

**TENURE AND ACADEMIC EMPLOYMENT:
MANAGING ACADEMIC STAFF AND LITIGATION TRENDS**

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ANN H. FRANKE, ESQ.¹
PRESIDENT, WISE RESULTS, LLC
WASHINGTON DC

Introduction

This paper begins with the premise that readers are familiar with the concept of academic tenure, including its definition and justification. The paper instead offers advice about how to avoid having tenure disputes turn into lawsuits. It will also share observations about how courts typically react to tenure litigation.

The general umbrella of “tenure litigation” covers both the denial of tenure and the dismissal of tenured faculty. These two points mark, in effect, the beginning and end of tenure. Tenure, of course, can also end through steps including resignation, retirement, program closure, or financial exigency. This paper excludes those, addressing the end of tenure only in the context of dismissal for cause of a tenured professor.

No data sets exist showing the number of tenure awards or denials across the country, internal appeals pursued, or even lawsuits filed over tenure denial. Similarly, no data show the number of tenured faculty against whom institutions bring dismissal proceedings. Still, enough disputes find their way into the media and into court that one can offer various generalizations.

¹ The author may be reached at annfranke@verizon.net. Portions of this outline are drawn from the author’s earlier works, including *Good Practice in Tenure Evaluation*, a report jointly produced by AAUP, ACE, and United Educators (2000); “Nobody Said This Was Going to Be Easy: Legal and Managerial Challenges for Department Chairs and Other Academic Administrators,” by Mary Ann Connell, Ann Franke, and Barbara Lee; “Faculty Hearing Panels: What They Do, How They Do It, and the Judicial Response,” Ann Franke (2009); and “The Faculty Member as Problem Employee: Investigation, Discipline and Termination Issues,” Ann Franke (1995). The latter two items are available to NACUA members through the on-line Legal Reference Service.

The paper concludes with a collection of “stray remarks” offered as evidence in faculty litigation (p. 12) and a list of illustrative damage awards and settlements in tenure denial cases (p. 19).

Denial of Tenure

A tenure application is a high-stakes situation for both the candidate and the institution. If tenure is awarded, the individual thereafter enjoys the presumption of professional competence and the security of a long-term commitment from the institution. Although tenure is often, and incorrectly, described as a lifetime commitment, it is a long-term commitment with contingencies typically including misconduct, program termination, or institutional financial distress. The total costs of salary and benefits over a tenured professor’s career typically exceed \$3 million, reinforcing that tenure decisions are indeed high stakes for both faculty and institutions.²

Lawsuits over the denial of tenure were relatively uncommon as recently as 30 years ago.³ In 1991, Congress amended Title VII to allow plaintiffs to try federal discrimination cases before juries rather than judges. This led to a significant increase in the number of discrimination lawsuits. Today almost any tenure denial may spark litigation.⁴

Losers in high-stakes situations typically feel disappointment. If they also feel aggrieved, they may resort to litigation. The author has identified four protective factors that can reduce the likelihood of litigation over tenure denial. They are: clarity in standards and procedures for tenure evaluation; consistency in tenure decisions; candor in evaluations; and caring for unsuccessful candidates.⁵ Each factor is briefly addressed below, with case citations further illustrating the principle.

² This estimate is an extrapolation from data in the 2009-2010 AAUP annual salary survey. At institutions with academic rank, 83% of associate professors held tenure. Their average compensation, including salary and benefits, was \$99,204. Assume, roughly, a career span of 35 years for a tenured professor. Without adjusting for salary increases, the total compensation would come to \$3.47 million. *Academe*, March-April 2010, Table 13, at page 31.

³ In 1987, George LaNoue and Barbara Lee estimated that the courts had decided 300 cases in which faculty plaintiffs alleged that their institutions discriminated against them. Their estimate was not restricted just to tenure cases. George R. LaNoue and Barbara A. Lee, *Academics in Court: The Consequences of Faculty Discrimination Litigation* at p. vi (University of Michigan Press 1987).

⁴ The notable exception is decisions by religious institutions affiliated with denominations that actively discourage resort to the courts for dispute resolution. Unsuccessful tenure candidates may be less inclined to sue such institutions.

⁵ “Good Practice in Tenure Evaluation,” jointly published by the American Council on Education, the American Association of University Professors, and United Educators (2000).

1. Clarity in Standards and Procedures for Tenure Evaluation. Institutions need clear standards and procedures for tenure evaluation, and they should share these early on with every tenure-track faculty member. These should include the actual criteria that the institution applies; guidance on the weight to be given to developments that occur after the candidate has submitted the application; and protocols on the weight, if any, accorded to informal communications made to decision-makers outside of the formal review channels.

Bennett v. Wells College, 641 N.Y.S.2d 929 (A.D. 4 Dept. 1996). Student enrollment was the crucial factor in the dean's decision to deny tenure to Professor Bennett but was not among the college's enumerated criteria for tenure. The tenure decision was thus substantively flawed.

Taggart v. Drake University, 549 N.W.2d 796 (Iowa S.Ct. 1996). Graphic design professor received favorable evaluations until the arrival of a new department chair. The departmental evaluation criteria included exhibitions, and the professor claimed that graphic designers do not typically exhibit or submit their work to peer review. She received a terminal appointment due to her refusal to provide adequate documentation or attend reviews. The court concluded that the university's evaluation procedures (which were based on AAUP's recommended policies) created an enforceable contract under state law.

In analyzing the professor's breach of contract claims, the court rejected her contentions that the evaluation criteria and procedures were insufficiently detailed, she was never advised about the standards, she was not given the opportunity to submit materials, and she was never notified about meetings. The court stated that the "plaintiff had no right to demand, as a condition for her own compliance [with rules about submitting materials], that Drake provide more criteria than was called for in the contract."

Conway v. Pacific University, 924 P.2d 818, 324 Ore. 231, 12 IER Cases 233 (Ore. S.Ct. 1996). A visiting psychology professor who received mediocre student evaluations was offered a regular tenure-track position. He asked the dean whether the student evaluations would affect his tenure prospects and allegedly was told that they would not. After several years his tenure-track appointment was not renewed because of poor student evaluations, and he brought a claim for negligent misrepresentation against the university.

