

**ACADEMIC FREEDOM: LIMITATIONS AND
PROTECTIONS**

**RELIGIOUSLY AFFILIATED COLLEGES AND
UNIVERSITIES**

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I. Overview

Academic freedom means many things to different people. Upon its invocation, a faculty member may claim academic freedom to do or not to do a particular activity or to seek particular information; this, in turn, conflicts with the college's claims that its academic freedom includes its right to make certain administrative decisions or its right to be free from intrusions from outside agencies such as government bodies and, in some cases, the courts. There is an ongoing debate about the particular origins of academic freedom, and there is constant questioning about to whom the right belongs--the individual faculty member or the college.

Recently courts have determined the parameters and contours of academic freedom in a number of situations: administrative decisions requiring a change of grades; charges by faculty that the college had interfered with their teaching methods or curriculum; the use of student evaluations; and faculty members' need to use confidential materials and votes from the peer review process as evidence in lawsuits. This essay will focus on the application of academic freedom to faculty members in two of these areas: grading policies and curriculum and teaching methods.

II. Application

Academic Freedom Defined

Certainly the most commonly cited statement of academic freedom emanates from the 1940 AAUP Statement on Academic Freedom and Tenure. The 1940 Statement, which has been subsequently interpreted, addresses academic inquiry in three areas: research, teaching, and extramural activities:

- a. Teachers are entitled to full freedom in research and in the publication of their results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon understanding with the authorities of the institution.
- b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

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c. College or university teachers are citizens, members of a learned professions, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Many colleges have adopted the approach reflected in the 1940 Statement as a part of their faculty handbook policies on academic freedom. In some cases, these handbook policies serve as a contractual basis for a faculty member at an independent institution to bring a lawsuit alleging the college's violation of its contractual provision on academic freedom. At public colleges, academic freedom also includes the faculty's First Amendment right of freedom of speech.

Over the years, the courts have wrestled with the nature and scope of academic freedom in litigation involving both constitutional and contractual arguments. The courts, as well as the academy, are not always clear about the precise nature of academic freedom nor its uses and limitations. However, they generally recognize the need to maintain the free marketplace of ideas as an essential value in a free society and in a learning environment.

Two of the earliest efforts to grapple with academic freedom occurred in cases that arose out of loyalty oaths. In these two cases, the court did not specifically base its rulings on the concept of academic freedom but clearly addressed the notion. In one case, the U. S. Supreme Court ruled that Paul Sweezy could not be held in contempt for refusing to answer certain questions about his past associations and expressions. The Supreme Court stressed "[t]he essentiality of freedom in the community of American universities" and warned against imposing "any strait jacket upon the intellectual leaders in our colleges and universities." (*Sweezy v. New Hampshire*, 1957)

In the other case, when faculty members from the State University of New York were threatened with dismissal for refusing to sign loyalty certificates, they challenged the action in court. The certificates were part of a fairly intricate scheme designed to identify and regulate "subversive" persons. When the Supreme Court ruled that the scheme was unconstitutionally vague, it set forth one of the most widely quoted statements on academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. (Keyishian v. Board of Regents, 1967)

Probably the most famous and widely quoted judicial statement on academic freedom emanates from Justice Felix Frankfurter in a concurring opinion in *Sweezy*, in which he relies on a statement regarding open universities from a conference of South African professors. The statement identified the four essential 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."

Faculty Responsibility

There are correlative obligations that go with academic freedom. Although a faculty member may possess this freedom, the faculty person does not have unfettered discretion to do anything. The American Association of University Professors (AAUP) has specifically addressed some of these concerns in its statement on professional obligations. Moreover, the 1940 Statement sets forth corresponding obligations of faculty regarding their right to investigate, teach, and make statements. As former AAUP counsel David Rabban stated:

Professors violate the norms of academic freedom when they falsify or plagiarize material, indoctrinate students, follow blindly the dictates of political or religious authority, or allow grants from government or industry to distort their research and conclusions. Even if professors do not violate academic freedom, they cannot invoke its protections to shelter incompetence, lack of productivity, or neglect of legitimately assigned duties.

