ADJUNCT FACULTY AND EMERGING LEGAL TRENDS

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There is little doubt that issues surrounding the use of adjunct faculty at U.S. colleges and universities have reached new, sometimes critical, heights.¹ The tensions created by economic, political, and social forces that lead to increased use of adjuncts at most campuses have resulted in considerable debate over the outcomes of such use.² Amid current discussions and controversies, several key issues have emerged as particularly important to higher education attorneys and administrators. Specifically, compensation and benefits, unionization, and general working conditions for adjuncts have received much recent attention by courts and the media.³ This paper explores some of the highlights regarding challenges to the use and treatment of adjuncts at colleges and universities. I begin by examining recent benefits and compensation cases involving adjunct faculty, then move into a discussion of relevant recent union activities and decisions,

¹ The term “adjunct faculty” is used throughout this paper as synonymous with “part-time faculty.” Specifically, the term refers to those instructors whose compensation and/or benefits do not equal those of full-time contractual or tenure-track faculty.
and finally summarize a range of issues that implicate the general working conditions of adjunct faculty and the legal and administrative challenges raised.

A brief word of caution is warranted here. This paper is not intended to discourage or disparage the use of adjunct faculty. In fact, these employees play important roles in delivering high quality education to students across the nation. A recent study released by the U.S. Education Department National Center for Education Statistics reported that in 1998 43 percent of faculty members teaching in the U.S. were part-time employees. What’s more, the study found that more than 40 percent of colleges and universities had reduced their full-time faculty over the past ten years and over a quarter of those schools have replaced full-time faculty with part-time employees. Such increased reliance on adjuncts requires a fresh look at the resulting legal and practical challenges facing campuses across the U.S..

Also important to note is that most litigation and practical issues arising out of the use of adjuncts on campus are similar or identical to those arising out of full-time faculty relationships. There is little separate legal ground reserved exclusively for adjuncts. However, the issues and cases

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2 See Leatherman, C. Part-time faculty members try to organize nationally: Many Think the Time is Ripe to Improve Their Pay and Working Conditions, (January 26, 2002).
3 Id.
highlighted below are as uniquely applicable as possible to adjunct faculty.

The intent of this paper is to highlight some of the major issues adjunct faculty are litigating and aggrieving. The remainder of this paper sets out, in turn, issues regarding benefits and compensation for adjuncts, unionization, and general working conditions and faculty rights.

**Benefits and Compensation**

**Benefits**

Inadequate benefits and unequal pay for equal work have long been the pillars of discontent among adjunct faculty. Regarding benefits, a recent study by the U.S. Education Department concluded that only 53 percent of colleges and universities contributed for benefits for adjunct faculty.\(^4\) The infrequent provision of benefit contributions, combined with the growing numbers of adjuncts on campus have resulted in a more aggressive push for establishing benefits more closely aligned with those provided to full-time faculty.

Nowhere have adjuncts been more aggressive in attempting to secure benefit contributions and equal compensation than in Washington state.\(^7\)

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\(^5\) Id., at 15.

\(^6\) Id.

Beginning with two suits seeking retirement and health care benefit contributions, part-time instructors at Washington community colleges pushed forward the conversation about just how “equal” part-timers are on many campuses.

In Mader v. Health Care Authority,8 two part-time community college instructors alleged rights to college paid health care benefits over the summer quarter of 1999. Neither instructor was under contract for that period but both claimed to fall under statutory and regulatory definitions of employees who qualify for such benefits without working during the summer months. At trial, the court recognized certain instances in which similarly situated plaintiffs might be eligible for summer benefits but denied such status to the plaintiffs.9 The plaintiffs appealed arguing they fell under one or both of two regulatory categories of employees eligible for college paid summer health care benefits.10 The first category of “seasonal employees” recognizes that certain professions—including teachers and school administrators—require substantial work over summer months.

