LOOKING AT ACADEMIC PERSONNEL ISSUES FROM "BOTH SIDES NOW": AN EXAMINATION OF ACADEMIC PERSONNEL ISSUES WHICH RAISE SERIOUS LAW-ADMINISTRATIVE & FACULTY-ADMINISTRATOR RELATIONS VIEWS, INCLUDING LEGAL AND ADMINISTRATIVE RESPONSE TO UNPRODUCTIVE FACULTY PERFORMANCE; DISRUPTIVE AND UNCOLLEGIAL FACULTY; THE ACCOMMODATION OF DISABLED FACULTY (ESSENTIAL JOB FUNCTIONS OF FACULTY)

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Looking at Academic Personnel Issues from “Both Sides Now”.

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Most public and private institutions of higher education have embraced the contract of tenure as the traditional means of protecting faculty members’ academic freedom and for providing long-term financial security for faculty. Tenure is a conditional contract which protects a tenured faculty member from termination for the exercise of academic freedom. Because tenure is a contractual right in private institutions and a constitutionally protected property interest under the Fourteenth Amendment in public institutions, institutions have developed elaborate procedural due process procedures which must be utilized before a tenured faculty member can be terminated. The purpose of due process is to ensure that the reasons for termination are legitimate and not a subterfuge to punish the faculty member for the exercise of academic freedom.

While both AAUP documents, upon which many institutional policies are based, and court decisions have allowed for a broad interpretation of what conditions justify termination of tenure, the history of institutions of higher education show that actions to terminate tenure have been few and have been used only in extreme situations. More often then not unprofessional conduct, incompetence, and other faculty actions warranting termination are negotiated away or ignored. Furthermore, threats by faculty that their actions are protected by academic freedom have caused many institutions to withdraw from taking proper employment actions. The fear of
litigation and possible damage to institutional reputation for being accused of infringing faculty academic freedom are also reasons institutions use to avoid tough faculty employment decisions.

Add to the threat of violation of academic freedom the increasing protections of the various discrimination laws, and normally legitimate institutional actions can easily be represented as subterfuges for discrimination. This is particularly acute when the actions are against older faculty, who claim age or disability discrimination. Furthermore, since many faculty actions are verbalized, claims of constitutional infringements on the exercise of free speech predominate.

Despite the fact that all of these protections are in place for faculty, a wave of accountability is rising across institutional consciousness. With reduced state budgets, federal cutbacks, demands by regents, governments, and taxpayers for greater efficiency and accountability, shifting emphasis towards undergraduate education and teaching excellence, and the elimination of mandatory retirement, institutions are being forced to reevaluate their levels of employment tolerance. To respond, institutions must be much more specific about their expectations for faculty and the rules that govern faculty conduct and performance. This becomes even more critical considering the Americans with Disabilities Act requirements that job functions be detailed in order to determine whether or not a person is otherwise qualified for the job or whether a reasonable accommodation should be provided.

Some courts have recently addressed the evolving issues of faculty misconduct or incompetence, and whether faculty or staff are otherwise qualified to perform their jobs. The
attached case synopses highlight the kinds of issues that are being faced by colleges and universities. Questions to prompt the development of policies and practices needed to permit institutional decision making in a fair and objective ways are presented as well.
Jeffries v. Harleson, 52 F. 3d 9 (2d Cir. 1994)

Professor Leonard Jeffries was Chair of the Black Studies Department at City College of New York. After a speech Professor Jeffries gave off campus, in which he made statements derogatory to Jews, the Board limited his reappointment as Department Chair. Applying the U.S. Supreme Court standard for protected speech enunciated in Waters v. Churchill 114 S.Ct. 1878 (1994), the federal appeals court held that the job action was proper. The test to be applied is:

Waters permits a government employer 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 actions against the employee based on the disruption and not in retaliation for the speech.

CCNY did not remove Professor Jeffries’ tenure. Had it done so, the court may well have found an academic freedom violation. “As the magnitude of intrusion on employees’ interests rises, so does the government’s burden of justification.” United States v. Treasury Employees Union, 115 S.Ct. 1003 1021(1995).

Phillips v. State Board of Regents of the State University and Community College System of the State of Tennessee, 863 S.W. 2d 45 (Tenn. 1993).
Betty Phillips was a tenured faculty member at Shelby State Community College. After years of complaints from colleagues and students about Phillips’ inappropriate and rude behavior, and after formal warnings, she was charged with “capricious disregard of accepted standards of professional conduct.” She was terminated following normal due process hearings. Finding that the rule was not void for vagueness, and that her conduct, though often verbalized, did not constitute protected speech, the court upheld her dismissal.

“Clearly, Phillips, using her common sense and general knowledge of employer-employee relationships, had fair notice that the conduct charged put her at risk of dismissal under the standard of ‘capricious disregard of accepted standards of professional conduct.’”

