RE-EVALUATING TENURE CRITERIA:
The Increasing Use of Collegiality as a Factor in the Tenure and Promotion Process

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Criteria for academic tenure and promotion in higher education in America generally conform to standards established by the American Association of University Professors in its 1940 Statement of Principles on Academic Freedom and Tenure.\(^1\) Typical criteria include: “teaching effectiveness, research and publications, professional activities, service to the academic community, participation in community affairs associated with the member’s area of professional competence” and others.\(^2\) These criteria by which college and university professors historically were evaluated for tenure and promotion have often been referred to as the “traditional trinity” of teaching, scholarship, and service.\(^3\)

Historically courts have upheld the right of a college or university to consider a faculty member’s working relationship with his or her colleagues as a valid basis upon which to base a tenure or termination decision.\(^4\) However, the word “collegiality” was not the focus of court decisions until 1981 when the Court of Appeals for the Fourth Circuit in

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\(^1\)AAUP Policy Documents & Reports (2d ed. 1995).


\(^3\)See, e.g., Lieberman v. Gant, 474 F. Supp. 848, 866 (D. Conn. 1979), aff’d, 630 F.2d 60 (2d Cir. 1980).

Mayberry v. Dees introduced into higher education case law, seemingly with approval, the defined concept of "collegiality" as a distinct fourth criterion upon which to base tenure and promotion decisions.

From the time of Mayberry on, discussion and disagreement has increased on the campus, in the literature, and in court decisions over the role of collegiality as a factor in tenure decisions. Faculty and academic administrators have been forced to wrestle with many questions which are difficult to answer: Should the ability to "get along" or to "work well" with one's colleagues be one of the requirements for a tenure decision? Is the college or university professor supposed to be a Mr./Ms. Personality or a competent professional--or, to a degree, both? Are not many leaders who intellectually challenge the campus radicals who simply do not fit into the establishment niche? Where is the balance between collegiality, academic freedom, and First Amendment rights of free speech? Should or must collegiality be listed specifically as a criterion for tenure if it is to be used as a factor in tenure decisions? Does the use of collegiality as a distinct criterion serve as a means for concealing discriminatory treatment of women and minorities?

Collegiality, as an acceptable criterion in tenure decisions, has been increasingly relied on by faculty and upheld by the courts, but it has not been without its critics. In the September-October 1999 issue of Academe, the AAUP published the draft text of a statement entitled "On Collegiality as a Criterion for Faculty Evaluation" and invited its members to comment during the coming months. In the proposed statement, the drafters


6The Mayberry court defined "collegiality" as being "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests. . . ." Id. at 514. Collegiality has also been defined as "cooperative interaction among colleagues." Random House Webster's Dictionary (3rd ed. 1993).

stated that the development of collegiality as a fourth criterion in faculty evaluation is "highly unfortunate" and should be discouraged.⁸

Alvin Snider, a Professor of English at the University of Iowa, expressed a similar opinion in a Point of View piece in the May 7, 1999, issue of The Chronicle of Higher Education.⁹ Professor Snider set forth his grave concerns over the efforts of the higher education community to achieve universal "niceness" to the extent that free and open debate is stifled. He focused his remarks specifically on the recent proposal at the University of Iowa that a candidate for tenure in the College of Liberal Arts would ordinarily be expected "to have interacted successfully with colleagues and students in achieving the mission of the department and the institution."¹⁰ Such language, Snider argued, while appearing innocuous enough, could easily be read to reward conformity, stifle dissent, and weaken meaningful discussion. Snider added that he was glad to see that, after vigorous objection from a number of his colleagues, the proposed language had been quietly dropped.

The debate on the appropriate role of collegiality in tenure evaluations will continue. This outline will present the existing arguments in support of and in opposition to consideration of collegiality as a factor in tenure decisions. It will also present an overview of the relevant case law to provide faculty and academic administrators with the necessary background information to formulate their own opinions on the subject.

I. The Arguments For and Against Consideration of Collegiality in Tenure Decisions
(A) Arguments In Support of Consideration of Collegiality

A number of arguments have been raised in support of the consideration of collegiality as a factor in tenure decisions, the most significant being: (1) There is a


¹⁰Id.
legitimate expectation that faculty will and should cooperate with their colleagues; (2) Reason and common sense dictate the consideration of collegiality in any significant employment decision; and, (3) Courts considering the issue of working relationships or collegiality of faculty with their colleagues have consistently upheld the importance of these considerations.

