A Guide to Some Issues Raised in the "Special Issues for Academic Deans" Case Study[1]

Promotion and Tenure Decisions – the Basics

A. Promotion and Tenure Criteria

Most colleges and universities have fairly well defined internal policies – often in a faculty handbook, sometimes in a hiring letter or other contract – that govern faculty personnel decisions involving appointment, promotion, and tenure. These policies usually include a written internal review process that begins at the departmental level and ends with governing board approval. Courts sometimes weigh in on whether such published requirements and processes form a part of the faculty member's contract with the institution; those contracts or letters are often, though not always, enforceable under state law, and sometimes letters of appointment also "incorporate by reference" the institution's faculty handbook. It is important for department chairs and deans to be aware of and familiar with their institution's policies. In addition, criteria for promotion and tenure are sometimes implied through expectations set forth in other university policy statements.

The processes of public institutions may be governed also by state statutes and administrative regulations, as well as the federal and state constitutions. In some states, such as California, even private institutions are covered by the state constitution. Moreover, procedures adopted by public institutions are subject to constitutional requirements of procedural due process.

A perceptive review of different tenure criteria can been found in Thomas Hustoles, "Auditing a Tenure Policy from the Perspective of the University Administration," National Association of College and University Attorneys Conference Outline, June 26, 2000. See also American Council on Education, American Association of University Professors and United Educators, "Good Practice in Tenure Evaluation," (2000; revised 2007), http://www.acenet.edu/bookstore/pdf/GoodPracticetenureeval.pdf, for excellent guidance on general tenure evaluation principles, and Donna R. Euben, "Hiring and Promotion Legal Issues for Department Chairs"

[1] This outline is intended for background informational purposes only and is not legal advice or a substitute for consultation with a licensed legal professional in a particular case or circumstance. The views expressed in this article are solely the views of the authors and should not be attributed to the American Association of University Professors or Wake Forest University or their officers or staff. For another excellent overview of the matters reviewed in this outline, see Ann Franke and Lawrence White, "Responsibilities of Department Chairs: Legal Issues," (2000; revised 2002), http://www.acenet.edu/resources/chairs/docs/franke_white.pdf.

(2000), http://www.aaup.org/AAUP/protect/legal/topics/hire-prom.htm, for an extensive discussion of employment-related legal issues. *See also* "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," *AAUP Policy Documents and Reports 67-72* (10th ed., 2006).

B. Challenges to Employment Decisions

Courts generally take a deferential approach to interpreting criteria for promotion and tenure. Of "all fields that the federal courts should hesitate to invade and take over, education and faculty appointments at the university level are probably the least suited for court supervision." *Dorsett v. Board of Trustees for State Colleges and Universities,* 940 F.2d 121, 123 (5th Cir. 1991).

However, deviating from the institution's policies in a significant way can risk incurring legal liability for the institution; as one court has noted, "[o]ur traditional reluctance to intervene in university affairs cannot be allowed to undermine our statutory duty to remedy the wrong." *Whiting v. Jackson State Univ*., 616 F.2d 116 (5th Cir. 1980). For instance, a Minnesota state appeals court ruled that the University of Minnesota discriminated against a female math professor when it solicited more than 40 external review letters about her; the usual number would have been 6 to 10. *Ganguli v. University of Minnesota*, 512 N.W. 2d 918 (Minn. App. 1994), aff'd, 1996 Minn. App. LEXIS 1347 (Minn. Ct. App. Dec. 3, 1996), review denied, 1997 Minn. LEXIS 69 (Minn. Jan. 21, 1997).

Similarly, in *Craine v. Trinity College*, 259 Conn. 625 (Conn. Sup. Ct. 2002), in upholding a jury decision in favor of a professor who was denied tenure despite a unanimous departmental recommendation, the Connecticut state supreme court reviewed a college handbook requiring the college to "indicate" to a tenure candidate "as clearly as possible" areas that require "special attention." The court concluded that the college had used a "shifting standard" by emphasizing quantity of publications at the tenure denial but not during her review: "with different notice, Ms. Craine might have performed differently." *See also Johns Hopkins University v. Ritter*, 689 A.2d 91 (Ct. App. Md. 1996).