Colburn v. Trustees of Indiana University, 973 F. 2d 581 (7th Cir. 1992)

Several untenured faculty members appointed in the Department of Sociology at Indiana University were, following normal review procedures, either nonrenewed or denied tenure. These faculty members claimed that the real reason for their nonrenewal or tenure denial was their requesting an external review of the department. The court found that “the requests were made in the context of a faculty feud.” Because this was an internal governance matter, their statements were not deemed to be about matters of public concern, and therefore not protected speech.

San Filippo v. Bongiovanni, 961 F. 2d 1125 (3rd Cir. 1992)

Rutgers University, after much due process, fired Professor San Filippo. Professor San Filippo had been accused of abusing and defrauding visiting Chinese scientists and the
University and of compelling them to do menial chores for him outside of their University responsibilities. The court held he could not be terminated for bad ethics because there were no ethical standards in institutional rules. However, such conduct did violate the rules -- found by the court not to be too vague -- which required Professor San Filippo to maintain standards of scholarship and teaching.

"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. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to ‘maintain standards of sound scholarship and teaching.’"

In The Matter of Dismissal Proceedings Against Dr. Barney K. Huang, 44 S.E. 2d 696 (N.C. 1994)

Dr. Huang was a tenured professor at North Carolina State University. After following full due process procedures, Dr. Huang was terminated for numerous physical and verbal altercations with colleagues over a period of time from 1973 to 1988. The Supreme Court of North Carolina upheld the dismissal, based on the dissenting opinion from the appeals court, (431 S.E. 2d 541). Finding that the scope of court review of an agency decision is limited to whether “it was supported by the evidence and not arbitrary or capricious”, the Supreme Court
affirmed the decision of the Board of Trustees that Dr. Huang’s misconduct justified his
dismissal because it violated the rule prohibiting “personal conduct detrimental to State service.”


Grassinger was a tenured associate professor at Indiana University of Pennsylvania. He
was accused by library and other staff of sexual harassment. He filed numerous grievances
against everyone to slow the process down. During the investigation process, his performance
was evaluated and he was informed of his academic performance deficiencies. He refused to
respond to the notices of performance deficiencies except by further charges of retaliation. He
was eventually terminated. The court upheld his termination and found his grievances to not be
protected speech about public issues, but “quintessentially matters of personal concern.”

**West Valley - Mission Community College District v. Miller, 21 Cal. Rptr. 2d 5 (Cal. App. 6
Dist. 1993)**

Miller, a tenured faculty member at a California community college, was arrested in his
home for sale of cocaine. He was eventually acquitted of the criminal charges. Nonetheless, the
college proceeded to terminate him for “immoral or unprofessional conduct” and “evident
unfitness for service.” The court found that “knowing participation in the sale of a large amount
of cocaine was immoral conduct showing unfitness to teach.” It is important to note that the State
Credential Committee found no cause to revoke Miller’s teaching credential.

**Statsny v. Board of Trustees of Central Washington University, 647 P.2d 496 (Wash. 1982)**
Professor Statsny was assigned to advising week as the school year began. He had an invitation to be present at an international conference, and requested leave, which was explicitly denied. (He had been given many prior leaves and had a history of numerous absences.) He went anyway to the conference, claiming to deny his attendance violated his academic freedom. He was terminated for neglect of duty and insubordination. The court upheld his termination, stating:

"Academic freedom is not a license for activity at variance with job-related procedures and requirements, nor does it encompass activities which are internally destructive to proper function of the University or disruptive to the education process."

Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984)

Professor Korf was a tenured faculty member at Ball State University. He was terminated, after an investigation and due process hearing, for sexually harassing present and former students. Ball State relied on the AAUP Policy on Professional Ethics - that professors “avoid any exploitation of students for their private advantage” - as grounds for Korf’s dismissal. The University did not have an explicit sexual harassment policy. Professor Korf claimed he had no notice that sexual harassment was a basis for his dismissal. The court rejected this claim stating:

"Common sense, reason and good judgment have made [Korf] cognizant of the fact that his conduct could and would be cause for termination... . The most conscientious of codes that define prohibited conduct of employees include catchall clauses prohibiting employee ‘misconduct,’ ‘immorality,’ or ‘conduct unbecoming’."

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Riggins v. Board of Trustees of Ball State University, 489 N.E. 2d 616 (Ind. App. 1986)

Professor Riggins had received four years of counseling, notices of performance deficiencies, and remediation attempts to help him improve. Despite these efforts by the University, Professor Riggins' teaching performance did not improve. As a result, the University terminated him for incompetence and neglect of duty. The faculty committee found that "Dr. Riggins does not meet even minimum expectations with regard to his professional performance."