1. **Legitimate expectation that faculty will cooperate with colleagues**

One of the strongest arguments in favor of considering collegiality is the fact that faculty do not operate in isolation from their departmental colleagues or from other faculty in related disciplines. Faculty must discuss, cooperate, compromise, and act as a group in making decisions regarding the development of curriculum, the scheduling and teaching of classes, the advising of students, and the allocation of limited laboratory space and resources. All of these important aspects of the work of an academician require cooperation and collegial interaction with colleagues; none can be carried out successfully if each individual faculty member acts solely in his or her own personal interest. A university community has a legitimate expectation that its faculty will cooperate and work in a positive manner in the best interests of the institution. This expectation is even stronger as interdisciplinary programs increase and rigid barriers between academic disciplines overlap and diminish.

2. **Reason and common sense**

The second argument in support of the use of collegiality is that reason and common sense require the consideration of collegiality in every important employment decision. After all, how many jobs exist in which one’s ability to work with others in a civil and positive manner is not taken into account in evaluating performance? To the world at large, it may appear frivolous that some faculty argue that the ability to get along with those people with whom he or she must work is not an essential element of the job. Whether one is a secretary in an office setting, a carpenter building homes, a bus driver, a waitress, or a lawyer, the nature of nearly every occupation requires a significant amount of contact with others and a basic level of civility and cooperation in the workplace. The university campus is no exception.
3. History of courts considering faculty members' working relationships with colleagues

One of the most persuasive arguments for considering collegiality as an implicit factor in tenure decisions is the fact that most courts that have considered a faculty member's working relationship with his or her colleagues as a factor in employment decisions have concluded that collegiality is an appropriate element for consideration and evaluation.\textsuperscript{11} Courts have recognized that the ability to be collegial is an essential element

\textsuperscript{11}See, e.g., Vukmir v. Univ. of Pittsburgh, 173 F.2d 422 (3rd Cir. 1998) (upholding university's non-renewal of Assistant Professor of Anesthesiology and Critical Care for lack of collegiality and rejecting professor's First Amendment claims); Newberry v. East Texas State Univ., 161 F.3d 276, 281 (5th Cir. 1998) (affirming jury verdict in favor of university on professor's disability claim and finding that university dismissed professor because of his work performance and lack of collegiality); Levi v. Univ. of Texas at San Antonio, 840 F.2d 277, 282 (5th Cir. 1988) (recognizing that "the future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty."); Rubinstein v. Adm'rs of Tulane Univ., 58 F. Supp. 2d 702, 714 (E.D. La. 1998) (finding lack of collegiality and lack of university citizenship valid, nondiscriminatory reasons for failing to promote plaintiff and to increase his salary); DeSimone v. Siena Coll., 663 N.Y.S. 2d 701, 702 (App. Div. 1997) (recognizing right of college not to renew probationary faculty member for inability to get along with colleagues); Curtis v. Univ. of Houston, 940 F. Supp. 1070, 1075 (S.D. Tex. 1996) (granting summary judgment for university and saying: "In considering a decision to grant that ultimate achievement [tenure] to a professor, the committee must take into account not only his quantifiable productivity but also his unquantifiable personality, collegiality, and future or projected performance, among myriad other factors about which the court can only speculate."); Garvey v. Dickinson Coll., 775 F. Supp. 788, 798 (M.D. Pa. 1991) (finding plaintiff's unwillingness to cooperate with colleagues, divisive presence within department, and marked inability to cooperate productively with departmental faculty nondiscriminatory reasons for dismissal); In re Brantley, 518 N.E. 2d 602, 605 (Ohio Ct. App. 1987) (holding that in deciding whether to grant tenure, educational institution may lawfully consider collegial relationships, unless that criterion is shown to be facade for discrimination); Johnson v. Michigan State Univ., 547 F. Supp. 429, 439-40 (W.D. Mich. 1982) (upholding university's tenure denial to black female described by colleagues as having abrasive personality, engaging in repeated clashes with students and faculty, being ineffective teacher, and failing to pass medical board examinations); Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 229 (E.D.N.C. 1976) (holding that faculty member's incompatibility with departmental colleagues and administration constituted legitimate non-discriminatory ground for termination of tenure); Perham v. Ladd, 436 F. Supp. 1101, 1107 (N.D. Ill. 1977) (recognizing that "[p]rofessional disagreements with members of an academic department are sufficient, nondiscriminatory reasons to deny tenure").
of being able to carry out the more explicitly stated criteria of teaching, research, and service. Collegiality is not an unrelated or independent criterion; it is, instead, a partial means of evaluating the other criteria.

