the University had ample reasons to deny the promotion which were unrelated to the professor's speech. The court held the University had

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[63]*See* SUSAN A. HOLTON, AND NOW . . . THE ANSWERS! HOW TO DEAL WITH CONFLICT IN HIGHER EDUCATION, in CONFLICT MANAGEMENT IN HIGHER EDUCATION 78-79 (Susan A. Holton, ed., Jossey-Bass Publ. 1995).

[64]940 F. Supp. 1070 (S.D. Tex. 1996).

met its burden of articulating rational, neutral justifications for nonpromotion independent of its assumed hostility to Curtis' speech and granted summary judgment to the University.

(2) Termination

In *Dodds v. Childers*,[65] a cosmetology instructor at a community college sued after being terminated, contending that her termination arose from her continuing complaints to the dean about special treatment afforded the sister-in-law of the president of the governing board. The instructor complained specifically that the sister-in-law had been allowed to enroll in a "nonexistent" course as a cosmetology instructor-trainee in order to prepare for the state licensing exam. The instructor admitted at trial that she was afraid the sister-in-law was being trained to replace her.

The court held that the instructor's speech was not on a matter of public concern. To rise to the level of public concern, the speech must have been made by the speaker primarily as a citizen, not as an employee. Finding that the instructor's complaints about the sister-in-law reflected predominantly the instructor's concern about the security of her job and her own working conditions, the court determined the instructor's speech to involve merely personal grievances. It noted the instructor did not address her complaints to anyone outside the college, nor did those complaints occur against a background of ongoing public debate about the administration of the college, its use of funds, or the operation of the cosmetology program. While the private form of the speech was not dispositive, it was a factor in assessing whether the speech addressed a matter of public concern.

In *Sinnott v. Skagit Valley College*,[66] Sinnott, a tenured welding instructor, had a long history of making derogatory remarks about other faculty members, of accusing the chair of the welding department of theft (which was never substantiated), of repeatedly using profanity, and of engaging in ongoing criticism of his supervisors and coworkers. After a review of the welding program by the State Board for Community College Education, Sinnott met with a reporter from the local paper and complained that the report was a "whitewash," the program

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[65]933 F.2d 271 (5th Cir. 1991).

[66]746 P.2d 1213 (Wash. Ct. App. 1987)

used inconsistent standards to certify instructors, instructors lacked sufficient course work in welding-related mathematics, and students were given credit for welding courses they did not take.

The president of the College met with Sinnott, gave him a letter outlining conditions for his continued employment, and directed him to make no derogatory statements about institutional employees or the welding program, to cooperate in the welding curriculum modification, and to team-teach a coordinated program. Sinnott refused to sign the letter and to agree to the conditions. He was terminated for unprofessional conduct and insubordination. Sinnott sued.

The court found Sinnott's speech was directed toward the quality of the welding program and was of sufficient public interest to merit constitutional protection. However, the court denied Sinnott's claim for relief, finding that, although his speech was a factor in his termination, the College produced sufficient evidence that it would have made the same decision in the absence of the protected conduct.

(3) Denial of Salary Increase and Requested Teaching Assignments

Faculty denied salary increases or requested teaching assignments have sued on First Amendment, discrimination, defamation, and retaliation charges. *Gumbhir v. Curators of the University of Missouri*[67] is a classic example of a case raising all of these issues. After years of feuding within the University of Missouri at Kansas City's School of Pharmacy (UMKC), Professor Gumbhir sued the University, the pharmacy dean, and another professor. During a lengthy trial, the parties presented extensive evidence of an incredible sequence of petty, venomous exchanges between the main protagonists and an unprofessional spate of communications that the court noted "would not be tolerated in a well-functioning work place and that should have been beneath the dignity and intelligence of the seemingly well-educated combatants."[68]

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[67] 157 F.3d 1141 (8th Cir. 1998)

[68] *Id.* at 1144. With critical language, the court commented on the marshalling of distasteful evidence by all parties and said: "Most of this is irrelevant to the issues on appeal, a waste of our time and a strong indication the case has been massively overlawyered." *Id.*

Gumbhir had complained to the dean about ethnic slurs by another professor (also a defendant in this suit), an associate dean's unfavorable comment concerning immigrants working in the United States, and what he perceived to be a racially biased environment in the Pharmacy School. The School gave Gumbhir substantially below average salary increases the next three times the School gave raises. Gumbhir contended the lower than average increases were the result of his criticisms.

The Eight Circuit found sufficient evidence of a causal connection between Gumbhir's protected activity of complaining about racial and ethnic discrimination and UMKC's adverse salary actions for the Title VII retaliation claim to have gone to the jury. It upheld the jury verdict in favor of Gumbhir on the retaliation count.

Turning to Gumbhir's Section 1983 First Amendment claims against the dean and professor, the appellate court upheld the district court's summary judgment in their favor. The court said Gumbhir's denigration of his colleagues was not protected speech. The court further found no evidence his criticism of the dean and professor was a substantial factor in the adverse salary actions and dismissed the Section 1983 claims.