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8 Id.
9 Mader v. Health Care Authority, supra n. 7, at 1247. The trial court judge certified three classes of instructors: part-time instructors who do not teach and do not sign a contract for the quarter (the plaintiffs fell into this category); part-time instructors who sign a contract to teach during the summer quarter but are denied benefits because they are considered to work less than half or full-time workloads; and part-time instructors who work on other than a quarterly basis and who do not receive employer paid health benefits during the summer quarter.

despite the ceasing of operations at schools, universities, and other settings.\textsuperscript{11} The plaintiffs argued that because they worked on a quarter-to-quarter basis over the academic year and during summer months when they were not teaching, they were entitled to “seasonal employee” status and thus to employer contributed health care benefits. The appellate court disagreed citing the clear language of the regulation did not contemplate the quarter-to-quarter contracts enjoyed by the plaintiffs. The court concluded that if part-time, quarter-to-quarter instructors were intended to be covered over the summer, such employees would have been specifically included in the regulation.\textsuperscript{12}

After losing their claim for seasonal employee status, the plaintiffs turned to the second category of employee they argued is eligible under Washington law for summer employer paid health care benefits: “part-time employees.”\textsuperscript{13} Here, the plaintiffs got more creative by arguing that the regulation provides part-time instructors with year-round employer contributions to health care upon the part-time instructors second consecutive quarter of employment.\textsuperscript{14} This was clever pleading—after all, the regulation clearly stated that part-time instructors remain eligible for

\textsuperscript{10} Wash. Admin. Code § 182-12-115(4,5).
\textsuperscript{11} Id.
\textsuperscript{12} Mader v. Health Care Authority, \textit{supra} n. 7, at 1259-50.
\textsuperscript{13} Wash. Admin. Code, \textit{supra} n. 10, § 182-12-115(5)(a) \&(e).
\textsuperscript{14} Id.
such benefits after successfully agreeing to teach a second consecutive quarter. The language of the regulation doesn’t say “summer is excluded.” Instead, the regulation requires instructors to teach fall and spring, and summer is deemed “off season” which the plaintiffs interpreted as a continuance of eligibility.\textsuperscript{15}

The appellate court disagreed and instead interpreted summer “off season” to mean that teachers who taught in the spring—but not summer—would remain eligible for employer contributions for health benefits the following fall quarter should they be offered another contract. That is, instructors who did not teach in summer wouldn’t lose their “consecutive” quarter status for the subsequent fall.\textsuperscript{16} Spring of the previous year would be added to fall of the next year to combine for consecutive quarters and thus allow eligibility for health care contributions. The summer break would not terminate that eligibility.

The Mader case has been appealed to the Washington Supreme Court and oral arguments were heard in November of 2002. This is a case that should be followed closely by higher education attorneys. It is clear that a decision in favor of the plaintiffs would result in considerable financial

\textsuperscript{14} Mader v. Health Care Authority, supra n. 7, at 1250.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
implications for colleges and universities in Washington who employ large numbers of part-time instructors. Moreover, such a case might provide valuable precedent for similar plaintiffs in other states.

In a second Washington state case involving part-time instructor benefits, a class action settlement was reached between a class of plaintiffs lead by Eva Mader, Dana Rush, and Ross Day who sued the State of Washington, State Board for Community and Technical Colleges and the Department of Retirement Systems.\(^{17}\) Here, the plaintiffs claimed to have been eligible for State retirement benefits that were never provided by the State. The plaintiffs sought declaratory relief, injunctive relief, benefits, damages, and attorney fees. Specifically, the plaintiffs argued that the State’s method of calculating the number of days and hours worked by part-time instructors reduced the actual amount owed to their retirement accounts.\(^{18}\) Essentially, the plaintiffs argued that erroneous calculations had been occurring since 1977 and that consequently, the part-time faculty were owed back contributions and a current and accurate adjustment of future contributions.\(^{19}\)

After the initial suit was filed, the parties agreed to enter into settlement negotiations. And there were several very important facts that

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\(^{17}\) Mader v. State of Washington, King Co. Cause No. 98-2-30850 SEA.

\(^{18}\) Id., settlement agreement p. 1.
emerged from the negotiations that ought to look familiar to most campus lawyers and administrators. First, evidence was introduced that many adjuncts were consistently working 50 percent time or greater. These same people were often receiving less benefits than their full-time counterparts or no benefits at all. Human resource databases were used to calculate actual workloads and establish a class of adjuncts who worked full-time—or nearly full-time—yet failed to receive adequate contributions to retirement systems (i.e., TIAA-CREF). Equally important was evidence that many adjuncts never received information about their retirement benefits rights or received erroneous information about the levels of contributions.\textsuperscript{20} Again, it should be emphasized that we’re discussing a class of adjuncts who work 50 percent or greater loads for consecutive academic quarters.\textsuperscript{21} Perhaps the most eye-catching result of this settlement was the $12 million state funded price tag—$8.3 million to payback omitted retirement contributions for faculty,\textsuperscript{22} and $3.6 million in attorneys’ fees.\textsuperscript{23} Finally, in regard to the healthcare benefit case discussed above that is currently being considered by the State

\textsuperscript{19} Id. See Was. Admin. Code § 415-112-335.