In its 1970 Interpretative Comments, the AAUP emphatically affirms that "membership in the academic profession carries with it special responsibilities," and points to its policy statements "providing guidance to the professor in his utterances as a citizen, in the exercise of his responsibilities to the institution and students, and in his conduct when resigning from the institution or when undertaking government-sponsored research."

There is a twilight zone between the legitimate use and claim to academic freedom and the competing claim of the institution to protect the confidentiality of peer judgments or to make administrative decisions that generate litigation. In a case involving academic freedom, a federal appellate court judge noted: "It is used to denote both the freedom of the academy to pursue its end without interference from the government...and the freedom of the individual teacher...to pursue his ends without interference from the academy; and these two freedoms are in conflict..."

Grading Policies

Natthu Parate was an associate professor in the Tennessee State University (TSU) Department of Civil Engineering. In his first semester of teaching during the academic year 1982-83, he taught a course, Groundwater and Seepage. Parate informed the students of his grading standards: to get an A, a student had to earn 90 to 100 percent of the total course work points; and to get a B, a student had to earn 80 to 90 percent. After Parate distributed the final grades in this course, two students asked for a grade change. Parate granted one student a grade change to an A because the student was involved in judicial action before the final examination, and his work had been of high quality before the final.

Parate denied the grade change to the other student because, according to Parate, the student had cheated on the final examination and had given Parate false medical excuses. When told by Parate that the grade would not be changed, the student allegedly stated that he would get the grade changed "through the Dean."

The student appealed, and a meeting occurred with Parate and the associate dean, who supported Parate's decision not to change the grade. The dean, Edward I. Isibor, asked to see Parate and at that meeting told Parate to change the student's grade to an A. The dean also insisted that Parate sign a memorandum to that effect. According to the court, when Parate refused, the dean began to "insult and berate him." Furthermore, the dean apparently said that Parate "did not know how to teach, asked him where he got his degree, and stated that it would be very difficult to renew Parate's contract at TSU."

Several times the associate dean tried to get Parate to change the grade and to sign the memorandum. Eventually Parate signed the memorandum with the notation that he was being required to do so by the dean and the department head. Finally, Parate signed a third memorandum with no qualifying notations, according to Parate, while under duress.

During the next two years, Parate alleged there were various efforts to intimidate him and to challenge his grading criteria and his competency to teach. Eventually Parate was informed that his contract would not be renewed beyond the 1985-86 academic year. However, Parate was informed that his contract might be renewed if his performance improved and if he would "obey and never disobey your dean." After this episode, the dean and the associate dean visited one of Parate's classes, which created further confusion. Finally, Parate was removed from teaching one of his courses, and eventually his contract was not renewed by TSU. He filed a lawsuit challenging the nonrenewal based on constitutional First Amendment and academic freedom grounds and on due process grounds. (*Parate v. Isibor, 1989*)

The court reaffirmed the role of university officials to "remain free to review a professor's classroom activities when determining whether to grant or deny tenure." The court noted, "The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself."

The court then examined the efforts to get Parate to change the grade and concluded that Parate's assignment of grades was a protected area because it was a form of communication. The court stated that the "freedom of the university professor to assign grades according to his own professional judgment is of substantial importance to that professor."

Suggesting that academic freedom, at least for constitutional purposes, includes free speech and that grades are a form of communication, the court ruled that Parate should not have been forced to change the grade. However, the court noted that the university administrators could have changed the grade without violating any of Parate's protected rights:

If the defendants had changed Student 'Y's' 'GSW' course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered Parate to change Student 'Y's' original grade. The actions of the defendants, who failed to administratively change Student 'Y's' grade themselves,

unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student 'Y'.

In a similar case, Richard Hills, a nontenured professor in the art department at Stephen F. Austin State University, alleged that his contract was not renewed because he refused to issue a certain grade to a student. Apparently the head of the art department told Hills to place a certain student in an advanced placement course and to give that student a B.

