

WHISTLEBLOWING AND RETALIATION

Presenter:

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I. INTRODUCTION

In recessionary times, when jobs are not plentiful, one can expect that a termination of employment will be resisted and contested. Disciplined and discharged employees rarely go quietly. They will frequently assert, either pre-emptively, or after discharge, that their engaging in constitutionally or statutorily protected activity led to their downfall.

This paper will examine the dimensions of the frequently invoked retaliation claim, and, hopefully, limit the uncertainty, and potential liability inherent in confronting problem employees.

II. RETALIATION

The typical retaliation allegation is stated, in the complaint filed against you, that “Defendant University engaged in unlawful retaliation against Plaintiff because [he/she] opposed practices prohibited by law.” Usually the claim arises after the employee has filed a claim, or spoken out on a matter of public concern. While most of the reported cases address claims of retaliation in the context of discrimination, they can arise in connection with any statutorily protected activity. For example, unlawful retaliation occurs if an employee suffers an adverse employment action because they have filed a worker’s compensation claim for job related injury.

While the right of an employee to bring his or her own retaliation suit, and not wait for the government to take action, is well established, a similar “private right of action” for students asserting retaliation following protected activity (such as the filing of a sexual harassment claim against a faculty member) has not yet been clearly established. See Litman v. George Mason Univ., 156 F.Supp.2d 579 (E.D.Va. 2001).

A. Discrimination Cases

The principal statute protecting employees from workplace discrimination, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e 3(a)), prohibits an employer from “discriminating” (retaliating) against an employee because that employee has “opposed” discrimination in the workplace, or because that employee has “participated . . . in an investigation, proceeding, or hearing . . .” within the scope of the Civil Rights Act. Furthermore, to proceed with a retaliation claim, the complaining employee (or former employee) must show: (1) that he or she engaged in protected activity; (2) that the employer took an adverse employment action against the complaining employee (or former employee); and (3) that there exists a causal connection between the protected activity and the adverse action. (emphasis added) E.g. Aquilino v. Univ. of Kansas, 268 F.3d 930, 933 (10th Cir. 2001); Smart v. Ball State Univ., 89 F.3d 437, 440 (7th Cir. 1996).

B. Essential Elements of a Retaliation Claim

The “prima facie” case of discriminatory retaliation requires a claimant to satisfy the three elements (protected activity; adverse action; causal connection) stated in Section IIA. Before looking at them in greater detail, remember that, as in other discrimination situations, the employer must come forward with a legitimate, non-discriminatory and non-retaliatory basis for the action complained of, once the prima facie case is made.

Since the enactment of the Civil Rights Act of 1964, and comparable measures, countless claims of retaliation have been litigated. Although courts and commentators caution that the allegations of a retaliation claim will be examined on a case-by-case basis, the quantity of decisions has provided a working understanding of the dimensions of the elements of retaliation claims¹

¹ The American Bar Association’s Section of Labor and Employment Law’s Employment Discrimination Law, Vol. I (1996) devotes Chapter 17 to Retaliation. See also the 2000 Supplement. Both volumes contain copious citations to relevant cases.

1. What is Protected Activity?

Protected activity has two prongs: opposition to an unlawful practice or participation in activity related to redressing the purported illegal activity. That the practice opposed ultimately is ruled legal does not vitiate the employee's protection so long as the employee's opposition is based on reason and done in good faith. E.g., Taylor v. Runyon, 175 F.3d 861 (11th Cir. 1999).

The opposition clause has been broadly interpreted, encompassing ambiguous protests against discrimination. Protected activities have included: complaining about sexual harassment by a co-employee; complaining about gender inequity in a union contract; complaining in a social setting about discrimination; indicating support of other employees who have filed discrimination charges and protesting against discrimination in an industry or society generally. E.g., Abramson v. William Paterson College, 260 F.3d 265, 287-88 (3rd Cir. 2001); Employment Discrimination Law, *supra*, at 658-659.