(B) Arguments In Opposition to Consideration of Collegiality

Those who oppose the consideration of collegiality as a factor in tenure/promotion decisions raise three main arguments: (1) Consideration of collegiality constitutes a breach of contract when collegiality is not stated as a distinct criterion in the institutional tenure policy; (2) Collegiality can easily be misused as a pretext for unlawful discrimination; and, (3) The isolation of collegiality as a distinct criterion for evaluation poses a significant threat to academic freedom.

1. Breach of contract argument

The most persistent argument advanced by faculty who have been denied tenure because of a lack of collegiality is that the university’s consideration of personality, collegiality, and “fitting in” as it evaluated him or her for tenure violated either the employment contract or the stated tenure policy because these factors were not specifically defined as part of the criteria for tenure.\(^{12}\) This argument was central to the plaintiffs’ claims of breach of contract in a number of recent cases.\(^{13}\)

2. Pretext for discrimination argument

Plaintiffs have also argued that a university’s denial of tenure based even in part on a lack of collegiality was highly subjective and was merely a mask for gender, age, or disability discrimination. A review of these cases indicates that the colleges or

\(^{12}\)See Leap, supra note 4, at 110.

universities involved prevailed in almost every situation.\textsuperscript{14} Even with the noted success rate of the institutions, however, a recognized authority on higher education law has cautioned that “[w]hile the courts may be unsympathetic to reversing negative tenure decisions that were based on lack of collegiality, the addition of a discrimination claim can substantially change the mix.”\textsuperscript{15}

3. Danger to academic freedom and free speech argument

Faculty denied tenure because of a lack of collegiality have argued denial of academic freedom and of free speech as a basis for their claims.\textsuperscript{16} The academic freedom argument has also been advanced recently in the AAUP’s proposed statement “On Collegiality as a Criterion for Faculty Evaluation.”\textsuperscript{17} The drafters of the proposed statement assert that to isolate collegiality as a distinct dimension of evaluation poses a “potential danger to academic freedom” and “should not be added to the three traditional areas of faculty performance.” In the opinion of the drafters, collegiality should not be assessed independently of tenure, research, and service but should rather be understood as a “virtue whose value is expressed in the successful execution of these three functions.”\textsuperscript{18}


\textsuperscript{16}See Watts v. Board of Curators, Univ. of Missouri, 495 F.2d 384 (8th Cir. 1994); Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).


\textsuperscript{18}AAUP, supra note 8, at 69.
The argument that the use of collegiality as a factor in tenure decisions poses a danger to academic freedom and to First Amendment protections has also been put forward in several articles and commentaries.19 Edgar Dyer, Professor of Politics and University Counsel at Coastal Carolina University, argues in “Collegiality’s Potential Chill Over Faculty Speech,”20 the need for a new judicial standard of academic free expression tailored specifically to faculty at public institutions, which would provide them greater protection than currently exists when collegiality is used as a factor in their employment decisions. He believes that the use of collegiality is a threat to academic free speech and to the integrity of higher education.

Dyer notes that the first problem with the use of collegiality is that it is an ambiguous and vague term, which does little to provide specific guidelines for behavior. He expresses concern that the use of collegiality is so subjective that there is no way to evaluate whether it is being used fairly or whether it is being used to punish faculty who disagree with those in control of the tenure process. Dyer takes little comfort in Pickering v. Board of Education21 since it does not deal with the complexity of the university environment, where there is much more independence in the classroom and more robust discussion about curriculum and philosophy than exists in the high school setting. He does not find Connick v. Myers22 meaningful because it involves an office, not an academic, environment.

Professor Dyer is also disturbed by the number of courts which have indicated that a teacher is expected to follow instructions and to work cooperatively with the


20Dyer, supra note 17, at 309.


administration. He expresses concern that the use of collegiality in this way does not make an appropriate distinction between the types of speech uttered by faculty. Dyer argues that since it is the primary mission of higher education to seek the truth, it is essential that “those who seek the truth and foster the habits of critical inquiry in others have a standard of speech/expression that effectively protects such a right without their jobs being held hostage to allegations of disruption, disharmony, lack of cooperation, and lack of collegiality.”

Perry A. Zirkel, Professor and former Dean of Education at Lehigh University, argues in “Personality as a Criterion for Faculty Tenure: The Enemy It Is Us,” that the courts have inappropriately used personality as a criterion in tenure denial cases. He equates collegiality with personality and asserts that the use of this criterion is a serious threat to individual academic freedom. He comments that in the vast majority of cases in which the courts have considered some element of personality, they have given great deference to the decision-making of the institution, holding in favor of colleges and universities in approximately two-thirds of the cases. In his view, the courts have relied upon the doctrine of institutional autonomy as a way of avoiding looking beneath the surface of the decision-making process to see the abuse of academic freedom and of free speech which has taken place.