The state supreme court rejected the claim, holding that the university's contractual employment relationship with the professor imposed no duty of care to avoid making negligent misrepresentations. The professor's contract, which was negotiated for each party's own benefit, did not require the university to exercise independent judgment on behalf of the professor or to act in his behalf. One of two dissenting opinions indicates:

"The majority holds in this case that a university dean has no duty (or, as the majority would require, no 'heightened duty') to exercise care to tell the truth."⁶

2. *Consistency in Tenure Decisions.* While tenure decisions are highly individualized, institutions must consider comparative elements to ensure that their decisions are fair among candidates. An unsuccessful candidate may allege that the negative decision was illegally based on protected attributes such as race, sex, disability, or age. Another candidate may allege that she would have received tenure had she not spoken out on some unpopular topic, such as gay rights or institutional budgeting. Protection for speech may be found in institutional policies and, at public institutions, the First Amendment.⁷ Plaintiffs bringing discrimination or free speech claims point to other candidates who did receive tenure, arguing that they were equally qualified.

Another aspect of consistency is the consistency over time in the treatment of one candidate. The successive evaluations of an individual should make sense relative to one another. An assistant professor who received glowing evaluations for five years but who is denied tenure for inadequate teaching or research has a compelling story to tell a jury.

Adelman-Reyes v. Saint Xavier University, 500 F.3d 662 (7th Cir. 2007). A university offered legitimate reasons for its denial of tenure to an education professor who was Jewish. Although the internal votes were split, with the department favoring tenure, the university was entitled to base the tenure denial on lack of service on institutional committees, negative student reactions, and poor enrollment trends in the program. The professor compared herself to another woman hired at the same time, and evaluated for tenure at the same time, who was not Jewish. The other candidate received tenure.

Bresnick v. Manhattanville College, 864 F.Supp. 327 (S..D.N.Y. 1994). The provost gave the plaintiff a "To Whom It May Concern" letter describing his positive qualities. Shortly thereafter the plaintiff was denied tenure on grounds of poor collegiality.⁸ The

⁶ See generally Gerald M. Gillmore, "Student Ratings as a Factor in Faculty Employment Decisions and Periodic Review," 10 Journal of College and University Law 557-576 (1984). Feldman, K.A., "College Students' Views of Male and Female College Teachers," Research in Higher Education, vol. 33 pp. 317-375 (part I)(1992); vol. 34 pp. 151-211 (part II)(1993). Wilson, R., "New Research Casts Doubt on Value of Student Evaluations of Professors: Studies Find that Faculty Members Dumb Down Material and Inflate Grades to Get Good Reviews," Chronicle of Higher Education pp. A12-14 (January 16, 1998).

⁷ First Amendment protection for public employees has been eroding in recent years, often making institutional policies the stronger basis for a plaintiff's claims. See Garcetti v. Ceballos, 547 U.S. 410 (2006). See "Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos," AAUP (2009). Available at www.aaup.org/AAUP/comm/rep/A/postgarcettireport.htm.

⁸ For discussion of collegiality as a stated or unstated criterion, see e.g., Bresnick v. Manhattanville College, 864 F.Supp. 327 (S.D.N.Y. 1994); Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981), cert. denied 459 U.S. 830 (1982). Connell, M.A. and Savage, F., "The Role of Collegiality in Tenure, Promotion, and Other Higher Education Employment Decisions," Stetson University College of Law, 19th Annual Law and Higher Education Conference, February 1998.

court rejected a breach of contract argument and indicated that the generic recommendation, useful for outside purposes, did not show bad faith in the college's nonrenewal decision. "[T]he inconsistent evaluations might each be correct when differing audiences and circumstances are taken into account."

Bennett v. Wells College, 641 N.Y.S.2d 929 (A.D. 4 Dept. 1996). An art professor received favorable votes on her tenure candidacy from two faculty committees. The interim dean informed the candidate that, after consultation with president and vice-president, he had decided to deny her tenure. The school's procedures called for the president to review the recommendation independently, which was not done. The court granted relief in a state Article 78 proceeding for the college's failure to follow its own regulations.

"No recommendation was ever made by the President, nor were the faculty committees consulted. Thus, petitioner's tenure review lacked both the active involvement of the President and the direct communication between administration and faculty required by respondent's rules. Given those procedural infirmities in the tenure process, the court properly directed respondent to contract a de novo review."

Koerselman v. Rhynard, 875 S.W.2d 347 (Tex.App. 1994). When Professor Rhynard was evaluated for tenure, the tenured faculty members inquired about rumors of sexual harassment allegations. The chair of the music department advised them that the information was "confidential and privileged." The chair wrote to the dean recommending denial of tenure and indicating that students had complained about inappropriate sexual content in comments made by Professor Rhynard. The chair had failed to place required evaluation summaries of teaching evaluations in the professor's files. The dean ordered the chair to place the materials in the file and conduct another tenure review. The outcome was again negative.

The appellate court held that the department enjoyed official immunity from the claims because, while placing the materials in the files might have been technically a ministerial act, they existed as part of the process of tenure evaluation, which requires the exercise of discretion. The chair had proceeded in good faith, had prepared this professor's file in the same fashion as earlier tenure candidates, and had included the materials when asked to do so.

3. *Candor in Evaluations*. An on-going challenge for chairs and deans is providing honest advice to tenure-track faculty. Some academics are averse to conflict and share only praise and encouragement. Over the long term, however, evaluations that omit constructive criticism and a realistic prognosis can hurt the individual. Chairs need to offer candid evaluations in plain English. Diplomatic argot may not get the message through to the candidate—or to a jury.

Mbarika v. Board of Supervisors of Louisiana State University, 992 So.2d 551(La.App. 1 Cir., 2008). An African-American assistant professor in the Department of Information Sciences and Decision Sciences alleged discrimination in the decision not to reappoint

him at the end of his initial three-year contract. The court observed that his tenured colleagues and the department chair spelled out repeatedly the steps he needed to take to succeed in reappointment, promotion, and tenure. His first evaluation explained:

Junior faculty members in ISDS are encouraged to focus their research efforts on projects that have a high potential for being accepted in the leading journals in information systems, or where appropriate, the leading journals in its reference disciplines. Over time, a strong research portfolio will likely evidence some mix of publications in both first and second tier journals. However, for faculty in the early stages of their careers we suggest targeting the former, with the assumption that the secondary outlets will prove to be acceptable homes for work that does not make it into the first tier outlets. To date, the journals in which Professor Mbarika has published would not be considered among those generally regarded among the first tier.