The opposition "test" for a retaliation action is not satisfied when the conduct complained of is not linked, or related to, the statute under which the claim is asserted. For example, a discussion of racial issues isn't tantamount to opposition. E.g. Wallace v. Motherhood Maternity Shops, 17 FEP 242, 245 (C.D. Cal. 1977). Protests involving union organizing, absent a civil rights linkage, aren't actionable (although they might be under labor law). Turner v. Barber – Scotia College, 604 F. Supp. 1450 (M.D.N.C. 1985). If protection against retaliation is sought under an employment related statute, your opposition must be to an employment issue. Thus, a teacher who opposed a school desegregation order because of a concern for the welfare of students did not state a Title VII retaliation claim. Evans v. Kansas City School District, 65 F.3d 98 (8th Cir. 1995).

The protected activity of participation in proceedings associated with claims of discrimination is broad, extending to persons who make a charge, testify, assist or participate "... in any manner in an investigation, proceeding, or hearing...under Title VII. 42 U.S.C. § 2000 e-3(a). Protection extends to your own claims, and those of others in the workplace. Its breadth has lead courts to provide protection from retaliation even when baseless charges are filed or

unreasonable testimony is given. Glover v. South Carolina Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999). But the protection is limited to participation in the relevant statutory proceeding. “Charges made outside of that context are at the accuser’s peril.” Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990). But employees are not protected from filing any charge claiming any misconduct. The charge must allege conduct within the scope of the relevant statute. Thus, a claim that one was falsely accused of sexual harassment was outside the scope of protected activity, whereas a claim of sexual harassment would be within. E.g. Balazs v. Liebenthal, 32 F.3d 151, 159 (4th Cir. 1994).

2. What is an Adverse Employment Action?:

To satisfy the second prong of the retaliation test, an adverse employment action must occur. As delineated by a very recent (12/31/01) decision of the U.S. Court of Appeals for the Seventh Circuit, a retaliation claimant must show a “...materially adverse action.” “Materially adverse” means more than a mere inconvenience or alteration of job responsibilities. Examples of conduct meeting the “materially adverse” standard includes termination of employment, demotion, a decrease in wages, a less distinguished title, or a material loss of benefits.” Gawley v. Indiana University, ___ F.3d ___ (7th Cir. 2001), 2001 WL 1662495. See also Burlington Industries v. Ellerth, 524 U.S. 742, 761 (1998). In Gawley, the court ruled that plaintiff’s claims of retaliation, that her supervisor treated her complaints of sexual harassment “...in a frivolous and disrespectful manner,” were insufficient.

In Aquilino v. University of Kansas, 268 F.3d 930 (10th Cir. 2001), an unsuccessful tenure aspirant’s claims of retaliation were rejected due to a lack of adverse action. Following the adverse tenure decision, and the filing of a discrimination claim with the Kansas Human Rights Commission, Dr. Aquilino was removed from a dissertation committee and denied both an “ad hoc” faculty status and a research associate position. Addressing the removal from the dissertation committee, the court stated: “Because Dr. Aquilino had already been denied tenure, she certainly had no right to be on a dissertation committee.” Her removal had “at best, a de minimus effect on her future employment opportunities.” Aquilino, at 934. Her inability to secure either ad hoc or research associate status were not retaliation because the denial was

consistent with the effect of the tenure denial and the reasons for it, limited scholarship and poor relationships with students and colleagues. Implicit in the court's decision is that retaliation does not occur if you decline to create a position for someone in terminal notice status.

Several decisions hold that adverse performance evaluation, following the filing of a charge, do not create a valid claim of retaliation. See Montandon v. Farmland Industries, Inc., 116 F.3d 355, 360 (8th Cir. 1997); Smart v. Ball State Univ., 89 F.3d 437, 442 (7th Cir. 1996) (“There is little support for the argument that negative performance evaluations alone can constitute an adverse employment action.”) Reprimands do not automatically affect the terms and conditions of employment. Rejecting a claim that a reprimand was retaliatory, a court noted recently that, to create “an automatic rule [that] would inhibit criticisms between supervisors and employees, which are “normal incidents of the working relationship.” Nye v. Roberts, 159 F. Supp. 2d 207, 214 (D.Md.2001). The reprimand letter in question asked Nye to correct her behavior, and rise to the same level of professionalism expected of all employees. The letter did not threaten termination, demotion or a decrease in pay. No adverse action was found.