Professor Zirkel finds that often the so-called “uncollegial” behavior of faculty who are denied tenure because of a lack of collegiality has simply been unpopular conduct, such as support for teacher organizations, holding of Marxist beliefs, or involvement with other non-establishment causes. These un-favored causes are frequently associated with

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24 Dyer, supra note 17, at 318.

personality problems, particularly where they involve clashes with other departmental colleagues or more frequently the department chair.

Drawing on cogent language of the Court of Appeals for the Fourth Circuit, Zirkel expresses the opinion that the use of personality as an independent criterion in tenure evaluations creates a threat to universities as "great bazaars of ideas where the heavy hand of regulation has little place. Like other bazaars, they may seem rude, cacophonous, even distasteful at times; but they are necessary predicates to the more orderly market of ideas in our public life."\(^{26}\) Instead of affording almost unbridled deference to institutional autonomy in decision-making, Zirkel suggests that the more appropriate standard would be to treat universities like any other employer in a Title VII employment discrimination case. This approach would require the institution to provide a legitimate non-discriminatory reason for its decision not to grant tenure and to do so without any special deference being given to institutional decision-making.

II. Overview of Relevant Case Law

The cases analyzed below are organized based on the claims asserted by the faculty plaintiffs. The overview of case law will present cases based upon: (1) breach of contract claims; (2) claims alleging that the use of collegiality is a pretext for discrimination; and, (3) claims that the use of collegiality is a denial of academic freedom and/or a violation of free speech rights.

(A) Breach of Contract Cases

In *University of Baltimore v. Iz*,\(^{27}\) the plaintiff, Dr. Peri Iz, was denied tenure and promotion. She sued, alleging constitutional and civil rights violations, breach of contract, and breach of the implied covenant of good faith and fair dealing. The tenure and promotion policies of the University of Maryland System, the University of Baltimore, and the Merrick School of Business set forth criteria for tenure and promotion as: (1) teaching

\(^{26}\)Id. at 237-08 (quoting *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981)).

\(^{27}\)716 A.2d 1107 (Md. App. 1998).
effectiveness, (2) research/scholarship, and (3) service to the university, the profession, and the community. The trial judge determined as a matter of law that these policies were incorporated into Dr. Iz’s employment contract.

Dr. Iz asserted that under her contract, the University was required to judge her tenure and promotion application solely by the three explicit criteria of teaching, research, and service set forth in the tenure and promotion policies. The University contended that the concept of collegiality was included in the criteria of teaching, research, and service described in the tenure policies and was thus inherently a part of Dr. Iz’s contract of employment appropriate for consideration in the tenure and promotion review process.

Agreeing with the University, the appellate court said: “In our view, collegiality was a legitimate factor for consideration in the promotion and tenure review process.” The court then addressed the question of whether, in a breach of contract action, collegiality should be considered when it was not listed as a distinct criterion in the tenure documents. Again agreeing with the University, the court stated: “We are persuaded that collegiality is a valid consideration for tenure review. Although not expressly listed among the School’s tenure criteria, it is impliedly embodied within the criteria that are specified. Without question, collegiality plays an essential role in the categories of both teaching and service.”

The Court of Special Appeals reversed the trial court’s refusal to grant the University’s motion for judgment as a matter of law. The appeals court concluded that “the University did not breach [her] contract when it considered Iz’s collegiality.” The Maryland Court of Appeals declined to review the case, thereby making the decision of the Court of Special Appeals final.

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28 Id. at 1120.

29 Id. at 1122.

30 Id. at 1120.

31 For a dissenting view of the Iz case, see Perry A. Zirkel, “The Personality Problem,” 80 Phi Delta Kappan 622, 638 (Apr. 1, 1999). Zirkel argues that the University should have had to factor the professor’s personality into evaluations of her teaching.
The plaintiff, Robert J. Kirsch, raised a breach of contract argument in *Kirsch v. Bowling Green State University*. Dr. Kirsch was denied tenure by the University in its College of Business Administration after having received negative recommendations from the tenured faculty in his department, the Dean, the University's review committees, and the Vice President for Academic Affairs. The President agreed with the negative recommendations.

Professor Kirsch contended that the University breached his employment contract by using in his tenure review improper criteria, which were not contained in the University's Academic Charter. The Charter provided that candidates for tenure would be granted or denied tenure solely on the basis of teaching effectiveness, scholarly or creative work, service to the University, and attainment of the terminal degree or its professional equivalent. Kirsch asserted that the University's consideration of personality, collegiality, and "fitting in" as it evaluated him for tenure violated his employment contract because these factors were additional criteria above and beyond teaching, scholarly work, and service. The trial court held that Kirsch's collegiality and personality were properly considered by the University because they necessarily permeated his ability to contribute to teaching, research, and service.