Professor Mbarika indicates that he has at least six research projects in-progress. We encourage him to closely evaluate these works and to pare this set down to the most promising pieces and focus on preparing those for submission to the leading journals.

He failed to heed their advice, which was repeated in subsequent years, and ultimately did not meet the university's standards for teaching, publication, and collegiality. The court ruled that the nonrenewal decision was not based on race discrimination.

Jimenez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995), cert. denied 516 U.S. 944 (1995). A black economics professor appointed to a tenure-track position received an evaluation after his first semester of teaching that cited his skills as a professor as lacking (with teaching weaknesses cited) and his personal fortitude as commendable. His second evaluation noted that his student evaluation scores were below average for the department and the college; it expressed the hope that time would cure this failure. The trial court found that negative student evaluations may have resulted from a concerted effort at racial discrimination among some students.

In his third year Professor Jimenez received a terminal contract. Subsequent improvement in his teaching evaluations was attributed to either the end of the conspiracy or the small number of students in his classes. The appellate court found that the evidence of a student conspiracy was speculative and insubstantial and that the professor had not met his burden of proving discrimination.

Baker v. Lafayette College, 532 A.2d 399 (Pa. 1977). An art professor whose probationary contract was terminated after two years alleged that the negative performance evaluations written by the chair were tainted by the chair's hostility toward him. An advisory committee felt that the evaluations were unreliable, and the college

physician had recommended psychiatric counseling for the chair. The president and governing board nonetheless upheld the nonrenewal. The court rejected the professor's contention that an evaluation not conducted in good faith breached his employment contract. The court pointed to the existence, and use, of internal appeal processes. "As in all aspects of life no procedure is fool proof....We would be hard-pressed to conclude that the College acted in bad faith when it followed the required review procedures."

Dalrymple v. University of Texas System, 949 S.W.2d 395 (Tex.App., Austin, 1997). Professor Dalrymple claimed that he was denied tenure in retaliation for his earlier opposition to a merit raise for a senior colleague. Dalrymple received a favorable evaluation after his first year on the business school faculty at the University of Texas, Pan American. He then served on a university committee that conducted evaluations of professors for merit increases. Against the dean's advice, the committee declined to recommend a merit raise for Professor de los Santos. Professor de los Santos then sat on the plaintiff's evaluation committee the following year. The two other members of the evaluation committee supported plaintiff's reappointment but de los Santos dissented citing, in part, the plaintiff's "less than satisfactory work" on the merit raise committee. The dean recommended nonrenewal, but the academic vice president gave the plaintiff another one-year appointment. The following year his contract was not renewed. The appellate court reversed the grant of summary judgment in favor of the university, given the existence of a material fact as to whether the administrators acted in good faith.

4. Caring for Unsuccessful Candidates. Efforts to assuage the anger and frustration of an unsuccessful tenure candidate can go a long way toward averting litigation. Such efforts are also the right thing to do. A meeting within a day or two of the adverse decision is vital to repairing the individual's damaged sense of self-worth. The provost or dean should give the individual an opportunity to express his or her feelings about the situation, without engaging in a dispute.

Academic administrators can outline the types of assistance the institution may provide as the individual seeks another position. Steps might include professional networking, career counseling, references, funds for travel to conferences, and other types of support that will enable the individual to move ahead with his or her life. Some institutions offer, for example, portable research grants that the individual can take to his or her next institution. Others fund travel to the discipline's major hiring conference. In still other situations, a dean or department chair will contact colleagues at other institutions to inquire about potential openings.

Dismissal of Tenured Faculty

Until January 1, 1994, colleges and universities could require tenured professors to retire when they reached age 70. With the elimination of mandatory retirement, institutions can no longer rely merely on the passage of time to resolve serious performance problems with tenured faculty member or other employees. The dismissal of tenured faculty remains a rare step. As one study observed:⁹

The primary barriers to the dismissal of faculty for nonperformance are traditions of collegiality and the administrative difficulty of dismissal. Many faculty members and a few administrators at our case study institutions stated that they would rather have their institution carry the weight of the occasional inadequate faculty member than risk a dismissal that might undermine the principle of tenure protecting all faculty members.

While no national data are available, it seems that over the past 15 years the number of tenured faculty dismissed for cause has increased slightly. One can assume that many situations are resolved behind-the-scenes with negotiated settlements and resignations. Several institutions have initiated the first dismissal proceedings in their history. We have a slow but rather steady stream of court decisions in which tenured professors have challenged their dismissals.

The dismissal of tenured faculty is sometimes called “detenuring.” Dismissal is a better term, because it makes clearer that the individual will have no continuing relationship with the institution. In contrast, one might erroneously assume that a professor who is “detenured” still maintains some ongoing role in, for example, an adjunct position without tenure.¹⁰

Solid proceedings within the institution greatly enhance the possibility of a favorable outcome in subsequent litigation. The two most important elements are:

- Have well-documented, compelling reasons for initiating dismissal proceedings
- Follow your own institutional procedures carefully

Below are three recent appellate decisions speaking to these principles.

Otero-Burgos v. Inter American University, 558 F.3d (1st Cir. 2009). While dealing with unrelated questions of remedies, the case outlines a situation in which an institution may have lacked a compelling reason for terminating a tenured professor. Professor Otero-Burgos had a twenty-year successful career at Inter American University in Puerto Rico.

⁹ Ending Mandatory Retirement for Tenured Faculty: The Consequences for Higher Education, National Research Council, p. 63 (National Academy Press, 1991).

¹⁰ As the number of faculty without tenure continues to grow, the possibility of confusion increases. In 1975, 43% of faculty served in part-time or non-tenure track positions. In 2007, the figure had risen to almost 69%, leaving just 31% of faculty either holding tenure (21%) or serving in tenure-track positions (10%). “Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives,” by Ann Franke at p. 2 (American Council on Education, 2009).