Hills refused to make the grade change but did give the student a "grade withheld" designation. After Hills' refusal, he was reassigned from teaching certain graduate courses to teach a freshman design course. Later Hills discovered that the head of the art department changed the student's grade to a B. When his contract was not renewed, Hills filed suit alleging that his nonrenewal was based on the grade incident. (*Hills v. Stephen F. Austin State University*, 1982)

The federal district court found for Hills when it ruled that, for First Amendment analysis, his nonrenewal was substantially related to the grade incident. The federal court of appeals reversed. In response to Hills' academic freedom claim, the appeals court noted that the parameters of academic freedom "are ill-defined and the case law defining it is inconsistent." Noting that interference with academic freedom should involve "a pall of orthodoxy" over the classroom, the court rejected Hills' claim because it found that Hills' nonrenewal was not related to the grade decision and that Hills did not claim any "censorship of the content or method of his teaching." The court categorically rejected Hills' claim that his refusal to assign a grade to a student constituted a teaching method.

Curriculum and Teaching Methods

Controversial Course Content

In a fascinating case involving the chairman of the art department of Prairie State College in Illinois, a court was confronted with the question of the extent of the college's control over the chairperson's art works. (*Piarowski v. Illinois County College*, 1985)

The chairperson, Albert Piarowski, along with his departmental colleagues, set up a faculty art exhibit in the mall area of the major college building. The mall area was a large area that was the college's main gathering place and thoroughfare, frequented by students, faculty, and visitors. Classrooms were on the upper floors of the building.

Piarowski contributed eight stained glass windows to the faculty exhibit. Five were abstract and did not pose any problem. However, three were representational and became the focus of the controversy.

The three stained glass windows depicted a brown woman in various naked conditions and a male with a rather large appendage. Piarowski suggested that the art work was representational of some previous Greek material and was based on the work of a well-known contemporary artist. However, the average viewer was unaware of this historical or artistic background.

Because of complaints and the explicit depiction of nudity and genitals, the college ordered Piarowski to remove the three windows from the mall. It did, however, suggest that he could exhibit the work in a classroom on the fourth floor of the same building. At the same time, the college asked Piarowski for any other suggestions he might have regarding the art show. Piarowski did not respond. Instead of removing the art work to the fourth floor, Piarowski and his art faculty canceled the show. Piarowski argued that he could not separate his abstract work from his representational work.

Piarowski brought a lawsuit challenging the action alleging a violation of First Amendment rights. A federal district court ruled for Prairie State College, and Piarowski appealed.

First, the appellate court noted that academic freedom is an "equivocal" term and that the individual's freedom sometimes conflicts with the college's responsibilities, as this case demonstrated. Piarowski argued that his academic freedom was violated by the order to remove the artwork, whereas the college argued that it had a freedom to manage its own affairs. The court noted quite clearly that the college had no legal duty to provide Piarowski with a prominent place to display his art and suggested that most galleries would not put their most controversial work in their main trafficked area.

If Claes Oldenberg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare....There is no constitutional right to exhibit sexually graphic works of art in a gallery that is missing an outside wall.

Accordingly, given the fact that the college provided Piarowski an alternative place to show his works, the court did not support Piarowski's claim to a First Amendment right of academic freedom to display his particular work. In all probability, a decision involving similar material would be sustained by the courts over the faculty member's academic freedom claim.

In *Dube v. State University of New York* (1991), a nontenured professor successfully challenged his denial of tenure by arguing that the motive behind the decision was to prevent him from teaching a controversial curriculum.

In the fall of 1981, Ernest F. Dube, an assistant professor at the State University of New York at Stony Brook (Stony Brook), began teaching a course in the Africana Studies Program designated as AFS/POL 319 "The Politics of Race." In a course description prepared for the summer term of 1983, Dube refers to the three forms of racism and how they manifested themselves: (1) Nazism in Germany; (2) apartheid in South Africa; and (3) Zionism in Israel.

Apparently a visiting professor, Selwyn Troen from Ben Gurion University in Israel, wrote a letter to the dean of the College of Arts and Sciences, Egon Neuburger, in which Troen stated that Dube, in his 319 course, taught that "Zionism is as much racism as Nazism was racism" and that "the class was asked to share the instructor's view that there is an identity between the two." Troen also accused Dube of using his position for "the propagation of personal ideology and racist biases." The letter was sent to several other administrators at Stony Brook, including several faculty and the news media.