The Ohio Court of Appeals agreed and upheld judgment for the University saying: "While we do not endorse the use of a candidate's personality as a separate and distinct criterion in a case like this, personality and collegiality as they effect (sic) teaching, research and service, are proper considerations." The court further stated that "[t]eaching, research and service simply cannot be evaluated solely on the basis of objective

service, and scholarship, since collegiality was not stated as a separate criterion. He writes: "To the extent that her personality was displeasing but not part of these three criteria, it should have been taken in stride as part of the price that society pays for the higher education marketplace of ideas."

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33Id. at *25.
factors,” and cited with approval Lovelace v. Southeastern Massachusetts University,\textsuperscript{34} in which the Court of Appeals for the First Circuit noted that in exercising what is largely a subjective judgment and in specifying in writing the criteria for promotion, such as teaching, scholarship and service, the university does not thereby set objective criteria and constrict its discretion.

In Fisher v. Vassar College,\textsuperscript{35} the plaintiff was denied tenure in the College’s biology department. She filed suit alleging that the College discriminated against her because she was a married woman in violation of Title VII and because of her age—53. The Court of Appeals for the Second Circuit vacated the judgment of the District Court on her gender, age, and Equal Pay Act claims. The pertinent part of the Court of Appeals’ opinion for purposes of this outline found the biology department concluded that the plaintiff lacked “requisite leadership qualities” and had “difficulty in establishing straightforward, open, trusting, collegial relationships with others in the department” to be valid, nondiscriminatory reasons for a negative tenure decision.\textsuperscript{36} The court wrote: “[T]he senior members of the biology department simply did not like Fisher and did not wish to establish a career-long professional association with her. It is arguable that such grounds alone justified the department’s recommendation against tenure.”\textsuperscript{37}

In McGill v. Regents of Univ. of California,\textsuperscript{38} McGill was denied tenure both because of his lack of current research and because of his lack of collegiality. (In particular, McGill had denigrated his colleagues and the university to candidates for new teaching positions.) McGill insisted that his denial of tenure was based solely on his lack of collegiality, which was not one of the stated criteria upon which tenure decisions were to be based. The appellate court disagreed: “Although not expressly listed as one of the tenure

\textsuperscript{34}793 F.2d 419 (1st Cir. 1986).
\textsuperscript{35}70 F.3d 1420 (2d Cir. 1995).
\textsuperscript{36}\textit{Id.} at 1429.
\textsuperscript{37}\textit{Id.} at 1436.
\textsuperscript{38}52 Cal. Rptr. 2d 466 (Ct. App. 1996).
criteria, it is inescapable that collegiality is an appropriate consideration. The American
Association of University Professors’ Statement on Professional Ethics contemplates as
much.\footnote{39}

In \textit{Schalow v. Loyola University of New Orleans},\footnote{40} Schalow was issued a terminal
contract for 1991-92, the same year that he would have been eligible for tenure review. He
filed suit, complaining that his employment was not continued because of lack of
collegiality. He contended that consideration of collegiality was not a valid basis for his
dismissal because it was not one of the specifically enumerated criteria—teaching, research,
and service—for evaluation set forth in the Faculty Handbook.

The appellate court upheld judgment for the University and affirmed the non-
renewal of the professor’s contract for lack of collegiality. Construing wording in the
Handbook regarding evaluating the suitability of a faculty member as a professional
colleague, the court held that the language was “certainly broad enough to include
collegiality.”\footnote{41} The court concluded by saying: “No one was calling into question Dr.
Schalow’s competence as a philosopher. All admit that he is very good. All admit that he
is a popular teacher.... The problem is one of collegiality....”\footnote{42}

In \textit{Bresnick v. Manhattanville College},\footnote{43} Robert Bresnick brought suit when he was
denied tenure in the Dance and Theater Department. The By-laws of the College stated
that tenure was to be awarded on the basis of “teaching excellence, scholarship and service
to the College.” At no place was collegiality or working well with one’s colleagues
mentioned.

The Faculty Committee which recommended that Bresnick be granted tenure noted,
however, that they were concerned with the lack of interdisciplinary dance/theater

\footnote{39} Id. at 472.

\footnote{40} 646 So. 2d 502 (La. App. 1994).

\footnote{41} Id. at 505.

\footnote{42} Id.