In seeking to overturn his dismissal, Riggins asserted that the University did not have written standards of performance. The court rejected this claim stating he had more than enough notice of the areas in which he was deficient.
Policy Questions Relating to Faculty Dismissal for Cause

1. Does the institution have clearly stated definitions of “cause” which justify faculty discipline and/or dismissal? Are these rules disseminated to faculty through handbooks or referenced in employment contracts?

2. Does the institution have articulated due process procedures that are applicable to all forms of causal terminations?

3. Has the institution adopted formal post-tenure review procedures or instituted trigger mechanisms justifying performance reviews?

4. Has the central administration provided college and departmental academic or personnel administrators training in performance evaluation and documentation techniques and strategies?

5. Does the institution at least annually disseminate to faculty and students its rules and procedures for addressing sexual harassment situations on campus?

6. Does the institution have policies on professional ethics, conflicts of interest, and outside work? Are these policies enforced?
7. Will the institution's central administration support a departmental action to assess and purge difficult or incompetent faculty?
Faculty with Disabilities


Assistant professor's contract was not renewed after three years of full-time and several prior years of part-time teaching in Dept. of Religious Studies. Plaintiff sought preliminary injunction and order of reinstatement pending trial. Court refused to grant preliminary injunction on grounds that that plaintiff was unlikely to prevail. Although plaintiff alleged that her disability—morbid obesity (she was 5'6" tall and weighed 380 pounds) was the reason for her nonrenewal, the college provided several nondiscriminatory reasons: 1) she did not have the proper educational background for the courses they wanted her to teach; 2) there had been numerous student complaints about her teaching; 3) students refused to enroll in her courses. Court found her unlikely to prevail on ADA claim because 1) her obesity did not limit her ability to teach and 2) the college had provided several legitimate nondiscriminatory reasons for the nonrenewal. The court also noted that, because the same two individuals made the decision to hire and also to nonrenew the plaintiff, an inference of discriminatory motive was more difficult for the plaintiff to establish.


Plaintiff, a tenured law professor, claimed that he received smaller annual salary increases than his colleagues and alleged that the school's motive was disability discrimination. He sued under the ADA and the Rehabilitation Act, and the school sought summary judgment. Plaintiff had suffered a stroke in 1983 which left him unable to use his left hand, arm, and leg. He argued that his disability did not affect his ability to teach, to publish (he had published 3 law articles since his stroke), nor had it required him to teach less than a full course load. Law school stated that plaintiff
was in the "lowest third" of faculty in performance, and that his class preparation was poor, his student evaluations were weak, and that his scholarship and community service were inadequate, compared with those of his faculty colleagues. Court granted summary judgment for law school, ruling that although plaintiff was disabled for purposes of the Rehabilitation Act (he had failed to file his ADA claim in a timely fashion), he was not "substantially affected" by his disability and thus not protected by the Rehabilitation. Nor was the plaintiff able to prove that the law school "regarded" him as disabled, given the many valid, nondiscriminatory reasons given for the law school for its salary decisions. Court dismissed his ADA claim as untimely, and awarded summary judgment for the law school on the Rehabilitation Act claim.


Assistant professor denied tenure claimed that his hearing disability was the reason for the tenure denial. Rice University argued that denial was based on narrowness of plaintiff's scholarly research and its lack of promise in the field of physics, as well as on plaintiff's failure to collaborate with the departmental research group.


Orthopedic surgeon employed by MIT was laid off from a part-time position after returning from a two-month leave of absence for a coronary bypass. MIT sought summary judgment on Runyon's age and disability discrimination claims. Court granted summary judgment on both claims because there was neither direct nor indirect evidence of discrimination by MIT. Runyon had not established that he met the legal definition of "disabled," furthermore, he had signed a
statement that he was physically able to work. MIT provided evidence that Runyon saw fewer
patients, was late for appointments, and was less productive than other surgeons who were retained.


Part-time instructor in the medical assistant program of Kee Business College suffered from
lupus erythematosus (a disease of the immune system that may cause joint pain, urinary and
intestinal disorders, and fatigue). In the 2 1/2 years that Tyndall was employed at Kee, she was
given additional sick leave, extra breaks during class, a shorter work day than that of other faculty,
and other accommodations. In her last year of employment, she missed nineteen days of work,
took a four-week leave to care for her son, and notified the school that she was unable to return at
the beginning of fall semester because her son was still ill. The department head asked her to resign
and reapply when she could work on a regular basis. Tyndall filed an ADA claim. The court ruled
that, although Tyndall’s condition met the definition of disability, she was not "qualified" because
she could not perform the essential functions of her job because, although her teaching evaluations
were good, she could not maintain regular attendance. The court said, "an employee who cannot
meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual
protected by the ADA."