The executive committee of the Stony Brook senate investigated the matter and unanimously determined that Dube's teaching was within the bounds of academic freedom. This position was ratified by the dean of the College of Arts and Sciences and the president and by the full University Senate when it voted 55-14 to accept this report.

But the controversy over Dube continued. It was fueled by several Jewish groups and a state legislator who raised questions about Dube's teaching. Apparently even the Governor of New York questioned "the failure of the university community to denounce Dr. Dube." The president of Stony Brook issued a statement in October, 1983, saying the administration "absolutely divorces itself from the views expressed in this course and from any view that links Zionism with racism or Nazism." Following this letter, Dube's course was removed from the political science department course offerings.

In the 1984-85 academic year, Dube was reviewed for tenure. The university followed its procedures and an ad hoc committee voted 6-1 in favor of recommending Dube for tenure and 4-3 in favor of recommending his promotion to associate professor. However, the dean of the college, Robert Neville, reviewed Dube's record and recommended that tenure and promotion be denied. He expressed concerns about the Africana studies program and concerns about the quantity and quality of Dube's publications.

Dube's file was then reviewed by the provost, Homer A. Neil, who also recommended denying both tenure and promotion. Again, he pointed to Dube's publication record as being extremely limited. The president concurred in the recommendation and denied both tenure and promotion. The president's letter to Dube was quite specific in focusing on Dube's scholarly record and the fact that the dean and provost had given greater weight to scholarship than had the committees which had recommended Dube for tenure.

After an unsuccessful appeal to the chancellor of the SUNY system, Dube filed suit raising a variety of constitutional and state claims, including a First Amendment challenge based on academic freedom. The district court found that all of Dube's claims were invalid except one--the court held that Dube could go to trial on the matter of whether his First Amendment academic freedom rights were violated by the denial of tenure. On appeal, the appellate court sustained that approach.

Dube's theory was that the administrators at SUNY were pressured into denying him tenure because of the community outrage over his exercise of academic freedom. Or as the federal appellate court stated:

We believe that Dube has proffered evidence from which a jury could find that defendants denied tenure and promotion to him in response to pressure exerted by government officials and community activists outraged by his teachings.

The appellate court then referred to the President's statement denying any racism on the part of the university and a statement by the chancellor concerning the controversy over Dube's teaching about

Zionism. The court felt that there was ample evidence for a jury to determine that these officials acted to deny Dube tenure because of the outrage. Such action, according to the court, would represent a violation of his academic freedom First Amendment rights, since Dube's classroom activity was protected. If a jury finds the denial of tenure and promotion was for legitimate academic reasons, however, then Dube will lose. For private colleges, the important lesson is that the college must establish a reasonable connection between Dube's comments and his classroom efficacy.

Teaching Methodology

The cases discussed thus far have focused on controversial ideas or expressions; *Cooper v. Ross* (1979) addresses academic freedom as it relates to teaching methodology. Grant Cooper, a faculty member at the University of Arkansas at Little Rock, brought a lawsuit challenging the decision not to reappoint him. The university offered several reasons for Cooper's nonreappointment, including the fact that he failed to adhere to the required text material in assignments, lectures, or discussion and that because of his negative attitude toward these materials, Cooper discouraged their use. Cooper alleged that his constitutional rights of speech and association were violated.

The federal district court found in favor of Cooper. It ruled that the reasons the university offered for nonrenewal were constitutionally suspect. However, the court did note, "The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial interference." The court also noted that there was very little case law on the question of a teacher's choice of teaching methodology.

The court suggested that, in the absence of guidelines or some generally accepted standards, it might rule in Cooper's favor on the issue of teaching methodology. However, the court did not actually decide the question related to teaching methods; instead, the court ruled for Cooper because the college's decision not to renew Cooper's contract was based on his political ideology.