\footnote{43} 864 F. Supp. 327 (S.D.N.Y. 1994).
productions. The Provost recommended against tenure, again noting Bresnick's difficulty working with colleagues. The President denied tenure, likewise expressing concern about the unwillingness of Bresnick to work with colleagues "in a sufficiently collegial and collaborative manner."\footnote{Id.}

Bresnick brought suit in federal court alleging breach of contract. His principal argument was that collegiality, or working well with colleagues in a collaborative manner, was not part of the criteria listed in the College's tenure documents. Granting summary judgment for the College, the court rejected Bresnick's claim that policy documents had to spell out every consideration that could form the basis for a judgment regarding his qualifications for tenure, saying:

Cooperation and collegiality are essential to a department which may be called upon to work with other departments, and to train students to collaborate in the difficult task of orchestrating dance or drama programs in the outside world. Where what is mentioned is clearly within a relevant category, it would be blind in the extreme to require the category to be specified \textit{in haec verba}.\footnote{Id.} (citations omitted)

Upon reconsideration, the court reaffirmed its earlier decision in favor of summary judgment for the College. Addressing once more Bresnick's contention that because collegiality was not specifically mentioned in the Bylaws of the College regarding tenure, it could not be considered as a factor in tenure decisions, the court said:

Tenure was denied, based upon what the College considered to be a deficiency in ability to work with other faculty members in an atmosphere of cooperation and collegiality so that dance and drama could be integrated with other activities. There is nothing in any contractual agreement preventing the institution from considering such matters in evaluating "service to the College." It is predictable and appropriate that in evaluating service to an institution, ability to cooperate would be deemed particularly relevant where a permanent
difficult-to-revoke long-term job commitment is being made to the applicant for tenure.  

The Bresnick court was deferential to the decisions of the College. The opinion rests to a significant degree on the ability of the College to convince the court of the importance of collegiality by a professor who must work with other faculty and departments of the institution.

(B) Pretext of Discrimination Cases

In Babbar v. Ebadi,\textsuperscript{47} an assistant professor in the School of Business at Kansas State University sued, claiming that he had been denied tenure on the basis of his sex, religion, and national origin. The departmental faculty and chair recommended that Professor Ebadi be denied tenure, expressing criticisms of both his research and his collegiality toward his colleagues. They described him as being “two-faced,” “zero collegiality,” “will say one thing and do another,” and “engages in tactless and inaccurate self-promotion.”\textsuperscript{48} The College Committee on Promotion and Tenure voted unanimously against tenure, as did the Provost.

Thereafter, Ebadi challenged the decision through the Kansas State University grievance procedure. The hearing panel determined that the department failed to follow established procedure in evaluating plaintiff’s research and improperly applied collegiality as a criterion for tenure. Despite these findings, however, the panel recognized that professional relationships between the plaintiff and his department had been so permanently and irreparably broken that his continued long-term employment was not in the best interests of the University, the School of Business, or the department. In response to the recommendation of the panel, the President denied tenure.

The professor sued, contending that the University discriminated against him by incorporating collegiality and heightened research requirements into his tenure evaluation process. The court disagreed and dismissed plaintiff’s suit, holding that “plaintiff has

\textsuperscript{46}Id. at 329.

\textsuperscript{47}36 F. Supp. 2d 1269 (D. Kan. 1998).

\textsuperscript{48}Id. at 1272.
failed to show how the University discriminated against him by incorporating collegiality and 'empirical research' requirements into the tenure process.\textsuperscript{49}

In \textit{Stein v. Kent State Univ.},\textsuperscript{50} the plaintiff alleged that her contract was not renewed because of gender discrimination and retaliation for filing internal complaints with the University and external complaints with EEOC. Kent State maintained that she was not reappointed because of her only average performance in teaching and research, and because of her demonstrated lack of collegiality in filing internal and external suits and charges that were consistently judged as frivolous. The district court granted summary judgment for the University saying: “The ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions. Plaintiff Stein makes no showing that the lack of collegiality was a pretext.”\textsuperscript{51} The Court of Appeals for the Sixth Circuit affirmed the district court, also finding the University's reasons for nonrenewal to be legitimate and nondiscriminatory, and they were not shown to be pretextual by the plaintiff.

\textbf{(C) Denial of Academic Freedom or Violation of Free Speech Cases}

The first case to discuss tenure and collegiality in depth was \textit{Mayberry v. Dees}.\textsuperscript{52} Robert Mayberry sued East Carolina University, alleging that the denial of tenure to him was retaliatory to punish him for his criticisms of the Department Chair. During the year in which he stood for tenure review, Mayberry had gone door-to-door to his colleagues in the Department of Romance Languages to complain about the Chair's appointment of himself and his wife to a departmental decennial reaccreditation committee. Mayberry had also sent an anonymous questionnaire to the University-wide Self-Study Steering Committee, which was highly critical of the Chair.