III. MATTERS OF PUBLIC CONCERN

Despite the lack of success for such claims, public employees frequently claim they have been retaliated against, and their constitutional rights violated, for speaking out on matters of public concern. To prove that one's First Amendment speech rights have been infringed, one must show that (1) they suffered an adverse employment decision; (2) their speech involved a matter of public concern; (3) their interest in commenting on matters of public concern outweighs the employer's interest in promoting efficiency; and (4) their speech motivated the adverse employment decision. Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563 (1968); Beattie v. Madison County School District, 254 F.3d 595 (5th Cir. 2001). As with many other retaliation claims, the critical portion of the “test” is that of causation: “but for” the speech, would the adverse action have occurred. E.g. Kadetsky v. Egg Harbor Township Board of Education, 164 F.Supp. 2d 425 (D.N.J. 2001).

Determination of whether a public employee's speech addresses matters of public concern occurs on a case by case basis. Wide latitude is given to faculty for statements made in the context of academic discussion: "Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of "public concern" Hardy v. Jefferson Community College, 260 F.3d 671, 679 (6th Cir. 2001) (holding that instructor's use of terms "nigger" and "bitch" as part of class discussion on social deconstructivism and language during course in interpersonal communications involved matters of public concern, and was protected by the First Amendment."

In assessing the effect of an employee's speech, consideration needs to be given to whether the comment's meaningfully interfere with the performance of his or her duties or with the employer's general operations, undermine a legitimate goal or mission of the employer, create disharmony among coworkers, undercut an immediate supervisor's discipline over the employee, or destroy the relationship of trust and loyalty required of confidential employees. See Pickering, supra, at 391 U.S. 569-70. An example of when one goes beyond the scope of constitutional protection is found in the recent Smith v. School District of Philadelphia decision, 158 F.Supp. 2d 599 (E.D.Pa. 2001), where the court upheld the removal of a parent from his position on a school evaluation organization in response to the contents of a letter he wrote, stating that white and Jewish teachers were racist and uncaring toward African-American students. The maintenance of healthy working relationships with others in the school was undermined by Smith's disruptive comments, which also were deemed contradictory to the values of the local system.

Discussion of the dimensions of speech concerning matters of public concern merits far more attention than appropriate in this context. Indeed, the Stetson Conference has devoted sessions to it. For a recent survey of relevant case law, see C. Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669 (2001). But, because of the principles it states, buttressing the ability of higher education to make personnel judgments in the face of public concern, I provide a copy of the Court of Appeals decision in Feldman v. Ho, 171 F.3d 494 (7th Cir. 1999). In short, in rejecting his constitutional claim, the court stated:

“Feldman objected to the way the Mathematics Department handled its core business of choosing and promoting scholars. That task is both inevitably concerned with speech and so central to a university’s mission that the university’s role as employer dominates.” Feldman, at 497-98. The emphasis in the decision on the university’s (Southern Illinois University-Edwardsville in this case) independence in managing its core function is reassuring.

IV. WHISTLE BLOWER PROTECTION

My colleague Jackie McLain will give you an insider’s look at the real world of whistle blowing and how vexatious this can become for a university. Before we get into a brief summary of the legal framework of the whistle blowing, let me emphasize that whistle blowing should be regarded as “protected activity” and the concepts previously delineated for retaliation generally are especially applicable when you hear the whistle blow.

There is no comprehensive whistleblower law. Protections are provided by various state and federal statutes. The common understanding of whistle blowing is the refusal by an employee to engage in illegal or wrongful acts of the employer or one’s colleagues on the job. The concept includes protection for those who report such acts.