Phyllis Hetrick was a nontenured assistant professor of English at Eastern Kentucky University. Hetrick apparently made some very shocking statements to her class; she used "extraneous matter in class;" and she covered only half of the plays in her modern drama course. Her contract was not renewed, and she alleged that it was because her pedagogical style and philosophy did not conform to the pattern prescribed by the university. She filed suit claiming various First Amendment violations. (*Hetrick v. Martin*, 1973)

The court ruled for the university, holding that a challenge to a nonrenewal decision based on teaching methods does not involve a protected form of speech. If it did, the court suggested, Hetrick "would have us substitute the First Amendment for tenure, and would thereby succeed in elevating contract law to constitutional status."

What the court was suggesting is that a college must be able to evaluate a nontenured teacher and the teacher's teaching methods and pedagogy. It specifically rejected the notion that Hetrick's teaching style is insulated from review "by her superiors when they determine whether she has merited tenure status just because her methods and philosophy are considered acceptable somewhere within the teaching profession."

III. Preventive Measures

At a public school, the faculty's academic freedom is based on both constitutional and contractual rights. At an independent college, faculty members cannot use constitutional reasoning as a basis for a claim of academic freedom against the college; instead, they must assert a contractual right. In challenges to intrusion by outside government bodies, a college or faculty may invoke constitutional norms such as those raised against the EEOC when it tries to obtain confidential peer review material. It can be argued that even if a college does not have a clear contractual statement on academic freedom, a faculty member might claim that such a right is part of the common law of the academy, which forms the basis for a claim against the employing college.

What is important, however, is what the courts have suggested as the major focus and limitations of academic freedom. Following are several major findings regarding academic freedom:

- Academic freedom is important to the academy and to democracy, for it supports free inquiry and protects against a "pall of orthodoxy."
- Academic freedom generates competing claims between the faculty member and the college, both of which may assert certain freedoms to act.
- Certain academic activities are not protected by academic freedom; there are limits to the concept.

In the light of recent case law, many issues related to academic freedom have become more clear:

- Colleges control final grade determinations, even over the objections of the classroom professor.
- Matters of pedagogy and classroom methodology can be assessed as part of a personnel review process, even if such matters impinge on academic freedom.
- Professors must conform to the rules and regulations of the college.

Other issues require a more in depth analysis of the facts of a given situation to determine whether the protections of academic freedom apply. For example, it seems reasonable that not everything that someone says is protected by academic freedom; clearly, the university has an interest in what is said in a classroom if those comments go beyond legitimate and reasonable professional standards. The introduction of repeated and irrelevant or highly personal or biased material is offensive both to the university and to students and probably falls outside the protection provided by academic freedom.

Alternatively, when a professor undertakes scholarly research and that research is used in the classroom, there is a much more serious issue about the ability to discipline the professor for voicing views based on that academic research.

In addition, an independent college may have more latitude in disciplining a professor because it is not subject to constitutional mandates. In all cases, however, courts will balance the competing claims raised by the professor and the right to espouse controversial views and the right of the university to make sure that unrelated and intrusive material that is harmful to the academic freedom of the institution and its students is not presented to a class.

Even though the courts acknowledge the lack of clear terrain in which academic freedom is grounded, the courts are clear about the basic purpose of the notion. Matters peripheral to conformity of thought (and most actions in general) are not embraced within the notion of academic freedom.

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**RELIGIOUSLY AFFILIATED
COLLEGES AND UNIVERSITIES**

Kent M. Weeks¹

INTRODUCTION

TOPIC

This paper focuses on the application of federal statutes and the religion clauses of the First Amendment of the United States Constitution to the employment policies of religiously affiliated colleges and universities.

STATEMENT OF ISSUES

The basic issue is under what circumstances are religiously affiliated institutions exempted from compliance with applicable federal civil rights statutes forbidding religious discrimination in the employment of personnel.