A frequently-litigated ground for challenged promotion and tenure decisions is an alleged lack of "collegiality." Courts, however, have generally been sympathetic to the argument that collegiality is a proper factor for review. One court, referring to the AAUP "Statement of Professional Ethics," held in a breach of contract action for tenure denial that although collegiality was not specifically mentioned, it was inherently part of the contract. "The capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the

university rests" could be considered. *University of Baltimore v. Iz*, 716 A.2d 1107 (Md. Ct. Spec. App. 1998). *See also Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972) (holding that "a college has a right to expect a teacher to follow instruction and to work cooperatively and harmoniously with the head of the department"). *See generally* Perry A. Zirkel, *Personality As a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984-85).

Courts are, however, sometimes receptive to allegations that tenure denials premised on lack of collegiality are instead a pretext for discrimination. One court, for instance, noted that "The ability to get along with co-workers, *when not a subterfuge for sex discrimination*, is a legitimate consideration for tenure decisions." *Stein v. Kent State Univ. Bd. of Trustees*, 994 F. Supp. 898, 909 (D. Ohio 1998) (emphasis added). *See also Sifferman v. Bd. of Regents, Southeast Missouri State Univ.*, 240 F.Supp.2d 1139 (E.D. Mo. 2003) (denying summary judgment to university where department head had stated that faculty member who testified in favor of female faculty member in a sexual harassment case and was subsequently denied promotion to full professor had acted "uncollegial").[2]

Collegiality could also be a pretext for something less obviously invidious than discrimination – for instance, a preference for those who don't disagree with their colleagues or with those in charge of the promotion and tenure process. As the AAUP has stated, collegiality is best understood not as an independent criterion or value but as a "virtue whose value is expressed in the successful execution of these three functions [teaching, research, and service]." "On Collegiality as a Criterion for Faculty Evaluation," *AAUP Policy Documents and Reports 39-40* (10th ed., 2006), http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm.

Sexual Harassment

A. Definitions and Standards

Sexual harassment in the workplace violates Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in the terms and conditions of employment, and may also violate Title IX of the Educational Amendments of 1972, which prohibits sex discrimination

[2] Indeed, a federal judge has recently agreed to hear a case involving a former department chair who is suing his university employer for demoting him from his chair position. A one-time dean at the university admitted making anti-Muslim comments to the ex-chair; in refusing to dismiss the case, the judge ruled that while the university offered a variety of non-discriminatory reasons for demoting the chair, including an assertion that the chair was "driving off talent," the fact that those reasons had changed over time "may imply that the reasons asserted . . . here are pretextual." See http://www.insidehighered.com/news/2008/01/15/lasalle.

with regard to educational programs and activities (though this applies most frequently to students).

Equal Employment Opportunity Commission (EEOC) Guidelines state that:

> *unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.*

29 C.F.R. sec. 1604.11(a).

Courts generally recognize two types of sexual harassment: quid pro quo (when terms or conditions of employment are conditioned on the performance of sexual favors) and hostile environment (when harassment is sufficiently severe, pervasive or persistent so as to limit or interfere with the terms and conditions of employment or educational benefits). See Donna R. Euben, "Sexual Harassment in the Academy" (2002), http://www.aaup.org/AAUP/protect/legal/topics/sex-harass-policies.htm, and Theresa M. Beiner, Donna R. Euben and Martha S. West, "Sexual Harassment In Higher Education: Current Issues And Trends" (2005), http://www.aaup.org/AAUP/issues/women/legsexhar.htm, for more in-depth discussions of sexual harassment law and higher education.

The Supreme Court has opined that sexual harassment can be distinguished from other behavior using "common sense, and an appropriate sensitivity to social context." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (U.S. 1998). In higher education, "an appropriate sensitivity to social context" requires recognition of the mission of a college or university as distinct from other workplaces, which include close working and mentoring relationships that often blur the lines between academic and social life. Jonathan Alger, "Love, Lust and the Law: Sexual Harassment in the Academy," *Academe: The Bulletin of the American Association of University Professors* 34 (Sept.-Oct. 1998).

B. Liability and Affirmative Defense

A decade ago, the Supreme Court defined an employer's liability for sexual harassment under Title VII. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court established a pair of guidelines on liability. A college or university is automatically liable for sexual harassment by a supervisor when the harassment results in a "tangible employment action" – i.e., discharge or demotion. However, when a supervisor engages in sexual harassment that does not result in a "tangible employment action," the employer may present an affirmative defense of "good faith" if it can demonstrate that:

(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries*, 524 U.S. at 807.

Although most federal courts have held that only institutions, not individual supervisors, can be held liable for harassment under Title VII, some state laws assign liability to individual supervisors who engage in harassment.