Federal law provides protections for both federal employees and persons employed by non-federal entities who are within the scope of the protection of various federal statutes. The federal scheme of protection includes civil rights (discrimination), workplace health and safety, environmental and labor relations areas. Of particular interests to colleges and universities is the necessity to protect against retaliation against a person who reports alleged research fraud or misconduct. 45 C.F.R. § 689, 1.

In addition to the federal structure of whistle blowing protection, most states have enacted whistleblower statutes. These citations to state law follow. The majority of the statutes protect public employees while a significant number protect persons employed in both the public and private sector. The scope of coverage of the state acts vary and can range, for example, to protection against retaliation for collective bargaining activity to protection for employees filing

Workers Compensation claims. With your counsel, you should review the whistleblower protections applicable in your jurisdiction.²

V. SUGGESTIONS FOR AVOIDING SUCCESSFUL RETALIATION CLAIMS WHILE MAINTAINING A PRODUCTIVE WORKPLACE

1. Avoid paralysis
2. Maintain standards and expectations
3. Counsel, train and control supervisors
4. Create or maintain an accessible complaint system
5. Create the expectation that complaints are to be first aired within the college or university.
6. Respond to retaliation complaints
7. Treat employees consistently and fairly
8. Consider employee transfers
9. Consider changing supervisors
10. Document planned or anticipated changes
11. Usually avoid immediate reaction; be deliberate
12. Don't tolerate extreme or disruptive behavior
13. Seize a legitimate opportunity to discipline or discharge a problem employee
14. Avoid transparent reasons for personnel actions, E.g. "reorganization"
15. Avoid "grants of immunity" for frequent, unreasonable or spiteful complaints
16. Require civility, good faith and reasonableness in any complaint process
17. Don't reinforce bad behavior
18. Limit knowledge of past or pending complaints
19. Involve HR and legal counsel

² For a more comprehensive analysis of whistleblower protection acts in consequences, see Phillip Burling and Kathryn A. Matthews *Responding to Whistleblowers*, NACUA, 1992.

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 97-4243 & 98.1074 MARCUS B. FELDMAN,

Plaintiff-Appellee, Cross-Appellant

v.

CHUNG-Wu Ho and BOARD OF TRUSTEES
OF SOUTHERN ILLINOIS UNIVERSITY,

Defendants-Appellants, Cross-Appellees,

Appeals from the United States District Court
for the Southern District of Illinois.

No. 95.CV.0452-PER-Paul E Riley, Judge.

ARGUED OCTOBER 29, 1998-DECIDED MARCH 22, 1999

Before HARLINGTON WOOD, JR., FLAUM, and
EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Southern Illinois University decided in spring 1990 not to renew the contract of Marcus Feldman, an assistant professor of mathematics then in his fourth year of teaching. Feldman received a terminal contract through June 1991. Litigation challenging this decision under the first amendment has lasted twice as long as Feldman's stint at the University.

Feldman charged Chung-Wu Ho, the Chairman of the Mathematics and Statistics Department, and many other leaders of the University with violating his freedom of speech. When the litigation began, his theory was that Ho had protected another colleague against Feldman's charge of plagiarism, by giving the accused colleague tenure while seeing to it that Feldman departed. On an interlocutory appeal we held that some of the defendants were protected from suit by the eleventh amendment, and that Ho had immunity from damages on a first amendment claim. *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993). Feldman then recast his theory. In the new telling, Feldman had accused another colleague of trying to improve her standing by claiming falsely that she had written a paper jointly with a famous mathematician. The accused member of the faculty denied the charge, Ho took her side, and Feldman was given a terminal contract as a result. This contention was submitted to a jury, which returned a verdict of some \$250,000 against Ho (\$200,000 in actual and \$50,000 in punitive damages) on a state-law claim that Ho interfered with Feldman's contract of employment. The jury also returned a verdict in Feldman's

favor on a first-amendment theory against the University (technically, its trustees, named as its proxies under *Ex parte Young*, 209 U.S. 123 (1908)). Because of the eleventh amendment, damages were unavailable from the University (an arm of Illinois), but the verdict would have entitled the district judge to fashion equitable relief such as reinstatement. This the judge declined to do, remarking that the damages awarded against Ho are sufficient compensation. He also refused to award interest on the portion of the damages that represent back pay. But the judge did order the University to pay more than \$185,000 as Feldman's legal fees. Cross-appeals challenge every aspect of this decision.