ANALYSIS

BASIC APPROACH

Title VII of the 1964 Civil Rights Act and many similar state statutes prohibit employers from taking into account the religious background or affiliation of an employee or prospective employee in hiring and other personnel decisions. Early on, however, it was recognized that the application of such prohibitions to religious institutions would interfere with their autonomy and disable them from pursuing their uniquely religious

¹The author is indebted to Derek Davis who initially prepared this material for the Legal Deskbook for Administrators of Independent Colleges and Universities, Editors Kent M. Weeks and Derek Davis, published by the Center for Constitutional Studies, J. M. Dawson Institute for Church-State Studies, Baylor University, Waco, Texas, 1993.

missions. Title VII of the 1964 Civil Rights Law thus exempts a church body or religious organization from the ban on religious discrimination—even if the employee in question is not directly involved in the religious activities of the institution. The Supreme Court has upheld this exemption against a court challenge on Establishment Clause grounds, although a number of justices in the case emphasized that the Court was leaving open the question of the constitutionality of the exemption for religious organizations that engage in for-profit activities (Corporation of the Presiding Bishop v. Amos, 1987). Applying the Amos decision to religiously affiliated colleges and universities, it is clear that certain institutions are free to maintain their religious character by hiring persons who share a commitment to the religious tradition or values of the institution.

In addition, case law seems to suggest that religiously affiliated institutions of higher education may preferentially hire certain employees on the basis of religion without impairing the entitlement of such institutions or their students to state and federal assistance programs.

KEY ISSUES

Religious Preference and Civil Rights Laws

Title VII of the federal Civil Rights Act of 1964 generally precludes an employer from refusing to hire, discharge, classify, or otherwise treat a person differently with respect to terms or conditions of employment because of that person's religion.

Title VII contains three exemptions from these religious nondiscrimination provisions.

(1) Section 702, The Exemption for Religious Corporations

Section 702 of Title VII provides that the general prohibition against religious discrimination does "not apply to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities." A religiously affiliated college or university may qualify under this exemption if its charter, bylaws, and operating manuals refer to the institution as a religious entity. Religiously affiliated institutions that are exempt under this provision are entitled to make religious preferences in their employment decisions, but may not discriminate on the basis of race, national origin, or sex. Note, however, that the statute does not require that the work performed by such employees be religious in nature or related to the religious mission and purpose of the institution. For example, the statute would permit a religiously affiliated institution to assert a religious preference, not simply with respect to professors of theology and campus ministers, but also with respect to faculty, building engineers, secretaries, maintenance personnel, and others who are not normally involved directly in the transmission of religious teachings (Amos, 1987).

(2) Section 703(e)(2), The Exemption for Religiously Affiliated Colleges and Universities

Although some religiously affiliated colleges and universities would qualify for exemption under Section 702 as religious corporations, Section 703(e)(2) specifically allows a college or university to prefer employees or prospective employees on the basis of religion if the institution is, in the language of the statute, "in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a religious corporation, association, or society or if the curriculum of such school, college, university, or other educational institution . . . is directed toward the propagation of a particular religion." For example, a religiously affiliated college or university may qualify under this exception if there is substantial control of the governing board by a religious corporation, if there is substantial financial support for the institution from a church, or if the curriculum of the institution includes offerings in theology that relate to a particular religious tradition. This exception does not permit a religiously affiliated college or university to discriminate on the basis of race, color, national origin, or sex (Maquire v. Marquette, 1986), but it does allow such an institution to prefer an employee on the basis of religion, irrespective of whether that employee would normally be engaged in religious activities such as the "propagation of a particular religion" mentioned in the statute.

(3) Section 703(e)(1), The Bona Fide Occupational Exception

This section allows any employer, whether an institution of higher education or not, to take into account the religion, sex, or national origin of an employee or prospective employee, but only in instances where such characteristics of the employee is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The legislative history of this provision suggests that the BFOQ exception should be construed narrowly. Both case law and federal regulations have adopted a restrictive view of the availability of this exception. For example, the gender BFOQ would allow an advertising agency to prefer a woman over a man as a model for pictures to sell lipstick, but an airline may not rely on the gender BFOQ to prefer women over men as flight attendants. The consequence of this narrow construction of the BFOQ exception for religiously affiliated colleges and universities is that they may not rely on the religion BFOQ as the basis for defending a policy of religious preference with respect to employees who are not normally engaged directly in a significant aspect of the institution's religious mission.