C. Prevention

Prevention and timely response mechanisms are critical to insulating a university from liability. In addition, "it is equally important to ensure that *retaliation* against persons complaining of sexual harassment is clearly covered and prohibited in such codes…[and] that mechanisms are in place . . . for protecting the due process and free speech rights of anyone accused of harassment." William Kaplin & Barbara Lee, THE LAW OF HIGHER EDUCATION 955 (4th ed. 2006) (hereinafter, "Kaplin & Lee"). On the other side of the coin, "[i]nteresting legal questions may arise when the institution attempts to enforce its policy against sexual harassment and uses that policy to discipline or terminate a faculty member when other institutional policies on discipline or termination exist that may provide greater procedural or substantive protections to faculty." Kaplin & Lee at 546. Termination of a tenured professor under harassment policy procedures, instead of under general procedures for removal of tenured faculty, could constitute breach of contract denying due process. *See Chan v. Miami University*, 652 N.E.2d 644 (Ohio 1995).

Best practices therefore suggest that universities should take proactive measures to reduce both the incidence of sexual harassment claims and the likelihood of being held liable for any incidents that do occur:

- Put a policy in place that is easy to understand, and publicize it widely every year;
- Train employees about workplace harassment;
- Clearly communicate to employees how to file harassment complaints, and ensure that complaint handlers are well-trained and accessible;
- Ensure that policies and procedures protect the due process of both the accuser and the accused;
- Effectuate an internal confidential complaint process that offers various means for resolving complaints, including mediation and alternative dispute resolution;
- Respond to individual incidents as they arise, to help prevent development of a hostile environment.

Discrimination

A. Statutory Framework

There are three primary federal statutes that prohibit discrimination in employment: Title VII of the Civil Rights Act of 1964 (Title VII); the Age Discrimination in Employment Act of 1967 (ADEA); and the Americans with Disabilities Act of 1990 (ADA). They lay out the circumstances under which discrimination is prohibited on particular grounds: race, sex (including pregnancy), color, national origin, religion, age (for people over 40), and disability. Titles VI and IX of the Civil Rights Act also prohibit discrimination in any "program or activity" receiving federal financing, which can include employment. The federal constitution also guarantees all citizens due process and equal protection – and because these rights are independent of statutory rights, employees can assert constitutional rights separately from (and in place of) rights granted by statutes. In addition, many states and localities protect employees on additional grounds – i.e., sexual orientation.

B. Claims of Discrimination

1. Methods of filing claims

As suggested above, employees have a number of different methods of pursuing claims of discrimination. Individuals asserting rights under Title VII, the ADEA and the ADA must first file a claim with the Equal Employment Opportunity Commission (EEOC). After investigation, if the EEOC concludes that there is reasonable cause to believe that the charge of discrimination is true, the Commission occasionally files suit against an employer; more frequently, it attempts informal resolution and, if that fails, issues a "notice of right to sue" allowing the employee to file suit in state or federal court. (Employees can also file a claim with the EEOC

asserting a violation of the Equal Pay Act (EPA).) Many states have similar state agencies, where employees can file complaints about employment discrimination – and employees must often "exhaust" their state administrative procedures before seeking relief under the federal statutes described above. Of course, many universities and colleges also have internal mechanisms intended to provide the first forum for hearing a claim of discrimination.

2. Types of claims

As a general matter, employees can make two different types of claims under Title VII: disparate treatment or disparate impact. And in proving those claims, they can use either direct evidence or circumstantial evidence of discrimination to show that they have been the targets of discrimination.

Direct evidence is generally an actual statement, usually by a supervisor or someone in a position of authority, that he or she has discriminated against someone in employment (for instance, decided not to hire or promote someone) because of the employee's (or potential employee's) membership in a protected class. For instance, in *Clark v. Claremont University Center*, 8 Cal. Rptr. 2d 151 (Cal. Ct. App. 1992), several racist comments made by departmental colleagues in the course of the tenure review process constituted such "strong evidence of improper motive" that the appeals court affirmed a $1 million jury verdict. The comments included "us white people have rights too" and "I just don't know how I would feel working on a permanent basis with a black man." In *Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (1st Cir. 1989), the court went one step further, awarding tenure to an assistant professor who received a unanimous recommendation from her department but was denied tenure where there was evidence of gender bias on part of university president; the court also rejected the university's argument that the award of tenure infringed upon the university's First Amendment right to determine "who may teach." (See also Appendix D to these materials, listing statements made in tenure discrimination cases.)