Given the verdict, we must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment. We assume, moreover, that the academic conduct (or misconduct) of teachers at a state university is an issue of public importance rather than just of private interest to the persons involved. Compare *Connick v. Myers*, 461 U.S. 138 (1983), with *Pickering v. Board of Education*. 391 U.S. 563 (1968). But it does not follow that a jury rather than the faculty determines whether Feldman's accusation was correct. A university's academic independence is protected by the Constitution, just like a faculty member's own speech. Concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), Justices Frankfurter and Harlan referred to the four freedoms *of a university*: "to determine for itself on academic grounds who may teach what may be taught, how it shall be taught, and who may be admitted to study." Although statutes have curtailed some of these freedoms (for example, no university today may use racial criteria to select its faculty), Feldman does not rely on any particular statute, as opposed to the all-purpose 42 U.S.C. §1983 that provides a hook for enforcing the Constitution against state actors. Yet the Constitution does not commit to decision by a jury every speech-related dispute. If it did, that would be the end of a university's ability to choose its faculty-for it is speech that lies at the core of scholarship, and every academic decision is in the end a decision about speech.

Teachers...speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some. They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and they deny continuing employment to professors whose speech does not meet their institution's standards of quality. See *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987). "The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door-and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech. . .Feldman. . .does not deny that speech in a university may be the basis of adverse action; he believes, rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of [academic misconduct] reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose

assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation.

Feldman v. Bahn, 12 F.3d at 732-33 (emphasis in original). When sending this case to the jury, and resolving post-judgment motions, the district judge ignored these observations. Indeed, one could not tell from reading the district judge's opinions that the parties' dispute had ever reached this court before.

Speech often is a legitimate ground of decision in employment. Consider the political patronage cases. Although a state may not prefer Republican road crews over Democratic ones, *Elrod v. Burns*, 427 U.S. 347 (1976), it may use political affiliation as a ground of decision for many other jobs. "[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). That principle cannot be limited to political affiliation. "[T]he question is whether the hiring authority can demonstrate that [speech] is an appropriate requirement for the effective performance of the public office involved." *Waters v. Churchill*, 511 U.S. 661, 671~75 (1994). "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 675. (This passage appears in Justice O'Connor's plurality opinion, but seven Justices approved the principle. See 511 U.S. at 685 (Souter, J., concurring), 688-89 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment).)

A university seeks to accumulate and disseminate knowledge; for a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not (or, worse, are distracting those who are). As we said the first time around, an unsubstantiated charge of academic misconduct not only squanders the time of other faculty members (who must analyze the charge, or defend against it) but also reflects poorly on the judgment of the accuser. A university is entitled to decide for itself whether the charge is sound; transferring that decision to the jury in the name of the first amendment would undermine the university's mission-not only by committing an academic decision to amateurs (is a jury really the best institution to determine who should receive credit for a paper in mathematics?) but also by creating the possibility of substantial damages when jurors disagree with the faculty's resolution, a possibility that could discourage universities from acting to improve their faculty. Cf. *Webb v. Ball State University*, No. 98-1317 (7th Cir. Feb. 5, 1999). In the wake of *Waters* the second circuit held that a university may respond to an incendiary public speech by a faculty member without violating the first amendment, even though the speech addresses issues of public concern. *Jeffries v. Harleston*,

52 F.3d 9 (2d Cir. 1995). *Jeffries* was a hard case, because the speech was given off campus. Our case is easy: Feldman charged a colleague with academic misconduct; the University investigated the charge and vindicated the colleague; and later it concluded that it could obtain better mathematicians than Feldman for its faculty. If the kind of decision Southern Illinois University made about Feldman is mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech. If the University erred in telling Feldman to seek employment elsewhere that is unfortunate, but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw.