In at least one case, a court indicated a reluctance to allow a religiously affiliated institution of higher learning to depend on the Section 702 and Section 703(e)(2) exemptions, and an inclination to require it, instead, to demonstrate that the exercise of a religious test in academic employment is permissible under the Section 703(e)(1) BFOQ exemption. In Pime v. Loyola (1986), the Seventh Circuit Court of Appeals rejected a

claim by Loyola University of Chicago, a Jesuit institution, that it was entitled to fill three vacancies in its philosophy department only with Jesuits pursuant to the broad exemption for religiously affiliated educational institution under Section 703(e)(2). While the rationale for its ruling was not clearly stated, the court seemed to be generally disinclined to tackle the question of whether all religious institutions, to whatever degree they might be religiously affiliated, were in fact intended by Congress to be covered by the Section 703(e)(2) exemption. The court did, however, allow Loyola to fill its teaching vacancies only with Jesuits pursuant to the BFOQ exemption, since a Jesuit "presence" was significant to the educational tradition and character of the institution.

Two years later, in Tagatz v. Marquette (1988), a federal court held that Marquette University, also a Jesuit institution, was entitled to provide free housing and a no deductible arrangement for health insurance to the Jesuit members of its faculty. Tagatz, an Episcopalian teaching statistics in the university's psychology department, complained that he and other non-Jesuit faculty members were unfairly discriminated against since they were not also provided these benefits. The court held that such benefits were proper, since it was important that Marquette maintain a Jesuit presence and, in any case, the Jesuits would not otherwise be able to survive since they voluntarily returned their salaries to the university. While the court did not specifically state that these Jesuit benefits were

justified under the BFOQ exemption, it cited and seemed to rely upon the Pime case, which, of course, was decided on the basis of the Section 703(e)(1) BFOQ exemption.

In 1993, the Ninth Circuit Court of Appeals ruled that all three of the Title VII exemptions should be narrowly construed. In EEOC v. Kamehameha Schools, (1993) a decedent, who in her will devoted a large portion of her estate to the establishment of a private school, also required that all of the school's teachers be Protestants. The school, although only one-third of its students were Protestants, rigorously followed for years the requirement that its teachers be Protestants. When an applicant for a position as a French teacher at the school was rejected because she was not a Protestant, she filed a complaint with the EEOC, which in turn sued the school for discriminating against the applicant on the basis of her religion in violation of Title VII. The district court, in 1991, held that a "Protestant presence" was significant to the educational tradition and normal operation of the school, and that the school was entitled to employ only Protestant teachers under the BFOQ exemption of Section 703(e)(1). Moreover, the court held that the school was entitled to adopt a policy of religious preference in its employment practices not only under the BFOQ exemption, but under the Section 702 exemption for religious organizations and the Section 703(e)(2) exemption for religiously affiliated institutions as well.

On appeal, the Ninth Circuit reversed the district court's ruling, holding that the school failed to establish its right to hire only Protestant teachers under any of the three exemptions. Regarding the school's entitlement to an exemption as a religious organization under Section 702, the court found that while the school offered some religious instruction, it was incidental in the overall framework of the school's educational mission. The court further found that the school was "an essentially secular institution operating within a historical tradition that includes Protestantism," and that the school's "purpose and character was primarily secular, not primarily religious." Accordingly, it was not a qualifying "religious organization" under Section 702. Regarding the exemption under Section 703(3)(2) for religiously affiliated institutions, the court held that the school was owned by a secular trust, thus failing the statute's requirement that an organization be "owned, supported, controlled, or managed by a particular religion."

Of particular interest is the court's finding that the Kamehameha school also failed to qualify for the BFOQ exemption under Section 703(3)(1). The court observed that the primary mission of the school was to provide a solid education to its students in traditional secular subjects. Therefore, while being Protestant might be a bona fide occupational qualification for a chaplain or religion education teacher in the school, the requirement of Protestant affiliation for a French teacher was irrelevant to the school's primarily secular mission. The court

did not disagree with the district court's holding that a "Protestant presence" was significant to the operation of the school, but held that a "Protestant Presence" did not require that 100 percent of the school's teachers be Protestant. The fact that the Protestant-only requirement appeared in the decedent's will did not alter the result. The court stated that the decedent was stating only a personal preference for Protestants based on her experience in missionary schools. "This kind of personal preference," the court held, "is not a BFOQ when expressed by a living employer, and there is no reason to reach a different conclusion because the preference is expressed posthumously."