After serving in administrative positions, he received tenure in 1994 and received a “Distinguished Professor” award in 1996. In 1999, he awarded a student a grade of “D” in a business theory course. The student asked for an opportunity to improve his grade, which Professor Otero-Burgos rejected. The student then complained to the dean, who ordered the professor to prepare a supplemental evaluation process for the student. The professor refused to do so, so the dean had another professor evaluate the student further. The student raised his grade to a “C.”

Professor Otero-Burgos filed an internal appeal alleging that his academic freedom had been violated, a contention with which a faculty committee agreed. The dean then appointed an ad hoc committee to review the work of the first committee and to review Professor Otero-Burgos. The ad hoc committee concluded that Professor Otero-Burgos had, among other misdeeds, been insubordinate and failed to follow university policies. He was dismissed and, after further appeals, the decision became final in 2004, some five years after award of the original grade. While the federal appellate decision analyzed and resolved a question on the remedies that would be available to Professor Otero-Burgos, the facts alone suggest a rather thin basis for terminating a tenured professor.

Bernold v. Board of Governors of University of North Carolina, 683 S.E.2d 428 (N.C. App. 2009). Lack of collegiality was a legitimate ground for dismissing a tenured professor of engineering. In three successive years Professor Bernold’s post-tenure evaluations had concluded that he failed to meet expectations for service. Regulations of the College of Engineering stated that “each faculty member is expected to work in a collegial manner.” The court concluded that the professor could reasonably anticipate that his post-tenure review could focus on collegiality. The appeals court declined to comb through the professor’s evidence that he engaged in disruptive behavior only with some colleagues, rather than with all, leaving intact the district court’s evidentiary findings.

Satcher v. University of Arkansas at Pine Bluff, 558 F.3d 731 (8th Cir. 2009). Professor Satcher, a historian, received tenure in 1987. He served for a time as department chair and was removed from that position in 1999. His lawsuit over removal from the chair position was settled and, as the appeals court noted, then “things began to unravel.” He refused, for example, to file a required report concerning a sabbatical or to provide his resume to an accrediting team. Apparently believing that the new chair was out to get him, “Satcher began filming his own classes, those of other professors, and even student registration. He refused to attend faculty meetings.” He was repeatedly reprimanded for his behavior. Ultimately the campus police forcibly removed him from a classroom and he was notified of termination, effective one year later. Professor Satcher declined to use the available internal procedures to challenge the decision, instead filing suit. The court found that the university had adequate grounds for the dismissal and did not violate Professor Satcher’s due process, since he declined to utilize the internal procedures.

Judicial Deference to Institutional Procedures

There is a noticeable trend of judicial deference to the internal procedures of colleges and universities. This extends the often quoted maxim that courts do not sit as “super tenure committees.” Most institutions offer internal review and appeals procedures which faculty members can use to challenge adverse actions such as tenure denial or dismissal for cause. In keeping with AAUP’s recommended policies, most institutions offer internal procedures *in advance of* a decision on dismissal, rather than after-the-fact. An internal challenge to the denial of tenure is, in contrast, generally accorded after the decision is made.

State court judges generally prefer that faculty members denied tenure or dismissed use campus review and appeal procedures before filing suit. State courts often show great deference to the decisions of internal review processes, as the cases below illustrate. Some courts will even interpret an *available* internal remedy as *mandatory*. The deference does not, however, extend to claims under federal law.

Roquitte v. University of Minnesota, 2000 WL 249263 (Minn. App. Mar 07, 2000) (NO. C4-99-1200), review denied (May 16, 2000). Following a ten-day hearing before the faculty’s Senate Judicial Committee, a majority of the committee found that a tenured professor had failed to fulfill his professional responsibilities. After review by the president and governing board, the professor was dismissed. In an unpublished opinion, the Court of Appeals ruled the internal proceedings were adequate and that the dismissal was not arbitrary, fraudulent, or reached without supporting evidence. It rejected the professor’s claims of conflict of interest by university counsel and the professor’s overly broad demands for pre-hearing discovery.

Neiman v. Yale University, 851 A.2d 1165 (Conn. 2004). Philosophy professor alleged a breach of contract in tenure denial. The state supreme court affirmed the trial court’s finding that she had failed to exhaust internal remedies available in the faculty handbook. The court accepted the position of other states that have held “almost uniformly that the exhaustion of remedies doctrine applies when faculty handbooks provide internal grievance procedures,” with a string cite. Moreover, although the handbook stated that a faculty member “may request review” of a tenure dispute through internal procedures, the process was not merely permissive. The plaintiff had the choice of foregoing the dispute or availing herself of the internal procedure. The absence of a damages remedy in the internal procedure did not excuse the plaintiff from invoking it. “[H]ad the plaintiff availed herself of the internal grievance procedures at Yale, she might not have incurred the damages for which she now seeks compensation. Furthermore, the plaintiff could have sought redress for her claims in court had she not prevailed in the internal grievance process.”

Pomona College v. The Superior Court of Los Angeles County, 45 Cal. App. 4th 1716 (Ct. App. Cal. 2d Dist. 1996). The judicial review of the tenure decisions of private universities in California is limited to evaluating the fairness of the administrative hearing in an administrative mandamus action.

Murphy v. Duquesne University, 745 A.2d 1228 (Pa. Super. 1999). The judicial review of a university's decision to dismiss a tenured law professor was limited to whether the internal hearing record included substantial evidence of "serious misconduct." The internal faculty committee had held two days of hearings. It concluded that the professor had harassed female law students but recommended against termination, finding that the university had inexcusably delayed in pursuing the matter. The president and governing board decided on dismissal. The professor then sued, arguing that he had not engaged in serious misconduct. The trial court ruled that the professor had no right to a jury trial on the issue and granted summary judgment to the university. The Superior Court affirmed.

Johnson v. University of North Carolina, 688 S.E.2d 546 (N.C. App. 2010). Winston-Salem State University suspended an assistant professor during the term of his contract because of serious concerns over his classroom conduct. The charges were neglect of duty and professional misconduct. (The removal of a faculty member during a term contract is generally treated as equivalent to dismissing a tenured professor.) Professor Johnson requested a hearing, which was held. He declined, however, to pursue an internal appeal that was available to him. In his lawsuit for breach of contract, the trial court dismissed the case because Johnson had not used the internal appeal. While the campus regulations provided that a faculty member "may" pursue an internal appeal, the court found that the step was mandatory before the individual could bring an action in court. "Since plaintiff elected not to pursue each level of appeal provided by defendants, we conclude that plaintiff did not exhaust his remedies prior to filing the present action in superior court."