\textsuperscript{20} \textit{Mader v. State of Washington}, King Co. Cause No. 98-2-30850 SEA, supra n. 17, Settlement Agreement, p. 11.

\textsuperscript{21} \textit{Mader v. State of Washington}, King Co. Cause No. 98-2-30850 SEA, supra n. 17, Settlement Agreement, p. 11.

\textsuperscript{22} Id. at 14. The prorata formula for repayment is as follows: salary earned during contributing quarters in calendar years x contribution percentage based on age x average gain (TIAA_CREF) = qualifying class member’s contribution and gain for calendar year.
Supreme Court, the settlement offer includes summer quarters in calculating retirement benefit entitlements. Recall that summer “off-time” was central to the Mader appellate court’s decision that health care benefit employer contributions were not available to part-time faculty who did not teach in summer. So, we’re left with a settlement agreement that states summer work counts towards employer retirement contributions but an appellate court case that denies such contributions for health care benefits. Certainly not the stuff of great legal intrigue but something worth noting that might produce an interesting discussion by the Washington State Supreme Court.

So, what lessons might be learned from the benefits cases described above? To begin with, employing adjuncts as full-time (or near full-time) faculty and not providing parallel benefits might increase the chances of litigation and animosity similar to what occurred in Washington. Attorneys and administrators should pay close attention to the hours worked, classes taught, and student contact hours to help ensure adjunct faculty are not merely inexpensive replacements for full-time cutbacks. If it’s not happening on your campus or system already, consider collecting and analyzing good data about your adjuncts—it can help identify potential

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23 Id. at 19.
24 Mader v. Health Care Authority, supra n. 7.
issues of liability and help plan for the future. Second, it’s worth noting that part-time instructors in Washington operate under a collective bargaining agreement (CBA) but in both cases described above the courts were willing to look at provisions in those contracts and contrast them with clear and conflicting statutes and regulations. Drafters of CBAs should always pay close attention to changes in regulations coming from agencies that oversee issues such as retirement benefits and healthcare for public employees.

**Compensation**

Along with benefits issues, compensation has become an important issue for adjunct faculty and the colleges and universities that employ them. One recent case—again out of Washington state—involved part-time community college instructors who sought inclusion under the State’s Minimum Wage Act (MWA)\(^\text{26}\) for the purposes of collecting overtime pay.\(^\text{27}\) In *Clawson v. Grays Harbor*, plaintiff instructors sought protection under the MWA because their contracts simply did not pay them enough to do the work required of their positions.\(^\text{28}\) Despite the presence of a collective bargaining agreement (CBA) that established the method of pay for part-time instructors, the plaintiffs argued that they were in fact hourly

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25 Id. at 1252.
26 RCW 49.46.
employees entitled to protection under the MWA and therefore, back pay for overtime. Specifically, the CBA calculated pay based on “contact hours” which roughly equated to hours in the classroom, course preparation, and required office hours. Under the CBA, the instructors were paid by contract based on the number of contact hours per quarter. This arrangement proved inadequate for instructors at five community colleges who claimed that much of their work occurred outside of the definition of contact hours and therefore they received no pay for that work.

At trial, the court found for the colleges citing the language in the CBA and the voluntary nature of the relationship between college and instructor. On appeal, the court affirmed the trial court’s decision for the colleges and added that the Minimum Wage Act was established to protect a different class of workers—nonprofessionals—whose ability to enter into voluntary and equitable employment contract was limited.\textsuperscript{29} The plaintiffs appealed to the Washington Supreme Court.

The single issue before the court was whether part-time community college instructors are professional employees compensated on a salary basis and therefore not covered by the wage and overtime provisions of the Washington Minimum Wage Act.\textsuperscript{30} This question seems incredibly

\textsuperscript{29} Id. at 1180.
important to attorneys and administrators because if answered in the negative, the potential floodgates regarding back pay and overtime (similar to what we’ve seen with graduate student cases) could be overwhelming. In addressing this question, the court first turned to the statute and focused on a single provision: professional employees are excluded from coverage under the MWA.31 “Professional employees” are defined in the statute “those employees compensated on a salary or fee basis…employed in a bona fide professional capacity.”32 Additionally, a list of criteria or work characteristics is included in the statute to describe a professional employee. The court focused on several such characteristics to determine that part-time instructors were excluded from the MWA, including specialized training and prolonged study, extensive education or apprenticeships, work that requires intellectual activity, work that involves considerable discretionary judgment, and most important of all, teaching, tutoring instructing, or lecturing in an area in which the individual is employed to do so.