An employee can also use circumstantial evidence to show disparate treatment by an employer based on a prohibited category; once the employee shows that he was rejected from a position for which he was qualified and that subsequently remained open, the employer must articulate a legitimate, nondiscriminatory reason for the rejection, after which the employee must show that the offered reason was not the true reason for the employment decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

When there is no direct (or circumstantial) evidence of intentional disparate treatment, an employee may assert that because of his or her membership in a protected class, he or she was disproportionately affected by a particular employment policy or decision. For instance, in *Bennum v. Rutgers, The State University of New Jersey*, 941 F.2d 154 (3d Cir. 1991), the court found that the application of different standards of research applied to a Hispanic professor, as compared to a white female awarded promotion at the same time, was sufficient to establish disparate treatment.

The type of evidence of discrimination on which an employee relies will vary from case to case. For instance, although only about one-fifth of women claiming sex discrimination prevailed on the merits in litigation between 1972-1984, women have succeeded in cases alleging both gender discrimination based upon sexist comments made by a decision-making official, *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989), and the application of a different objective standard for men and women, *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). See Kaplin & Lee at 514-515, citing George LaNoue & Barbara Lee, *Academics in Court: The Consequences of Faculty Discrimination Litigation* (University of Michigan Press, 1987).

C. Seeking Diversity

How can administrators work to ensure a diverse faculty mix and remain protected from claims of discrimination? Comments or advertisements stating that employees that belong to a particular protected class are specifically sought or, alternately, discouraged from applying will generally run afoul of anti-discrimination laws, though institutions may be able to use race or gender as a "plus" factor in hiring. *See* Kaplin & Lee at 523. Of course, the extent to which institutions can engage in affirmative action in employment continues to evolve. Under Title VII of the Civil Rights Act, any consideration of race or national origin in hiring or promotion decisions at colleges are subject to "strict scrutiny." (Consideration of gender, however, is subject to a less stringent standard, that of intermediate scrutiny). Under strict scrutiny analysis, courts have recognized two compelling interests that can justify consideration of race or national origin: (1) remedying present effects of past discrimination at a particular institution; and (2) diversity as it contributes to the learning environment.

In 2004, the Seventh Circuit Court of Appeals became the first federal appellate court to apply the seminal Michigan affirmative action decisions (see *Grutter*, 539 U.S. 982 (2003) and *Gratz*, 539 U.S. 244 (2003)), in the employment context. In *Petit v. City of Chicago*, 541 U.S. 1074 (2004), the court reiterated the value of context, noting that there was a "compelling need for diversity in a large metropolitan police force charged

with protecting a racially and ethnically divided major American city like Chicago." It also held that the police department "had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department," and that "the presence of minority supervisors is an important means of earning the community's trust." *But see Wygant v. Jackson Bd. of Educ*., 476 U.S. 267 (1986) (rejecting assertion that black faculty can be favored over white faculty at traditionally black institutions because they are needed to act as role models for black students).

Faculty committees and administrators can follow some best practices in seeking out diverse and qualified candidates.[3]

- Publicize positions in a variety of publications and professional networks, including those specifically targeting minority groups;
- Design position descriptions to attract candidates who have a demonstrated commitment to equal educational opportunity, or who can teach in multicultural environments and engage in interdisciplinary scholarship;
- Ensure that search committees themselves are diverse;
- Make an effort to retain faculty members once retained; sharing syllabi and insights on departmental quirks and tenure standards, and making sure those standards don't contain hidden biases, goes a long way.

First Amendment Concerns

The scope of the First Amendment and speech protection in higher education is a complex issue, and this outline by no means covers the myriad issues raised. In addition, this area has recently become more unsettled, as a result of a 2006 Supreme Court decision and its somewhat limited progeny in the area of higher education. (And of course, the First Amendment only governs behavior at public institutions, though private institutions may operate under similar strictures in a state constitution or state statute.) Nevertheless, there are some general guiding principles of which to be aware.

A. Free Speech in the Workplace

During promotion and tenure reviews, administrators should be alert to avoiding consideration of subsidiary conduct that is unrelated to promotion and tenure criteria, especially when that conduct implicates free speech questions. *See* "On Freedom of Expression and Campus Speech

[3] *See* Ann Springer, "How to Diversify the Faculty" (2006), http://www.aaup.org/AAUP/protect/legal/topics/howto-diversify.htm for additional information and suggestions on developing and retaining a diverse faculty body.