The court then addressed the defamation claim. When Gumbhir refused to teach some of his assigned courses, the School issued a letter of censure and distributed the letter to the entire faculty. Gumbhir contended the letter was defamatory. The court disagreed, stating that dissemination of the letter within the UMKC community was not the requisite publication for defamation. The court further found that even if the distribution of the letter were sufficient publication, a qualified privilege applied for a good faith communication by one with an interest and a duty to another person having a corresponding interest and duty. The court such interest and duty on the part of the administration and faculty of the Pharmacy School.

Ayoub v. Texas A & M University[69] is another case arising from a salary dispute. Ayoub, an Egyptian-born professor, made repeated complaints that his starting salary was too low and, as a result, his salary in each succeeding year remained low. The University provided numerous reviews of his complaint, finding after each review that no raise was called for. Ayoub continued to complain. The chair resigned, allegedly because he did not want to deal with

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[69] 927 F.2d 834 (5th Cir. 1991).

Ayoub any longer. The new department chair attempted to move Ayoub's office to a building outside the School of Engineering, allegedly because of complaints other department members made about Ayoub's disruptiveness. The Faculty Senate investigated and concluded that Ayoub had been denied due process when administrators decided to move his office without prior notice to him. The administration revoked its decision to move Ayoub's office, but he still sued, alleging his civil rights had been violated when the chair sought to move his office in retaliation for his complaints about the University's discriminatory pay scale.

The jury found that each of the administrators involved had punished Ayoub for exercising his right to free speech and awarded $625,000 in compensatory and punitive damages. The trial judge entered judgment notwithstanding the verdict, finding that Ayoub's speech was not protected and that the evidence did not support the verdict. The Fifth Circuit affirmed. In so doing, the appellate court recognized the difficulty in distinguishing between speech on matters of public and private concern. It noted that almost anything that occurs within a public agency can be of concern to the public. However, the court defined its role as not focusing on the inherent interest or importance of the matters discussed but to decide whether the speech was made primarily in the plaintiff's role as a citizen or primarily in his role as an employee. Applying this principle, the court determined that Ayoub had spoken primarily as an employee, because his speech involved only his personal situation. "There is no evidence," the court said, "that [he] expressed concern about anything other than his own salary. Although pay discrimination based on national origin can be a matter of public concern, in the context in which it was presented in this case by [the professor] it was a purely personal and private matter."[70]

In *Webb v. Board of Trustees of Ball State University,*[71] Webb, a member of the University's Department of Criminal Justice and Criminology, and several other University employees sued maintaining the University retaliated against them for protected speech. Webb accused other professors of sexual harassment, ethical lapses, and various improprieties. He filed multiple charges with the University's discipline system. Dissatisfied with the outcomes,

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[70]*Id*. at 838.

[71]167 F.3d 1146 (7th Cir. 1999).

he presented the president and board of trustees a 225-page broadside laying blame on almost everyone but himself. He and another professor, Sayles, filed various charges with EEOC. None were successful. However, they asserted that the University removed Webb as department chair and denied tenure to Sayles in retaliation.

The University's president appointed a new chair and directed Webb to cooperate in the transition. Instead, Webb filed two suits in an Indiana court asking the judge to resolve a dispute about teaching assignments. The court resolved both suits in the University's favor in late 1997. In 1998, the new chair issued teaching schedules to which Webb and Sayles objected. They filed this suit, asking the court to order the chair to juggle teaching schedules to their satisfaction and for other relief. In denying injunctive relief, the court said the University was entitled to insist that members of the faculty devote their energies to promoting goals such as research and teaching. When the bulk of a professor's time goes to fraternal warfare, the court said, students and the University community alike suffer, and the University may intervene to restore decorum and ease tensions. Under the circumstances and facts of this case, the University's right as an employer to achieve its goals prevails over speech, even though on matters of public concern.

D. SUMMARY AND SUGGESTIONS

From this overview of the law involving faculty employment issues, there are several points to be made in summary and some practical suggestions for avoiding legal problems:

- Academic administrators almost never hold tenure in administrative positions. They do, however, have the right to have their contracts honored for the stated terms and the expectation that they will not be removed during the term of the contract except for cause.

- Since administrators seldom hold a property interest in an administrative position, they are not entitled to a hearing before being removed from the position when the contract term expires.

- Although difficult to accomplish, a college or university can reassign administrative duties during the term of an appointment if the salary is not reduced.

- When administrative responsibilities end, the critical question is whether there will be a corresponding reduction in salary. It is important to designate in either the contract of employment or university policy a salary conversion formula,

which will clearly distinguish salary paid for administrative responsibilities from salary paid for professorial duties.

- Claims of discrimination, violation of First Amendment rights, defamation, and retaliation are raised by administrators, as well as faculty, when adverse employment actions are taken against them.

- While faculty and administrators enjoy First Amendment protections, speech is not unlimited. They have no constitutional right to disrupt the workplace, even when speaking on matters of public concern.

- Collegiality can be considered in making higher education employment decisions, including tenure, promotion, and termination. This is true even if collegiality is not set forth as a distinct criterion.

- Deal with problems immediately. Do not permit conflict to fester and grow through neglect. Administrators who identify and diagnose conflict at an early stage minimize disruption and disturbance in the academic community.