After reading the statute and exploring the professional exemption to the MWA, the court had the seemingly easy task of affirming the lower court opinions in favor of the colleges. But the plaintiffs brought their best arguments to the high court and focused particularly on apparent

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31 RCW 49.46, supra n. 25.
32 RCW 49.46.010(5)(c).
contradictions in the way in which their pay was established. First, they argued that they must be “hourly employees” and thus under the MWA because their salaries are determined by the number of contact hours they’re expected to perform each quarter. That means they’re paid hourly, right? Second, they argued that their contact hour pay is based on an hourly breakdown equivalent to the hourly pay of full-time faculty members and that part-time pay is set in that manner. Again, to a reasonable person that system might appear to make part-time faculty “hourly employees.”33 Third, and most persuasive, the plaintiffs argued that under their collective bargaining agreement their pay was reduced at an hourly rate for time the instructors were absent beyond their allotted sick leave. So if a part-time faculty had to miss class due to illness but had used up all his or her allotted sick leave, they were docked pay at an hourly rate.34 Those are pretty compelling arguments that these part-time faculty might be considered hourly employees and thus fall under the MWA. The Supreme Court’s task was seemingly more difficult than it originally appeared to be.

The Supreme Court addressed the first argument by recognizing that part-time instructors got paid based on “contact hour” contracts whether they worked or not. That is, there was no real proctoring of the time they spent

connecting in and out of class with students. If a professor ended class fifteen minutes early, they were still paid the full amount for that period. Furthermore, the part-time instructors were paid regular amounts at regular intervals whether they worked during that period or not (e.g., if they attended a conference, had a TA or guest speaker take a class, etc.). Therefore, part-time faculty pay was consistent with the definition of salary under the MWA legislation.35

The second argument offered by the plaintiffs involved the calculation of their pay based on full-time faculty salaries. Here, the court simply noted that part-time salaries were set according to full-time equivalents and that method was perfectly consistent to establishing a salary for less than full-time work. The final argument set forth by the plaintiffs involved the hourly deduction of pay for missed time at work after sick leave had been exhausted. The court noted an absence of guiding language in the State statute so it turned to the federal regulation that addressed the same issue.36 There, the court relied on federal regulatory language that contemplated strong public policy reasons for reducing public employee pay—even for salaried employees—when work was missed and the employee had

34 Id.
35 RCW 49.46
36 29 C.F.R. § 541.5d
exhausted sick leave time.\textsuperscript{37} The court took notice of the maxim that public
policy requires accountability for monies paid to public employees who are
unable to perform their required work.\textsuperscript{38}

In the end, the plaintiff part-time instructors were deemed ineligible
for overtime pay under the Washington State Minimum Wage Act.
However, their determination in pursuing the case leaves us with much to
consider. First, the idea of equal pay for equal work is something familiar to
all adjuncts irrespective of institutional type or location. Effective and high
quality teaching and research require adequate remuneration and higher
education’s continued success at recruiting and retaining high quality
adjuncts will likely depend on our willingness to pay living wages.\textsuperscript{39} That
said, higher education faces unparalleled financial crises, burgeoning
enrollments, and increased scrutiny regarding accountability that collectively
pose tremendous challenges to resolving the compensation and benefits
issues raised in the cases described here and in the media. There seems to be
no easy solution to resolving equality issues among our adjuncts but it
remains incumbent upon attorneys and administrators to seek alternative

\textsuperscript{37} 29 C.F.R. § 541. 5d.

\textsuperscript{39} A search for adjunct pay and discontent on the Chronicle of Higher Education’s website produced over
300 features, editorials, and news items from the past 18 months. Issues surrounding equal pay and benefits
are among the most controversial and discussed topics today.
approaches to strengthening the position of those members of our communities. As a recent example of such efforts, the City University of New York (CUNY) has decided to pay adjuncts for some of the time they spend meeting with students and doing other work outside of classroom responsibilities. CUNY’s 7,250 adjuncts now receive substantial pay increases up to 24 percent depending on teaching load. CUNY hopes that adjuncts will consider the gesture as an act of good will and encourage part-time faculty to spend more time with students and to feel a more valued part of the community.