The Kamehameha case illustrates rather pointedly the trend of the courts to construe narrowly all three of the exemptions from Title VII's general requirement that all employment practices be free from discrimination. Under Kamehameha, the religious organization exemption under Section 702 is available only to institutions that are "primarily religious," which perhaps means that merely being owned or controlled by a church body is not sufficient by itself. Rather, the overall operation of the institution must clearly demonstrate a religious, not secular, purpose. Moreover, for an institution to meet the Section 703(e)(2) exemption for religiously affiliated colleges and universities, its relationship to a church or religious body must be clear and unmistakable, not merely hypothetical or incidental. Finally, the BFOQ exemption allows an institution to

take into account the religion of an employee or prospective employee only when the duties and functions to be executed by the employee essentially demand, consistent with the institution's mission, a particular set of religious beliefs. Obviously, the Kamehameha case is troubling in many respects. The United States Supreme Court denied review of the decision.

Several recent cases involving religious preference have arisen under state law.

Walter v. Seton Hall University, (1992) involved two nuns who claimed they were denied the 12 month dismissal notice to which they were entitled. The university claimed that because of Roman Catholic Common Law and its Free Exercise rights, the courts were prevented from adjudicating this "essentially doctrinal" dispute. The university conceded it breached the notice requirements of the nuns' contract. The court drew a distinction between purely secular activities and those related to the function of "intermediaries between the church or the clerical authority in the university and the community or student body," and ruled that the nuns were not functioning as such intermediaries. Accordingly, the university was not immune from suit.

In Alicea v. New Brunswick Theological Seminary, (1992), a faculty member challenged the refusal of the seminary to grant him tenure based on a promise of tenure that he had received. The Seminary was a member of the Reformed Church of North America and was supervised by that denomination's Board of Theological

Education. Only that board had the authority to grant contracts in excess of one year.

The faculty member claimed that he was promised a tenure track position and that he had not received it. Employing an approach similar to that applied in the Seton Hall litigation, the court looked to the nature of faculty seminary employment, the doctrinal nature of the controversy, and the practical effect of applying neutral principles of law. The New Jersey Supreme Court concluded that because the faculty person performed a ministerial function and was a "spokesperson for the church," enforcement of the president's promise would violate the free exercise rights of the institution.

In a recent case, Scheiber v. Saint John's University, (1994), the Court of Appeals of New York overturned a summary judgment in favor of the university and its exercise of a religious preference in the termination of its vice president for student affairs. New York law provided a specific exemption for religious institutions from the nondiscriminatory requirements of its Human Rights Law. The university, in its answer, denied that it exercised any religious preference but then as an affirmative defense, asserted the religious preference as a way to defeat the lawsuit of the dean.

The court ruled that Saint John's University was a religious institution by noting that the university:

Has not abandoned its religious heritage and plainly falls within an exemption for entities that are 'operated, supervised or

controlled by or in connection with a religious organization.'

Second, the court ruled that Saint John's did not exercise any religious preference since it made no comment about religious function or the Jewish background of the dean at the time of the termination. Instead it argued that the termination was based on inadequate performance. The court ruled that an institution must invoke a religious preference and not just rely on the character of the institution.

A religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise in religion and then evoke the exemption as a shield against this unlawful conduct.

Accordingly, the court ruled that the case should go forward to trial based on whether Saint John's University had cause to terminate its vice president for student affairs.

SUMMARY

There are, in summary, three religious exemptions from the nondiscrimination provisions of Title VII. First, if a college or university is deemed to be a "religious corporation" or a "religious educational institution," Section 702 allows it to exercise religious preferences with respect to all of its employees. Second, an institution may maintain a similar employment policy under Section 703(e)(2) if it is substantially "owned, supported, controlled, or managed by a particular religion." Third, under the narrow construction of the BFOQ exception set forth in Section 703(e)(1), a college or university may prefer employees on the basis of religion, but only when

those employees are directly engaged in a significant aspect of the institution's religious mission.

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