A public employer's entitlement to consider speech under *Waters* is limited to the kind of speech that is part of the employer's mission. If Feldman had campaigned for a candidate for Governor he could not have been sacked for supporting the losing party-though the University could require its faculty to refrain from running for office or injecting politics into the workplace. See *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Accusing the University's President of padding his expense account would have been a closer issue. See *Levenstein v. Salafsky*, 164 F .3d 345 (7th Cir. 1998). How public employees handle public funds is a matter of public concern, but if the speech proves excessively disruptive to the employer's mission then the employer may respond. Thus a faculty member's unwarranted charge of embezzlement might justify discipline under the approach of *Pickering*. But Feldman's speech was neither unrelated to his job (the case of supporting a Democrat for Governor) nor unrelated to mathematics (the case of charging the President with fiscal improprieties). Nor was it concerned with the *rules* by which academic departments at Southern Illinois University evaluate charges of scholarly misconduct. Feldman objected to the way the Mathematics Department handled its core business of choosing and promoting scholars. That task is both inevitably concerned with speech and so central to a university's mission that the university's role as employer dominates. This conclusion also knocks out the award of attorneys fees and makes it unnecessary to discuss Feldman's cross appeal, which seeks additional relief against the University.

Feldman's claim against Ho personally requires only brief analysis. He recovered under a state-law theory of tortious interference with contract. Ho advanced a jurisdictional defense: that this is a suit against the state, and thus foreclosed in federal court by the eleventh amendment. Feldman concedes that Illinois treats the state as the real party in interest, provides the public official with absolute immunity, and channels any litigation to the Illinois Court of Claims with the state as the defendant, whenever judgment for the plaintiff would control the state's actions. 705 ILCS 505/8(d); *Currie v. Lao*, 148 Ill. 2d 151, 592 N.E.2d 977 (1992). In a case that is almost the clone of ours, *Wozniak v. Conry*, 288 Ill. App. 3d 219, 679 N.E.2d 1255 (4th Dist. 1997), the court applied this rule to a suit by a faculty member of the University of Illinois against the department's chairman. Wozniak accused the chairman of falsely charging him with failure to live up to professional standards, tortiously interfering with his employment at the University because the chairman's statements cost him his teaching position. The court responded that such a claim is in effect one against the State of Illinois and may not proceed against the department's chairman.

Illinois follows the federal practice by making an exception for situations in which the public employee did not act within the scope of his employment or violated the Constitution. Under the Westfall Act, any tort claim against a federal employee for wrongs committed within the scope of his employment must be dismissed, and the United States substituted as the defendant, unless the plaintiff establishes a "constitutional tort." 28 U.S.C. §2679(b)(2)(A); *Gutierrez de Martinez v. Lamagna*, 515 U.S. 417 (1995); *United States v. Smith*, 499 U.S. 160 (1991). Likewise in Illinois: "Whenever a state employee performs illegally, unconstitutionally, or without authority a suit may still be maintained against the employee in his individual capacity and does not constitute an action against the State of Illinois." *Wozniak*, 679 N.E.2d at 1259. See also *Nelson v. Murphy*, 44 F.3d 497, 505 (7th Cir. 1995). Feldman persuaded the district judge to allow his suit to proceed on the theory that Ho violated the first amendment. Yet we held in 1993 that Ho has immunity against any claim resting on the first amendment - and now we add, in light of the rest of this opinion, that there was no constitutional violation by the University as an entity. Ho acted within the scope of his employment when handling matters related to Feldman's tenure on the faculty, because "the occasion ... would have justified the act, if [Ho] had been using his power for any of the purposes on whose account it was vested in him." *Gregoire v. Biddle*, 177 F.2d 579,581 (2d Cir. 1949) (L. Hand, J.); see also *Cross v. Fiscus*, 830 F.2d 755,757 (7th Cir. 1987); *Restatement (2d) of Agency* §§ 228-29, 231-36 (1958). In this respect Ho's conduct is identical to Conry's. Whatever remedy state law offers to Feldman must come in a suit against the State of Illinois, and because of the eleventh amendment that suit belongs in state court.