In addition to benefits and compensation cases, issues surrounding the unionization of adjunct faculty have received much attention from the media, labor organizations, and the courts. The following section briefly summarizes current trends in the area of unions and part-time faculty.

**Unions and Part-Time Faculty**

The idea that adjunct faculty sometimes organize under state and federal labor laws comes as no surprise to attorneys and administrators in higher education. This is particularly true at community and two-year colleges where the practice of organizing under public labor laws has a long

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41 Id.
tradition. Recently, however, the idea has become somewhat more mainstream and carries with it several important implications for the U.S. higher education community. For example, there is an increase of organizing efforts occurring on four-year campuses that have seen recent growths in percentages of adjunct faculty use. In this section of the paper I examine several key issues involving unions and adjunct faculty, including recent case law, standards for good practice, and the apparent groundswell of activity among adjuncts to promote equity and eliminate stigmas associated with their roles. In so doing, the legal implications of such phenomena will be discussed and explored.

One recent case that made headlines across the country involved adjunct faculty at Keene State University in New Hampshire. There, adjunct faculty successfully gained certification by the State’s Public Employee Labor Relations Board (PELRB) on the grounds that adjunct faculty were so similarly situated at Keene as to represent a certifiable class for the purposes of collective bargaining. PELRB’s certification of adjunct faculty was rooted in several characteristics. First, the faculty were teaching

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43 Leatherman, C. Part-time faculty members try to organize nationally: many think the time is ripe to improve their pay and working conditions. The Chronicle of Higher Education, January 26, 2001, A12.
45 Id. at 841.
faculty with little or no research responsibilities or expectations. Second, the faculty must be currently employed by Keene State or have taught at least two of the last three semesters at Keene State College. The University System of New Hampshire Board of Trustees appealed PERLB’s decision to the Supreme Court of New Hampshire and the case was fully underway.

Much of what makes this case so interesting is the Supreme Court’s willingness to examine the changing role of adjunct faculty over the past 25 years. At issue was the continued validity of earlier New Hampshire cases that characterized the work of adjunct faculty as “temporary,” “irregular,” and outside the scope of public employee labor laws because of their temporary and discretionary nature of employment. Here, however, the Court looked at the changing role of adjunct faculty including, and especially, the expectation that adjuncts teach semester to semester, year to year. This judicial notice seems to undermine the earlier cases that held that adjuncts were temporary and therefore excluded from collective bargaining opportunities. Today’s adjuncts, it seems, are far from temporary and many have established themselves as fixtures on campuses and in departments. So how then could the Supreme Court of New Hampshire rationalize its

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47 RSA 273-A:1; see RSA 273-1-A:1IX(d) (1999).
unwillingness to allow the PERLB’s certification to continue? To begin with, the Supreme Court recognized the importance of adjuncts at Keene State—their growing numbers, contributions to programs, and importance to the fiscal survival of the campus. That said, the Court looked at a series of facts that it concluded rendered Keene adjuncts “temporary” and thus unable to organize. First, the Court looked at the plain language in their contracts that stated that no expressed or implied expectation of continued employment exists (i.e., temporary). Second, there are no promotion opportunities at Keene State for adjuncts—in an odd paradox, they are permanently temporary. Third, adjuncts are often hired at the last minute to take over classes with excessive enrollments or for other instructors who are unable to take the class. And fourth, unlike tenured faculty, adjuncts at Keene State are given no role in the governance of the institution and do not have the same privileges and obligations that tenured faculty have. Notably, the Court acknowledged that the absence of expectation of continued employment described under the first rationale above could be overcome by institutional or departmental custom when a reasonable expectation of


49 Id. at 845.
continued employment could exist and work to undermine the finding of a temporary employee.\textsuperscript{50}

So, it’s clear from the above paragraph that the Keene State case summarizes the proverbial “roadmap” to decreasing the likelihood that adjunct faculty will be certified as bargaining units. Colleges and universities must make clear that there exist no expressed or implied expectation of continued employment,\textsuperscript{51} limit or completely eliminate opportunities for promotions of adjuncts, and to the extent possible practice “last minute” or late hiring of adjuncts for classes, and limit the role of, or completely exclude adjuncts from governance and management issues at campus and department levels. Undoubtedly, most campuses engage in these behaviors already but it’s prudent to engage in a quick audit of practices to determine whether the chances of adjuncts organizing on your campus has grown more likely over time. And, for what it’s worth, I’m of the mind that that’s not always such a bad thing. Certainly, we can learn much from our treatment of adjuncts and their views of our campuses.