Some Casual Remarks Used as Evidence in Tenure-Denial and Other Faculty Lawsuits

Ann H. Franke, Esq.

Faculty members who bring lawsuits against educational institutions may offer as evidence comments allegedly made in the past by colleagues or administrators. These comments, typically from emails or casual conversation, are most often used as evidence of discrimination.

The circumstances of the comments can vary widely. To whom was the statement directed? It might have been directed to the plaintiff, or he or she may have overheard it or learned of it through a third person. About whom was the comment made? The comment may have been made about the plaintiff. Even if it concerned a different individual, a remark might be offered to show indirectly how the speaker felt about the plaintiff.

Below is a collection of comments that have been offered as evidence in litigation over the denial of tenure or other faculty disputes. Some are direct quotes, while others have been paraphrased from court records or news reports. Some speakers may have denied ever making the statements attributed to them. Others may have claimed that their comments were taken out of context and misconstrued. Most probably found their role in the litigation quite unpleasant.

The message is clear. Faculty and academic administrators need to understand that almost anything they say or write may someday be repeated in a courtroom. Email is especially problematic. Comments are grouped by the role of the speaker.

A. PRESIDENTS

The English Department is a damn matriarchy.

University president's comment made to the department chair, offered as evidence by a female English professor who was denied tenure. At the time, the department had a female chair and six other tenured females, out of a total of 26 tenured faculty.

In terms of comparable white faculty members, blacks would cost the university more money to hire.

University president, responding in a meeting to a question as to why the university did not have more black faculty members. Used as evidence in a lawsuit by a black faculty member who was denied reappointment.

Your point of the tenure decision of [Professor X] as an instance of continued unfairness in the treatment of women in the Medical School is well taken. (In this particular case, I was already aware of the problem, and I have previously made inquiries of the Dean. I have not had a response.)

Letter from university president to a tenured medical professor who had expressed concern about the on-going tenure candidacy of a colleague. The colleague, ultimately denied tenure, filed suit for gender discrimination.

All Mexicans hired by the college cause trouble.

College president's remark to a part-time Mexican-American faculty member who was rejected for a full-time position. The judge found "unconvincing" the president's testimony that he never made the statement.

Because of federal legislation that has eliminated a mandatory retirement age, institutional flexibility would be undesirably constrained and the granting of tenure in this instance is likely to foreclose a more appropriate appointment later.

Letter from college president to faculty member who was nearly 60 years old explaining why she was denied tenure.

There are too many foreigners in the Life Sciences department, and I plan to do something about it.

Comment by president of a historically black university to a department chair, used as evidence by a Nigerian chemistry professor. The week after the chemist's discrimination claims were made public, an African American department chairman spoke in the Faculty Council. The transcript recorded her remarks as "We ought to be the majority here, the descendants of the slaves in this country ought to be. Now it doesn't mean that anybody should dominate anybody just because they're descendants of slaves, but we shouldn't be absent. And when we start being absent here, I'm going to be concerned."

I want a Catholic man in his 40's for the job.

College president allegedly expressed biased preferences for candidates for administrative positions. He would not, according to witnesses, hire women and he told another administrator not to hire pregnant women. The federal Equal Employment Opportunity Commission sued the college. An EEOC attorney pointed out that "Unlawful discrimination can happen in any workplace, regardless of managers' education or sophistication." The college settled the case.

B. PROVOSTS, DEANS, AND OTHER ADMINISTRATORS

The dean is trying to get rid of black professors and I'm in a struggle with her over the appointment of an additional black professor. The dean's office is a bunch of racists.

Comments allegedly volunteered by vice provost to an African-American visiting professor who was seeking renewal of her contract.

That's a problem. There are different standards for males and females.

Interim dean, who was a faculty member in the political science department, discussing with a male colleague the successful tenure candidacy of a female professor. The male was later denied tenure.

What are you going to do, sue me? Do you know what happens to people who sue their employer?

Comments by dean offered as evidence of retaliation by an associate professor of engineering in his lawsuit over denial of salary increases and promotion to full professor. The dean denied using these exact words, but he did admit that he inquired into whether the professor planned to file suit, expressing the opinion that it would be a bad idea. The engineer, who was Jewish and raised in the USSR, also offered evidence that senior colleagues repeatedly referred to him as a “Russian Yankee” and a commie, and made anti-Semitic remarks about Jewish frugality and wearing a propeller on a yarmulke.

She missed work or other University events due to the celebration of Jewish holidays.

A dean of education’s comment about a tenure candidate during a conversation with the vice president for academic affairs at a Catholic university. Another professor testified that the dean had also said the tenure candidate was a “**liberal union-oriented Jew.**”

I would like to see young, fresh blood, newer than the candidates brought forward.

Comment by an administrator to a human resources staff member about the applicant pool for a full-time faculty position. Another administrator commented to a professor’s wife that “**They need young blood up in that department.**” These statements were used as evidence of age discrimination by an unsuccessful candidate for the position. The candidate had taught as an adjunct at the college for seven years, receiving strong evaluations and recommendations.

That department chair only wants to hire white females for faculty positions.

A medical school dean reportedly made this comment to a candidate during an interview for a faculty position. The candidate was appointed and then nonrenewed. Both the dean and the candidate were African-American males; the department chair was a white female. At the time of the interview the dean was serving as the institution’s interim president.

I feel we should not have too many Chinese or Indian professors here. With too many foreign-born professors they would not assimilate culturally and therefore would not be good role models for the American students.

Comments by an engineering professor, who was formerly an administrator at the university, to government investigators examining the discrimination claims of a Chinese professor who had been denied tenure.

This university is first for blacks, then for whites, and then for you.

Comment by a dean to an Iranian assistant dean. The dean also told a candidate for a faculty position that the assistant dean **did not have the work ethic of most Iranians and did not work as hard as Chinese faculty.**

C. DEPARTMENT CHAIRS

You were “fundamentally dishonest” for not disclosing in your interview that you are disabled.