The judgment is reversed, and the case is remanded with instructions to enter judgment on the merits for all defendants - but without prejudice to Feldman's ability to file suit against the State of Illinois in the state's Court of Claims.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Whistleblower Statutes applying both to public and private sector employees:

1. Cal Lab. Code Ann. § 1102.5 (West Supp. 1989)
2. Cal Government Code §§ 8547
3. Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988)
4. Me. Rev. Stat. Ann. tit. 26, §§ 831-840 (1988)
5. Minn. Stat. Ann. §§ 181.931-.935 (West Supp. 1989)
6. Mont. Code Ann. §§ 39-2-901 (1990)
7. N.H. Rev. Stat. Ann. § 275-E:1
8. N.J. Stat. Ann. §§ Stat. Ann. §§ 34:19-1 to –8 (West 1988)
9. N.Y. Lab. Law § 740 (McKinney 1988)
10. La. Rev. Stat. Ann. § 30:2027 (West 1989)
11. West Va. Code § 6c-1-3

Whistleblower Statutes applying solely to public-sector employees:

1. Ala. Stat. Ann. § 25-8-57 (2001) [falling under the Industrial Relations and Labor Chpt. 8 – Child Labor]
2. Ak. Stat. Ann. § 39.90.100 (1989)
3. Ariz. Rev. Stat. Ann. §§ 38-531 to –532 (1985)
4. Colo. Rev. Stat. §§ 24-50.5-101 to –107 (1988)
5. Del. Code Ann. tit. 29, § 5115 (1983)
6. Fla. Stat. Ann. § 112.3187 (West Supp. 1989)
7. Ga. Stat. Ann. § 45-1-4 (2001) [protection afforded for employees making complaints on information from public employees as to fraud, waste, and abuse in state programs and operations]
8. Hi. Stat. Ann. § 378-61 to 69 (2001)
9. Ill. Rev. Stat. Ch. 127, ¶63b119c.1 (Smith Hurd Supp. 1988)
10. Ind. Code Ann. § 4-15-10-4 (Burns 1986 & Supp. 1988)
11. Iowa Code Ann. §§ 79.28-.29 (West Supp. 1988)
12. Kan Stat. Ann. § 75-2973 (1984)
13. Ky. Rev. Stat. Ann §§ 61.101-.103 (Michie 1986)

14. La. Rev. Stat. Ann. tit. 23 § 967
15. Ma. Stat. Ann. tit. 149 § 185 [applicable to employees reporting violations of law or risks to public health, safety, or environment remedies]
16. Md. Ann. Code art. 64A, §§ 12G-12J (1988)
17. Mich. Comp. Laws Ann. Chpt. 15.361-.369
18. Miss. Code. Ann. § 25-9-171 to 173 (West 2001)
19. Mo. Stat. Ann. § 105.055 (Vernon 2001)
20. N.C. Gen. Stat. Ann. § 126-85
21. N.D. Cent. Code § 34-11.1-04 (Supp. 1987)
22. Ohio Stat. Ann. § 124.341 (Baldwin 2001)
23. Okal. Stat. Ann. tit. 74, §§ 840-6.2 (West 1987)
24. Or. Rev. Stat. § 240.316(5) (1986)
25. Pa. Stat. Ann. tit. 43, §§ 1421-28 (Purdon Supp. 1988)
26. R.I. Gen. Laws §§ 28-50-2 (1995)
27. S.C. Code Ann §§ 8-27-10 to 50 (Law Co-op Supp. 1988)
28. Tenn. Code Ann. §§ 8-50-601 to -604 (1988) (“Public Employee Political Freedom Act”)
29. Tex. Rev. Civ. Stat. Ann. § 6252-16a (Vernon Supp. 1989)
30. Utah Code Ann. §§ 67-21-1 to -9 (1986)
31. Wash. Rev. Code Ann. §§ 42.40.010-.900 (Supp. 1989)
32. Wis. Stat. Ann. §§ 230.80-.89 (West 1987)