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\textsuperscript{49}Id., at 1279.
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\textsuperscript{50}No. 98-3278, 1999 WL 357752, (6\textsuperscript{th} Cir. May 11, 1999).
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\textsuperscript{52}663 F.2d 502 (4th Cir. 1981).
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The University defended by producing evidence that the Department Chair had expressed reservations about granting Mayberry tenure before Mayberry made any of the criticisms on which he based his case and that the Chair was unaware of Mayberry’s criticism and actions prior to the denial of tenure. The Court of Appeals for the Fourth Circuit upheld the denial of tenure for these reasons. The court noted in a footnote the Mi. Healthy principles, which permitted the University to consider Mayberry’s protected speech in its tenure decision as long as there was sufficient evidence that it would have made the same decision even without the protected speech.\textsuperscript{53}

Mayberry is significant because of a number of comments made by the Fourth Circuit about the role of collegiality in considerations of tenure. First, the court cited the trial judge’s conclusion that “the evidence reflected an insubordinate dimension to his [Mayberry’s] protected criticism.”\textsuperscript{54} In addition, the court cited with approval a number of factors noted by the Commission on Academic Tenure in Higher Education as being important to the consideration of tenure, including collegiality:

Demonstration of factors well beyond the mere passage of time in service, (footnote omitted) namely (a) creditable scholarship, (b) accomplished pedagogy, (c) able service to the university in matters associated with its maintenance, operation, growth and continued endurance, and (d) developed collegiality—the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests (footnote omitted)—is required by the university, and should be established before a candidate is granted tenure.

Faculty members in universities in general who had proven their own worth appreciated the possibility of pollution of the academic atmosphere, in which their own lives were conducted, through indiscriminate admission of insufficiently tested candidates who might prove to be unproductive, uncollegial, or both. (citation omitted)\textsuperscript{55}

\textsuperscript{53}Id. at 517 n.35.

\textsuperscript{54}Id. at 507 n.16.

\textsuperscript{55}Id. at 514.
Although *Mayberry* simply carried forward the concept of an expectation of cooperation and civility from faculty, which had been upheld earlier by a number of courts, it is the first case to isolate and identify “collegiality” as a distinct criterion for tenure. While the case has been widely cited, it has not been without its critics.

In *Watts v. Board of Curators, Univ. of Missouri*, the plaintiff brought suit after being denied tenure, contending that his tenure denial was based on his exercise of free speech. The University said tenure was denied because Watts, even after receiving considerable grant support from the University to enable him to complete and publish a book, had failed to honor his commitment to do so; further, he had demonstrated an unwillingness to teach world history after having been directed to do so by his Department Chair.

In earlier correspondence to the Dean from the University’s Tenure Review Committee, the Committee listed several factors taken into account in their negative recommendation of Watts, among which were his disloyalty to his colleagues by distributing a critical review to members of the department and his taking of a position

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56See supra, note 9.

57The University Faculty Manual declared that “a factor to be considered in evaluating salary increases and promotion in rank (including conferral of tenure) is ‘constructive relationship with colleagues.’” *Mayberry*, 663 F.2d at 514, n.26.

58For criticism of the result in *Mayberry*, see Zirkel, supra note 57, in which Professor Zirkel calls on courts not to give undue deference to administrations and to require universities to justify their decisions. “Reviewing courts should be vigilant in keeping such criteria [collegiality] within the narrow boundaries of their supporting policy and evidence. . . . [T]he court should have protected Mayberry’s academic freedom, narrowly construed the collegiality criterion, and strictly scrutinized the evidence regarding his qualifications for tenure.” *Id.* at 241, 243. For criticism of the reasoning in *Mayberry*, see Perry A. Zirkel, “Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure,” 12 Educ. L. Rep. 1053 (1983), in which Zirkel comments that the court’s opinion seems “to encourage the uncritical use of collegiality as overt or even covert criterion for faculty tenure decisions and perhaps for other stages of faculty employment decision making as well, thus threatening from inside the protected tradition of the robust exchange of ideas at public institutions of higher education.” *Id.* at 1059.

59495 F.2d 384 (8th Cir. 1994).
with students that they were always right and that perhaps the University “might need burning down.”

Affirming judgment for the University, the Court of Appeals for the Eighth Circuit recognized the broad range of factors which a university may consider in making its employment decisions: “There is no requirement in the constitution that a teacher’s classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. (citation omitted) A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration.”