Codes," *AAUP Policy Documents and Reports 37-38* (10th ed., 2006), at http://www.aaup.org/AAUP/pubsres/policydocs/contents/speechcodes.htm. Faculty at public institutions asserting free speech claims in the wake of an adverse employment decision are subject to Supreme Court analysis of their claims. In light of a 2006 Supreme Court decision described below, however, and some subsequent lower court decisions, it is by no means settled how that analysis will be conducted.

B. Balancing Employer and Employee Interests

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), a public high school teacher was dismissed for writing a letter to a local newspaper in which he criticized the local school board for its financial plans. The school board argued that the letter "damaged the professional reputations of [board] members and of the school administrators, would be disruptive of discipline, and would tend to foment 'controversy, conflict, and dissension' among teachers, administrators, the board of education and the residents of the district." In balancing the teacher's free speech interests with the state's interest in an efficient educational system, the Court found that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance [matters of legitimate public concern] may not furnish the basis for dismissal from employment."

In *Connick v. Myers*, 461 U.S. 138 (1983), an assistant district attorney who opposed her transfer to another office division circulated a questionnaire on office practices to other staff. The Court distinguished *Givhan*, reasoning that Givhan's statements about employment practices had "involved a matter of public concern," whereas with one exception Myers' questionnaire about office transfer policy "did not fall under the rubric of matters of public concern." However, it noted that one question about whether staff felt pressured to work in political campaigns did "touch upon a matter of public concern." Although this question presented "limited First Amendment interest" for Myers, the Court determined that in applying the *Pickering* balancing test, Myers' discharge was justified where the communication pertained to matters only of personal interest rather than public interest and it disrupted "close personal relationships" within the office. The Court pointed out that matters of public concern are to be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148.

More recently, the Supreme Court in *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), defined "public concern" as "a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public at the time of publication." In *de Llano v. Berglund*, 282

F.3d 1031 (8th Cir. 2002), a federal appeals court determined that the subjects of letters critical of faculty colleagues and interdepartmental conflicts did not constitute "matters of public concern."

In 2006, however, the Supreme Court handed down an opinion that in many ways adopted the most restrictive understanding of public employees' speech rights. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006). In *Garcetti*, the Court ruled that when public employees speak "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 126 S.Ct. at 1960. The First Amendment does not empower employees to "constitutionalize" their grievances, if speech is made pursuant to their official duties. No more balancing test or "public concern" inquiry need be done. The Court explicitly set aside speech in the academic context, however, holding that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" by the Court's decision. *Id.* at 1962.

It is not yet clear how courts will apply *Garcetti* in the higher education context, particularly since the Supreme Court specifically recognized that speech in the higher education context might be treated differently.[4] Most recent cases in the federal courts have applied *Garcetti* standards to deny relief to litigants. For instance, even when a student aid counselor's report of possible fraudulent student aid practices resulted in a $2.1 million payment by the university to settle "serious noncompliance" with federal regulations, the Eleventh Circuit still insulated the university from liability for failing to renew her employment contract. The court concluded that because the aid counselor's report was within her official duties, she had no First Amendment protection against retaliation based on the report. *Battle v. Board of Regents for State of Georgia*, 468 F.3d 755 (11th Cir. 2006). Moreover, the Seventh Circuit ruled that a college could refuse to renew the contract of an instructor for giving a gay student religious pamphlets on the sinfulness of homosexuality, where the EEOC concluded that the instructor had sexually harassed the student. The instructor argued that she had a free speech interest in distributing religious materials and information on sexual orientation. Relying on *Garcetti*, the court declared that the college had an interest in ensuring that instructors remained on class subject matter, and could direct them to keep personal discussions about sexual orientation out of the class. *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006).

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[4] *See* Kevin Cope, Defending the Ivory Tower: A Twenty-First Century Approach to the *Pickering-Connick* Doctrine and Public Higher Education Faculty After *Garcetti*, 33 JCUL 313 (2007), for a useful discussion of speech in the academic context after the *Garcetti* decision.

A recent case from California does provide an important clue to courts' interpretation of *Garcetti* in the higher education faculty context. In *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), the federal district court considered whether the denial of a faculty member's merit salary increase by the University of California at Irvine (UCI) infringed upon the faculty member's right to participate in the shared governance process and to make critical statements about both university administrators and fellow faculty members. The court held that because faculty members at UCI have the explicit right to participate in shared governance, UCI had the right, under the *Garcetti* analysis, to police that participation; the court stated that "UCI 'commissioned' Mr. Hong's involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference." *Hong*, 516 F.Supp.2d at 1167.