Professor demoted from department chair position sued on grounds of disability, gender,
physical disability, and religious discrimination. Court dismissed disability claim for lack of
subject matter jurisdiction—plaintiff had not included it in EEOC charge.
Relevant Staff Cases


Librarian suffering from polycystic kidney disease was frequently tardy to work because her disease interfered with her sleep. She made several requests for a modified work schedule; her requests were refused. She filed a an EEOC claim and then a lawsuit under the ADA, claiming that the university had failed to provide her with a reasonable accommodation. The University argued that her claim was untimely because it was filed more than 180 days after the university refused to change her work schedule. The court ruled that the university's repeated refusal to alter her work schedule was "an ongoing policy to discriminate against Lewis on the basis of her disability and a continuing state of nonaccommodation of Lewis' disability." Furthermore, ruled the court, her disorder met the definition of "disability" under the ADA, and thus the University's request for summary judgment was denied.


Head basketball coach was arrested and charged with driving under the influence of alcohol and having an open container of alcohol in the car. Shortly after arrest, coach held press conference and admitted need for treatment for alcoholism. Six days later, he was discharged. He was subsequently indicted for cocaine abuse and alcohol intoxication. After completing rehabilitation, coach sued university under Rehabilitation Act for disability discrimination, based on his alcoholism. University filed motion to dismiss, asserting that Mackey was fired for his criminal misconduct, not for his alcoholism. Court denied motion to dismiss, stating that university would have to demonstrate that it discharged Mackey because of his arrest, not because of his disability.
Doe v. University of Maryland Medical System Corporation, 50 F.3d 1261 (4th Cir. 1995).

Doe, neurosurgical resident at the University of Maryland Medical System Corporation (UMMSC), was stuck with a needle while treating an individual who may have been infected with HIV. Doe later tested positive for HIV; upon learning of this, UMMC suspended Dr. Doe from the practice of surgery, pending the recommendations of its panel of experts on blood-borne pathogens. The panel recommended that Doe be permitted to perform surgery, with some exceptions, and following strict infection control procedures. Senior administrators at UMMC rejected the panel's recommendations and permanently suspended Doe from surgical practice, offering him residencies in pathology and psychiatry. Doe rejected these alternatives, and insisted that he be reinstated to full surgical privileges. UMMC then terminated him from its residency program. Doe sued UMMC under section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The trial court determined that Doe was not "otherwise qualified" to perform surgery, and ruled for UMMC. Using the test developed in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the court determined that Doe posed a significant risk to patient safety that could not be eliminated by reasonable accommodation. Because the safety risk could not be eliminated, the court affirmed the finding of the trial court that Doe was not a "qualified" individual with a disability.


Schwartz, a library clerk, alleges constructive discharge on the basis of her age (63) and disability (night blindness) when the college changed her schedule from a day shift to a noon-9:00 p.m. shift. Both her doctor and one retained by the college found visual problems that affected her
depth perception. Her visual condition did not affect her ability to do her job, but did make driving
at night more difficult. The court, using Iowa's nondiscrimination law, entered summary judgment
for the college on the disability discrimination claim (but not on the age discrimination claim). The
court ruled that Schwartz's visual impairment did not disqualify her from a wide range of jobs, and
thus it did not substantially limit her ability to work. Nor did the impairment affect her
performance at work. Because the court found that Schwartz was not disabled for purposes of the
disability discrimination law, the college did not have an obligation to attempt to find a reasonable
accommodation for Schwartz.
Policy Questions Related to Faculty Disability Issues

1. Does your institution have a policy for addressing requests for accommodations from faculty or staff with disabilities?

2. Are your institution’s workload policies and practices clear and are they followed consistently? Does your institution document deviations from standard practice (faculty given special projects, research leaves, etc.)?

3. Does your institution, or academic subunits, have written policies on how it will handle sick leave, tardiness, absences from class, requests for professional trips, etc.? What are the consequences for frequent or repeated tardiness or absences?

4. Does your institution have an established structure to allow it to respond immediately to student complaints of tardiness, absences, canceled classes, unprofessional behavior, or other disruptions of the academic program? Are there consistent practices for documenting all complaints, observing faculty member's classes, or monitoring his/her attendance in and promptness for class?

5. Are administrators trained and reinforced for confronting faculty whose performance is problematic for the academic unit, particularly with respect to disruptive behavior or inappropriate conduct in class? Is your institution able to compel medical or psychiatric evaluations?
6. Has your institution defined the "essential functions" of a faculty member's job and developed a policy or handbook provision that makes these explicit? Must all faculty conduct research and publish? Must they all perform service to the community, the institution, or the profession/discipline? May a faculty member "trade off" additional teaching for the right not to conduct research or engage in service?
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