Department chair’s complaint to a soils scientist who, after her appointment to the faculty, requested special office furniture and laboratory adjustments to accommodate her long-term,

permanent back injury. The scientist cited the remark as evidence of disability discrimination in her tenure denial lawsuit, filed a decade later.

The promotions committee decided that you wouldn't be happy here, and that other members of the department would resent you and be demoralized.

Department chair's explanation to a female who was denied tenure.

Hey, you the Moroccan.

Greeting at a department event by acting chair of foreign language department to an Algerian visiting professor. The acting chair had opposed the visiting professor's appointment to an assistant professor position. The federal district judge ruled that a trial was needed to assess whether the visiting professor was a victim of discrimination.

An effort to correct the imbalances in the department is beginning to show its effects. The ratio of U.S. born versus foreign born has improved from 5:37 to 10:28.

Draft departmental self-evaluation by the department chair, discussing "present weaknesses" in a department of east Asian languages. Offered as evidence by a Japanese professor who alleged national origin bias upon being denied tenure.

As indicated on the recruitment signoff sheet, the hiring goals for the psychology department are 61.8 percent women and 9.8 percent minorities. According to the attached workforce utilization report, there are 4 women and 2 minorities in the department. Thus, the department needs 3.23 women to reach its target.

Memo by a department chair used as evidence by a male candidate who was denied a tenure-track position. In later email messages, the chair also commented on a particular search, "Two male candidates cannot go forward" and "We cannot send two male candidates forward, given the targets in the department." The appeals court quipped in its opinion that the chair did not explain how the department "was going to appoint 23/100 of a woman."

You are at the university only because you're African-American. Being African-American without meeting publishing expectations isn't enough for tenure.

Remarks allegedly made by department chair in conversation with untenured medical professor. Department chair alleged that professor claimed that being African-American ought to suffice for tenure.

Whites at a historically black institution can only make a contribution in a subordinate role.

From an article distributed by the chair of the physics department at a historically black institution. The chair also allegedly told a Mongolian professor that there was no room for advancement for whites in the physics department and only blacks could expect advancement.

Your performance wasn't bad for a broad.

Chair of music department, said after a performance by a female faculty member. The statement was used as evidence by another female musician who was denied a promotion to full professor.

How can you stand to be around those white bitches?

Comment by chair of recreation department made to black coach, used in lawsuit by a white physical education professor. Evaluating this and other evidence, a federal judge concluded that the chair's "equivocal explanation of these incidents is less than satisfactory and is inconsistent."

There is no room for an Indian in this department. You are not "black enough."

Remarks by department chair made in African-American Studies department meetings to an East Indian professor who was later denied tenure. Although the chair, who was untenured, did not vote on the tenure application, the candidate alleged that the chair poisoned her chances.

I just didn't know how to proceed after he filed the age discrimination charge.

Comment by a department chair considering a retired professor's application for a vacant adjunct position. The remark was used as evidence of possible retaliation against the candidate for filing an age discrimination charge.

Deposition testimony about a hiring decision.

Q: So you thought that Ms. J. would be a better choice because she was black and she could relate to those black students?

A: I thought she could.

Q: Okay. So the fact that she was black motivated your decision?

A: That is correct.

Q: Okay. And the fact that Dr. K. was white made you think in your mind he wouldn't be best for the job; is that right?

A: That is correct.

Q: Okay. Ms. J. was much younger than him also, wasn't she?

A: She was.

Q: That was better too, wasn't it?

A: She probably had a lot on the ball.

Q: And so your thinking was that because Dr. K. was over 65, or 65 or so, that Ms. J. probably could be better at doing the job than him because she was younger?

A: That is correct.

Deposition testimony of division director. Dr. K. was not hired for a faculty position. He sued the college for age, race, and sex discrimination.

D. COLLEAGUES AND COMMITTEE MEMBERS

We want to see young blood in the department.

Comments to colleagues by two interviewers who rejected a woman over 40 for a community college faculty position. The following year two candidates under 40 were hired.

White people who do research in black history are exploiting blacks just for their personal advancement.

From a black colleague to a white professor of religion whose work on religion and society touched on black studies. The white professor was denied tenure.

The department made a mistake in bringing in a person of such advanced age to teach classes one after another. The university is trying to renew itself.

Comments made during consideration of candidate's tenure application. The trial judge observed that the plaintiff "has presented the rare 'smoking gun' in a discrimination case that compels the Court to find that he has come forth with direct evidence of discrimination."

He is too old for the job.

A colleague wrote an evaluation of an engineer seeking a mid-career change into academia that he was "too old for the job." The candidate was nonetheless hired and eventually denied tenure, when the evidence of earlier hiring bias came out. In addition, another colleague frequently referred to older professors in an industrial engineering department as the "legacies," borrowing a term that refers to old and outdated computer systems.

It will go through because she's a woman.

Comment by a member of a promotion and tenure committee about a female professor's tenure application. Offered as evidence in the case of a *male* electrical engineering professor who was *denied* tenure.

I have trouble working with her because she reminds me of a prison matron.

Comment by one professor to another made about a third. Offered as evidence in a discrimination lawsuit over the selection of a department chair.

She had trouble attracting graduate students because she was too feminine, namely too unassuming, unaggressive, unassertive and not highly motivated for vigorous interpersonal competition.

Comment during tenure committee meeting by department member who abstained from voting on the candidate.

She is able to get her work published because of her relations with her publisher.

Comment by male during department tenure meeting. When asked to explain, he allegedly replied, "You are very naïve."

Find your rabbi and start a happy new life.

A college felt that a long-serving female theater professor was no longer contributing to the department and offered her a buyout package. A female colleague of the professor reportedly made the comment in a discussion about what the professor should do. The comment, which referred to a recent theatrical role the professor had played, offended her.

We are interviewing you because we have to interview women.

Remark to candidate for position in social science department, who was eventually hired as the first woman in the department. She later complained of harassment and the college eventually denied her tenure for failing to establish effective working relationships. She alleged the tenure denial was in retaliation for her harassment complaint.

Us white folks have rights too.

Comment made during a department's consideration of a black faculty member for tenure.

Women and blacks don't have any trouble getting jobs.