There are a number of other cases in which courts have concluded that the claims of First Amendment violations are without merit. In many of these cases, the courts recognized that even though the speech in question was on a matter of public concern, the claims of the plaintiffs failed when their interest in free expression was balanced against the interest of the university in maintaining an efficient and harmonious workplace. In other cases, the courts found the nature of the alleged First Amendment activity involved to be little more than running disputes among colleagues and internal bickering.

In Sinnott v. Skagit Valley College, 61 a tenured faculty member was discharged on grounds of insubordination and unprofessional conduct. He claimed he was discharged because he had exercised his First Amendment rights in criticizing the quality of the academic program of which he was a part. The court recognized that Sinnott’s comments concerning the program were protected speech. However, in balancing the First Amendment interest of Sinnott against the interest of the College in maintaining harmony and an efficient work place, the court focused on the fact that the College had admonished Sinnott on a number of occasions to discontinue his profanity and his criticism of fellow faculty members, and had warned him that he would be terminated if he continued this activity. The court upheld his termination.

60Id. at 389.

In Stastny v. Board of Trustees of Central Washington University, a professor was terminated after he ignored the University’s directive not to take a trip overseas which would interfere with classes he had to teach and with his advisory duties during registration. In upholding the termination, the court noted that “it does not follow that because academic freedom is inextricably related to the educational process, it is implicated in every employment decision of an educational institution.” The court further noted that “academic freedom is not a license for activity at variance with job related procedures and requirement, nor does it encompass activities which are internally destructive to the proper function of the University or disruptive to the educational process.”

The courts are more sympathetic in general towards faculty members who have engaged in speaking or organizing on matters of more legitimate public concern. In Kim v. Coppin State College, the Court of Appeals for the Fourth Circuit upheld the First Amendment claims of two faculty members, who contended that their pay increases for a particular year had been adversely affected by their participation in a student boycott. The Fourth Circuit found that the faculty members’ activity in speaking to students about the boycott and offering them counsel was protected by the First Amendment.

The Colorado Court of Appeals denied summary judgment to the university in Cotter v. Board of Trustees of University of Northern Colorado, a case in which the plaintiff alleged that he was denied tenure in retaliation for raising questions about mismanagement and misappropriation of funds by the Dean, for complaining that the Dean abused the authority of his office, and for asserting that the Dean made salary and promotion decisions in a manner that discriminated against his critics. The court found

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63 Id. at 504 (citing Kunda v. Muhlenberg Coll., 621 F.2d 532, 547 (3d Cir. 1980)).

64 Stastny, 647 P.2d at 504.

65 662 F.2d 1055 (4th Cir. 1981).

that the professor’s allegations of malfeasance and impropriety concerning the use of public funds were not merely criticisms of internal management decisions, but touched on matters of public concern and deserved First Amendment protection.

It is clear that courts are not sympathetic to First Amendment claims which are based upon personal disputes and bickering among colleagues. In *Jawa v. Fayetteville University*, a tenured professor brought suit, claiming that his termination was based on his national origin. The evidence indicated, however, that numerous student complaints had been registered regarding the professor’s poor teaching performance, his interpersonal reactions with students, his failure to keep office hours, his improper advising of students, and his refusal to abide by the University’s grading policies. In addition, Jawa demonstrated unprofessional conduct toward his department chair and a continuing pattern of noncooperation with other faculty colleagues. Specifically, he stopped speaking to the Chair except when they were in meetings and then he frequently caused a disturbance. On one occasion he burst into the Chair’s office, on another he called him a liar, and on another he refused to come to the Chair’s office when requested to do so, responding that he “was not an office boy.”

Finding that Jawa’s termination was the direct result of his inadequate performance as a teacher and his non-cooperation with his colleagues and the administration, the court wrote language helpful to colleges and universities in similar situations:

Bickering and running disputes with colleagues does not constitute a form of protected speech under the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship. “A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department.”


68*Id.* at 230 (quoting *Chitwood v. Feaster*, 468 F.2d 359, 360 (4th Cir. 1972)).
It is important to note the attention the court gave in *Jawa* to “getting along with one’s colleagues” and to the concept of collegiality. Lack of collegiality, however, may not be used as a smokescreen to punish legitimate First Amendment speech.

III. Conclusion

While there has been much discussion and debate within the academic community about the proper role of collegiality in tenure decisions and while there has been much concern expressed by AAUP and legal commentators that the use of collegiality will diminish free speech and limit the contractual rights of the faculty, the courts have been largely unsympathetic to these perspectives. The courts have almost uniformly upheld the use of collegiality in the tenure review process, whether collegiality is listed as one of the stated criteria for evaluation or is considered as an implicit criterion in evaluating teaching, research, and service.