Court cases like the Keene State case are not the only indicators that adjunct unions are becoming an increasingly popular issue for attorneys and administrators. Indeed, last year the American Federation of Teachers (AFT)
produced a report entitled Standards of Good Practice in the Employment of Part-time/Adjunct Faculty: A Blueprint for Raising Standards and Ensuring Financial and Professional Equity. Among the leading principles set out in the report are rationales for equal pay for equal work and the importance of bringing in line part-time pay with full-time pay in a more accurate and proportional way, as well as developing a more rigorous approach to hiring adjunct faculty that adopts many of the same practices used for hiring full-time faculty. The essential purpose of the document is to raise awareness about the concerns of this rapidly growing population of educators and to help create a climate of dignity and support that ultimately benefits the students on our campuses. Perhaps most intriguing—albeit controversial—is the AFT’s position that adjunct faculty should share more in the administrative and governance issues of campuses and departments. Additionally, the document advocates for increased opportunities for promotion and seniority. It remains to be seen how such changes might affect four-year institutions, although two-year institutions seem to operate

51 This includes educating faculty and staff about behaviors that might lead to the creation of such expectations.
52 The report can be found at www.Aft.org
with few of the bumps in the road typically associated with heavy “union shops.”

Although such rhetoric and research is common among interest groups like the AFT and NEA, there seems a renewed interested on their parts to educating a growing population of adjuncts about their legal rights to organize. Indeed, the Chronicle of Higher Education recently documented a tense rivalry between the AFT and the United Auto Workers over the right to represent adjunct faculty at New York University. At the risk of sounding pessimistic, the potential money and political power involved in organizing thousands upon thousands of adjuncts is staggering. Such appeal will certainly keep the issue at the fore of legal and policy debates in higher education.

**General Working Conditions and Faculty Rights**

As noted, most legal issues involving adjunct faculty are similar or identical to those involving full-time, tenure track faculty. But the growing dependence upon adjuncts across institutional types led me to search for emerging issues that might separate our thinking along part-time and full-time faculty issues. To that end, I have identified several areas in which I

believe adjunct faculty will begin to challenge at rates far greater than full-time faculty, and in ways that uniquely fit the lives of adjuncts. The remainder of this section focuses on three such areas: the use and abuse of graduate research and teaching associates, academic freedom for the “at-will” adjunct, and the development of expectation for future employment on the part of adjunct faculty. In exploring these three areas, I rely on cases I find particularly interesting and illuminating.

The first case I’ll examine involves the misappropriation of research produced by a graduate research and teaching assistant by a senior faculty member. Many readers will roll their eyes in recognition of this age-old problem. The junior scholar does all the work and the senior scholar gets all the credit. But there is a difference of sorts here, a wrinkle in the analysis, worth noting. Specifically, we (higher education as an enterprise) are relying more than ever on promising graduate students to conduct original research and teach increased course loads. The question that comes to mind is simple: do research and teaching assistants have more rights to their work than do typical adjuncts? One important case seems to answer that question in the affirmative.

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In Demas v. Levitsky, a former graduate student and adjunct teacher sued a Cornell professor for misappropriating her research and passing it off as his own. In the early 1970s, the plaintiff began to study nutritional elements of public school lunches. Her early work concluded that most school lunches were inferior nutritionally and her studies of that subject received considerable national attention. In the late 1980s, the plaintiff applied to and was accepted into the College of Human Ecology at Cornell University where she intended to further her work with the help of Dr. David Levitsky. After completing her Master’s studies, the plaintiff published the book “A framework for a handbook of food study for elementary schools” which included recommendations for healthy lunches based on the plaintiff’s earlier work. Cornell then hired the plaintiff as an adjunct instructor with responsibilities under the University’s outreach program. She then applied for doctoral study at Cornell and was accepted. Much of her work as a doctoral student built upon her earlier work regarding nutrition and school meals. As part of her research, the plaintiff studied the nutritional content at a local school district and discovered wide disparities in quality and nutritional content. All the while the plaintiff continued to teach courses

58 Id. at 2.
using standard, pre-developed syllabi yet managed to integrate her own original research into class.

Soon after the plaintiff’s local study was complete she submitted a proposal for a dissertation on the topic of her work at local schools. Her dissertation committee included Dr. Levitsky who rejected the proposal as controversial and incomplete. However, Dr. Levitsky began submitting articles for publication and a grant application using the Plaintiff’s data and ideas without adequate attribution. Soon after such incidents, Plaintiff brought suit against Dr. Levitsky and Cornell University for misappropriation of research, negligent supervision, and a range tort and contract claims. After years of litigation the Plaintiff finally prevailed on most counts and remains an active academic researcher.