Comment by senior department member shortly after a 5-2 vote against the candidacy of a woman for promotion to full professor.

Her lab manual is like a collection of cookie recipes.

Trial testimony by a philosophy professor who served on the appointments and promotion committee, commenting on the work of a scientist whose tenure candidacy was rejected by his committee.

This final example, from a dean, was not used in a lawsuit but rather reported in the *Wall Street Journal*.

It is no secret that faculty effectiveness decreases with age, and turnover would be healthy. Older faculty members become distanced from the modern roots of their fields. There are the yellowed lecture notes, the less-traveled path to conferences and seminars, the less than enthusiastic welcome for students.

Memo from a dean of faculty to the college's board of trustees, advocating swift implementation of a retirement program.

Damages and Settlements in Tenure Denial Cases

Ann H. Franke, Esq.

Gathered below are financial terms from selected court cases brought by faculty members who were denied reappointment or tenure. The information comes from various sources including reported case decisions, media accounts, and press releases.

Some of the outcomes may have been altered on appeal or through subsequent settlements. Please bear in mind that some tenure cases are resolved for smaller sums or in favor of the institution.

2010 A jury awarded **\$164,000** to a faculty member who was denied reappointment in East Asian languages at the University of Oregon. She claimed that the decision was based on national origin discrimination. She is half-Japanese; by her account, a less qualified 100% Japanese faculty member received a contract renewal. The jury also found that the plaintiff suffered retaliation after she filed a grievance. It ordered the department chair to pay \$30,000 in damages for committing discrimination, creating a hostile work environment, and retaliating against the plaintiff. The faculty member commented in the media that the university's treatment of her mirrored the difficulties that mixed race individuals face in Japan. The university reportedly spent **\$500,000** defending the case.

2009 Benedict College (SC) agreed to pay **\$165,000** to three white faculty members for reverse discrimination. One was an instructor who was not selected for an assistant professor opening, and two faculty were not renewed. Each received \$55,000 in settlement of a case brought by the EEOC. The college also agreed to redistribute its equal employment policy, provide training to administrators, faculty, and staff, and make periodic reports to the EEOC.

2008 Mars Hill Graduate School (WA) agreed to pay **\$300,000** to a faculty member whose appointment was not renewed after she filed for divorce. The professor and her husband were both founding faculty members of the institution, which opened in 2002. She was not renewed for the 2005-06 academic year and sued for gender discrimination.

2007 The Rhode Island Supreme Court upheld a **\$455,000** verdict, with interest, against Brown University. The plaintiff was a former engineering professor who was denied tenure. The professor claimed that the adverse decision stemmed from his refusal to conduct "sham" interviews with Asian candidates for a faculty position that had already been offered to another scientist. A jury awarded \$175,000 in compensatory damages and \$100,000 in punitive damages, along with \$400,000 in back pay. The Supreme Court decided that the university was not responsible for \$100,000 in punitive damages and did not have to reinstate the professor. The university's total payment, with interest dating back to 1993, would be roughly **\$1.3 million**.

2006 New Mexico Highlands announced a **\$170,000** settlement with a math professor denied tenure. On the same day, the university announced the president's departure. The professor's claims included due process violation, retaliation, and discrimination. The settlement and departure followed the imposition of censure on the university's administration by the American Association of University Professors.

2006 California State University San Marcos paid **\$100,000** to settle a disability discrimination claim brought by a Latin American literature professor who was denied tenure. The professor, whose legs are paralyzed, received a terminal sabbatical with no duties other than writing recommendation letters for former students and participating in any grading appeals.

2005 Notre Dame University made an “offer of judgment” totaling **\$67,450** to an art history professor who claimed that his tenure denial stemmed from violations of the Family & Medical Leave Act, age discrimination, and retaliation. The professor alleged that a leave he took in 2001 for his mother’s illness was used against him in his tenure review. Under Rule 68 of the Federal Rules of Civil Procedure, the university made an offer of judgment for \$52,200 plus \$15,250 in attorney’s fees, which the professor accepted within the 10-day time period.

2004 Brown University was ordered to pay **\$555,000 plus interest** to a former engineering professor who was denied tenure. The trial judge reduced the backpay award by 30%. The judge also ordered payment of **\$220,000** to the professor’s lawyers for their fees and expenses.

2003 A female business professor at Indiana University of Pennsylvania brought a discrimination complaint and then was denied tenure. The departmental committee had recommended against tenure, while the universitywide committee was in favor. She brought a lawsuit for retaliation, which she eventually settled for **\$290,477**.

2003 A federal appeals court refused to reinstate a **\$637,000** award to a professor who claimed that he had been denied tenure at California State University at Hayward because of his race and national origin. The verdict had included economic loss, emotional distress, and punitive damages. The court of appeals ordered a new trial to correct earlier problems with an expert witness’s testimony.

2002 The Thomas Jefferson School of Law agreed to settle the claims of a male professor denied tenure for **\$1.2 million**. The settlement came one day after a jury had found that the school had sexually discriminated against him and awarded \$1 million in compensatory damages. The professor claimed that a tenured female colleague had harassed him and sabotaged his tenure bid after he broke off their romantic relationship. She served on the committee that considered his candidacy, and abstained from voting, but the male professor argued in court that she sought to taint the opinions of others.

2002 A federal jury awarded **\$353,000** to a University of Arkansas at Fayetteville professor of political science who was denied tenure. She had complained about sexual discrimination and mismanagement and sought to show at trial that the university both discriminated against her and also retaliated for her outspokenness. The university sought to show the tenure outcome was properly based on the professor’s insufficient publications. The jury found that the university had not committed discrimination but had retaliated against the professor. In May 2003, the federal district judge overturned the award, concluding that the professor had abandoned her tenure candidacy.

2001 A jury awarded **\$453,460** to a former comparative literature professor at the University of Georgia, concluding she had to meet different requirements during tenure review than three similarly placed men. The professor had argued that the tenure committee criticized both the presses that published her work and the types of publications she offered in her tenure review. The award recompenses the professor, who now teaches high school, for back pay.