Although the link between adjunct issues and misappropriation of graduate student research is not necessarily intuitive, this case highlights the propensity to abuse positions of power in academe. Adjuncts, like the plaintiff in the above case, often engage in research or original teaching methods yet occupy such low rungs on the academic ladder that misappropriation of their intellectual contributions might go unchallenged. For me, the Demas case represents an occurrence that likely happens

59 Id. at 4.
60 Id. at 6.
countless times a year—whether it’s original research or pedagogy—and the lack of standing and status held by most adjuncts might prevent a fair resolution. It’s a stretch, and I’m certain that the majority of institutions protect and honor their adjunct faculty, but the power differential between full-time, tenured or tenure-track faculty is not much different from that of senior scholar and junior, graduate student scholar. Both relationships deserve further explorations of creating new ways to foster dignity and respect for original research and pedagogical techniques.

In another important case emerging last year, we were exposed to a landmark academic freedom cause of action involving an adjunct professor who allegedly used offensive language in class and a student who complained to administrators about the language used. The case is Hardy v. Jefferson Community College, and was anchored in an adjunct faculty member’s use of offensive terms during a class session in which he sought to illuminate how language contributes to dominance in culture and the marginalizing of populations in society. Many of the terms used by Hardy that day were perceived as deeply offensive by his students, one of whom complained to Hardy’s superiors about the incident. After several meetings with his superiors, Hardy finished the course as planned and awaited his

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62 Id.
course assignments for the next year. Shortly after the semester in question ended, Hardy received a phone call from the Assistant Dean of Students who told Hardy there were no classes for him to teach the following semester.\textsuperscript{63} He was never again asked to teach at the college.

Hardy filed suit pursuant to 42 § 1983 alleging violations of his freedom of speech rights under the 1\textsuperscript{st} and 14\textsuperscript{th} Amendments to the U.S. Constitution based on alleged retaliation for his in-class remarks. Additionally, he filed a range of tort and contract claims. The U.S. Court of Appeals held that Hardy met the standards of academic freedom in his classroom use of offense words and that short of establishing a legitimate contractual reason for not reappointing him, the school had violated his constitutional rights. The Hardy case is far too complicated to fully cover in this paper, and most observers of higher education are familiar with the decision. But its primary contribution here is to further the idea that adjuncts are in many ways on equal legal footing with full-time, tenured or tenure-track faculty. Moreover, the court’s historic view that adjuncts are exclusively “at-will” seems to be eroding in areas of growing concern to higher education attorneys and administrators, such s dismissal resulting

\textsuperscript{63} Id.
from protected speech. The cases highlighted in this paper suggest several ways in which that erosion might be occurring.

Finally, regarding the topics of adjuncts, there are several other cases worth noting (however briefly). First in Daniel v. University of Cincinnati, and adjunct visiting professor was denied an interview for the full-time, tenure track position she was filling on a temporary basis. Believing her performance to excellent, and relying on an encouraging email message from her former dissertation advisor (from another school), the plaintiff submitted an application for the position. Shortly after she applied for the tenure-track position, the plaintiff received a letter from the Dean informing her that she was again appointed as “visiting professor” and announcing a full-time position would be advertised the following year. The plaintiff accepted the visiting position and continued her work as visiting assistant professor. What transpired over the next several months looks all too familiar in higher education settings. The plaintiff testified that several of her departmental colleagues “suggested” that she would make a strong candidate for the permanent position, but that her publication record was a bit weak and different from the expressed needs of the Department.

Nevertheless, the plaintiff applied for the position but was not given an

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65 Id. at 1170.
interview with the search committee and ultimately the permanent position went to another candidate.\textsuperscript{67}

The plaintiff sued under a range of civil and constitutional rights (e.g. due process) and contractual claims, the most important for our purposes was her claim in promissory estoppel. The court denied all claims and the appellate court affirmed for the college.\textsuperscript{68} Important here is to recall what we, and our faculty, say to potential employees might create unwarranted expectations of future employment. Although no such expectations were enforceable in the Daniel case, the evidentiary documentation at times reflects discredit upon our faculty and the ways in which we interact with adjuncts. Perhaps regular reminders about implications of future employment might avoid such situations in the future.