2000 The University of California, Davis settled a sex discrimination suit for **\$600,000**. An English professor was appointed to a tenure-track position in 1989 and subsequently denied tenure. She remarked when filing the suit that tenure was denied not due to her performance in the stated criteria of “research, teaching, and service,” but rather because of departmental politics. Many female faculty members agreed that a gender-biased environment existed.

2000 A professor at San Jose State University claimed she was denied tenure in an African-American studies program because she is not African-American. She charged the school with discrimination based on race and national origin. In a settlement with the university, the professor received **\$307,000** in damages and **\$340,000** in benefits. As part of the deal she took administrative leave before an early retirement.

2000 A federal jury awarded **\$241,000** to a former tenure-track professor at New Mexico State University's Dona Ana Branch Community College. When she applied for a departmental coordinator position she was not interviewed and was told that the college had enough female coordinators. She filed a sex discrimination charge. She then claimed that, in retaliation for her discrimination charge, her work was scrutinized excessively and she was denied tenure.

1999 **\$12.7 million** jury award to a female chemistry professor denied tenure at Trinity College in Connecticut. Professor Leslie Craine, an organic chemist, received unanimous support from the department, but the college-wide Appointments & Promotion Committee concluded that her scholarship was inadequate. The department and the committee disagreed over whether work on a textbook and a lab manual should count as scholarship or as service. In terms of published articles, Professor Craine had authored a major article in the most prestigious refereed journal in her field. The committee felt the quantity of her research was inadequate, although the department viewed the major article as equivalent to several smaller ones. Professor Craine compared her experience to that of a male faculty member in history who, like herself, had been counseled in the fourth year review about the need for scholarship. He subsequently published nothing but still received tenure. In 2002 the Connecticut Supreme Court reduced the verdict to **\$721,300**.

1998 **\$117,000** and reinstatement to former theatre-and-dance professor at SUNY-Geneseo. A federal judge found that sex discrimination tainted the nonrenewal of the professor's contract. The judge found that the department chair had refused to take her ideas seriously and had called her a “man-hating bitch” and other, more vulgar names. Although the chair did not participate directly in the process for contract renewal, he did persuade a male student to write a critical letter describing the professor as an “intense advocate for female rights” who “ignored the rights of people in general.” The Faculty Personnel Committee considered the letter and voted 3 to 2 against contract renewal. Administrators also evaluated the professor as uncollegial, but

the judge observed that the university's own rules did not mention "collegiality" as a relevant criterion.

1997 **\$400,000** jury award to conservation biology professor who claimed that the University of Nevada, Reno, manipulated the tenure criteria and denied him tenure in retaliation for his outspokenness on controversial land and livestock issues. The professor had left a tenured position at Indiana State University to join the university's department of environmental science in 1990. The university denied his tenure bid three times and said the request had received 18 levels of review. The professor claimed he was denied tenure because the conservationist bent of his teaching and research rankled university administrators and some of his colleagues. After winning the jury verdict, the professor offered to give up the award in exchange for tenure. The university rejected the offer and filed an appeal.

1996 **\$453,000** award by federal jury to professor who claimed that her tenure denial at Wilberforce University was tainted by race discrimination and retaliation. The award included \$44,500 for back pay, \$50,000 for other compensatory damages, \$230,880 for front pay, and punitive damages of \$125,000 against the university and \$2,500 against an individual defendant.

1996 **\$290,000** jury award to an African-American professor who was denied tenure in the English department at the Chabot-Las Positas Community College in California. According to press reports, the administration had never denied tenure to anyone in the history of the college. The professor offered circumstantial evidence of discrimination, such as the college's lack of complaints about her performance until 14 days before her tenure hearing. The jury deliberated for five hours following a ten-day trial.

1996 **\$260,000** federal jury award to an accounting professor who claimed that Metropolitan State College in Denver denied him tenure in retaliation for his protest over the college's refusal to hire a Mormon for a faculty position. The award included \$250,000 for emotional distress and more than \$10,000 in back pay and legal fees. The judge declined to order reinstatement, given the strained relations between the professor and department chair, but ordered an additional **\$238,557** in front pay. The judge based the front pay calculation on the plaintiff's age, 54; anticipated retirement at 65; the difference between his projected future college salary and his potential salary in the private sector; 15% for fringe benefits; and a 2% net discount rate.

1996 **\$1 million** settlement reached between Asian American faculty member and University of California, Berkeley, to resolve claims that the professor was denied tenure due to her race and gender. The professor, an architect, had received a favorable mid-career appraisal at the half-way point in her probationary period. In the department's first tenure review, so many members voted to abstain that the professor filed a grievance and the provost ordered a new vote. The department turned her down a second time. She filed suit in 1992 and filed an amended complaint in 1994, alleging breach of contract, sex and race discrimination, retaliation, and breach of the covenant of good faith and fair dealing. The parties spent 2 1/2 years in discovery, during which the university produced nearly 5,000 pages of UC documents. In January 1996 the parties jointly announced their settlement. The terms included the \$1 million payment and return to the university of all documents obtained during discovery. The provost reported that the

university would pay \$250,000 of the settlement and the rest was paid by its insurance. At the time, 71% of the tenured faculty members at UC Berkeley were white males, 19% were women, and 7% were of Asian descent.

1994 Large award by a federal district judge to a biologist who was denied tenure at Vassar College. The award included **\$529,800** in back pay and damages, over \$97,000 in Social Security and pension benefits, and attorneys fees. The award was later reversed on appeal.

1991 **\$400,000** jury award to female social science professor who accused Michigan State University of sex discrimination in tenure denial. She brought suit in 1986, claiming that only she and another woman had ever been denied tenure in the department. She placed blame on a former department chair who she said had fostered a discriminatory environment.

1990 **\$1.4 million** by a California state court jury to black education professor who accused Claremont Graduate School of race discrimination in tenure denial. The award included \$420,000 in attorneys' fees. The jury also voted to award the professor \$16,237 in punitive damages, the amount of cash that the institution had on hand at the end of its previous fiscal year. The jury award was affirmed on appeal. The department had voted 5-3 in favor of the professor, but the appointments, promotions, and tenure committee voted against him 4-1. Two deans and the president sustained the committee's negative recommendation. The professor had overheard the departmental meeting on his tenure candidacy and made notes about comments including, "Us white folks have rights too" and "I don't know how I would feel working on a permanent basis with a black man."