Another brief and interesting case involved a state legislator hired as an adjunct at a public university but was later deemed ineligible for such employment under state statute. In Pitts v. Larson,\textsuperscript{69} Carol Pitts enjoyed a successful career as an adjunct faculty member for the South Dakota State University Cooperative Extension Unit.\textsuperscript{70} In November of 2000, she was elected to the South Dakota House of Representatives. Shortly after her

\textsuperscript{66} Id at 1172
\textsuperscript{67} Id. at 1173.
\textsuperscript{68} Id. at 1173.
\textsuperscript{69} 638 N.W.2d 254 (2002).
election, the Attorney General of South Dakota learned of her employment with South Dakota State University and recommended that she leave that position because of a possible conflict of interest.\textsuperscript{71} Pitts refused to leave her university position and the State moved to have her compensation from SDSU terminated because of the perceived violation of Article III § 12 of the South Dakota Constitution which prohibits a legislator from having any interests, direct or indirect, in a contract with the State or county entity.\textsuperscript{72} The appellate court ruled in favor of the state citing a clear conflict of interest imbedded within South Dakota’s constitution that unequivocally prohibits state legislators from working for other public entities and thus creating and impression, or potential impression, of misuse of public funds.\textsuperscript{73}

It is true that the Pitts case might seem unusual but it provides interesting insight into the pitfalls of bringing state leaders into adjunct roles on campuses. It is likely that other states would permit such a relationship between higher education and state legislators but the Pitts case reminds us to check thoroughly for constitutional or statutory prohibitions on such actions.

\textsuperscript{70} Id. at 255.
\textsuperscript{71} Id. at 256.
\textsuperscript{72} Id. at 257.
\textsuperscript{73} Id. at 258.
A final, recent case of interest to those concerned with adjunct faculty issues involved alleged free speech and the termination of an adjunct faculty member who disclosed personal student information during a class lecture. In Peterson v. State of North Dakota, an instructor divulged private information about a student during a class lecture and the student involved reported the incidence to the Dean and Assistant Dean of the program. The instructor received a letter of reprimand and apologized to the students present during the original disclosure of personal information. Subsequently, the instructor received a letter of notice to dismiss. The instructor challenged the notice because she believed the Dean and Assistant Dean had engaged in collecting information from students that was derogatory about the Deans and allegedly said by the instructor. The instructor viewed the letter of dismissal as retaliation for her negative comments about the administration rather than her classroom incident regarding the student’s personal information. After alleging a range of civil rights violations, constitutional claims, and contract claims, the plaintiff’s case was afforded a thorough constitutional analysis beginning with protected free speech and due process rights. Here, the court determined that her speech was not a matter of public concern, nor was it the primary

74 2003 WL 133722.
75 Id. at 1.
motivation for her termination. Moreover, the court determined that the Plaintiff had more than ample opportunity to tell her side of the story and simply diverted the attention to perceived retaliation. Hence, the dismissal was upheld. Here, the primary point is that the academic leaders did everything right—they provided a summary of the charges against the adjunct, they provided an opportunity to be heard, and they based the dismissal of the adjunct exclusively on the evidence collected regarding the incident. Noteworthy, too, was the court’s recognition that adjuncts are often at will employees and due process standards are much lower for cases such as these.

In the end, we find more litigation involving adjunct professors than ever before. Some looks very much like litigation coming from full-time, tenured plaintiffs, while other litigation seems uniquely tied to adjunct status. The review provided above sets out the recent highlights of such litigation and seeks to provide insight into what we might see more often over the coming years.

Conclusions and Implications

There is a growing interest in litigation and legal issues surrounding adjunct faculty on U.S. campuses. The phenomenal growth in their numbers,
the increased roles they play in governance and administration, and their important contributions to continuing to strengthen the greatest system of higher education in the world are difficult to ignore. Along with such growth, however, comes the increased likelihood that adjunct faculty will find themselves in situations that raise legal implications for campuses. This may very well be a case where our use of adjuncts is, at times, outpacing our ability to develop sound legal and practical relationships with them.

Whatever the current thinking about or use of adjuncts is on a particular campus, one thing remains certain—they’re sure to become a larger player in our enterprise. It’s up to campus leaders, attorneys, and faculty to craft means of welcoming this group into our world and enjoying the tremendous benefits they offer.