C. Actions Short of Termination

Usually an adverse employment action must be taken by an employer to invoke *Pickering/Connick* analysis. In *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), for instance, the court held that a law dean's criticism of two law professors did not give rise to a First Amendment claim without evidence of an adverse employment action. But more recently the Seventh Circuit Court of Appeals ruled that a free speech claim need only show that some institutional action likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable. This "deterrence test" suggests that if the average reasonable person would be deterred in the exercise of free speech by the institution's action, a claim may be actionable. *Power v. Summers*, 226 F.3d 815 (7th Cir. 2000). *See also Davis v. Goord*, 320 F.3d 346 (2d Cir. 2003).

D. "Whistleblower" Protection

All states and several federal laws offer statutory protection for whistleblowers, although such safeguards can be limited; in the aftermath of *Garcetti*, however, it is likely that more employees will be pursue those remedies, rather than constitutional ones, to remedy potential violations of their rights to free speech. To avail themselves of protection in a wrongful discharge action, litigants must usually assert that they disclosed inappropriate employer conduct that was in violation of a public policy reflected by statute, constitutional provision, or professional code of ethics.

Remedies and Grievance Processes

A. Constitutional Due Process

Promotion and tenure policies usually provide grievance processes for evaluating the promotion and tenure decisions. Such policies contractually bind the institution, and courts will usually expect compliance with such policies. But public institutions are also bound by the federal and state constitutions, and may also be bound by state statutes or regulations that govern faculty personnel decisions. Although educational institutions are given wide latitude in interpreting their policies, a summary denial of such processes to a faculty member at a public institution may present constitutional "due process" issues.

Whenever a decision deprives a faculty member of a "property" or "liberty" interest under the Fourteenth Amendment, including tenure, the faculty member has a right to a "fair hearing." *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Property interests are created by "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," *Roth* at 578. Moreover, claimants "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'policies and practices of the institution'." *Perry* at 603. Making false or stigmatizing charges against a faculty member public in any intentional manner may violate a faculty member's "liberty interest." *Ortwein v. Mackey*, 511 F.2d 696 (5th Cir. 1975).

With few exceptions, however, the *denial* of tenure is not considered a deprivation of a property interest, and courts are generally reluctant to find that a public institution has infringed a faculty member's right to due process (as a separate matter from considering a claim of discrimination) unless the denial of tenure was based on unconstitutional reasons, such as a free speech claim, or the institution failed to provide even a minimal amount of appropriate process. Still, administrators should be alert to provide appropriate procedural safeguards where university policies, practices, or "mutually explicit understandings" between a faculty member and the university support a claim of entitlement to continued employment or where the university makes charges that could damage one's reputation, standing, or associations in the community. Kaplin & Lee at 550.

B. Contractual Processes and Best Practices

Although contractual claims for tenure denial are rarely successful, administrators should remain mindful of the need to adhere to established practices for evaluation of probationary faculty. Regular written performance evaluations of faculty, with the opportunity for conversation

with and a written response from the evaluated faculty member represent the best practice. Notice of tenure review should be timely and the tenure procedures clearly spelled out to the faculty candidate early in the process. If mentorship opportunities are provided as part of the customary practice of the institution, department chairs should regularly inquire about the progress of the mentored candidate and any concerns about his/her performance. The best practices usually assure an affirming review process in which there are no surprises for either the institution or the candidate under review. "Faculty and administrators can help to ensure that judges and juries do not second-guess the judgments of academics by ensuring that written policies are clear, that the criteria applicable to faculty employment decisions are stated clearly, that the procedures for making these decisions are followed carefully, and that written justifications are given for recommendations or decisions made under the faculty handbook or other policies." Kaplin & Lee at 575.

C. Disclosure of Confidential Evaluation Records

Discovery requests for peer review information or votes and opinions of faculty on tenure review committees are generally subject to disclosure, subject to an evaluation of the information's relevance to the claim under review and the burden placed on the university by disclosure. In general, state open records laws usually support disclosure by public universities. Moreover, assertion of an "academic freedom privilege" that would keep confidential peer evaluations from disclosure was rejected by the Supreme Court in a Title VII discrimination case. *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). The Supreme Court ruled that when an institution is presented with a subpoena from the EEOC, it must produce the relevant, requested information, whether or not the institution promised to keep it confidential. But see *Staton v. Miami University*, 2001 Ohio App. LEXIS 1421 (Ct. App. Ohio March 27, 2001), in which a state court allowed individual faculty votes to remain confidential because university policy forbade divulging the university's decision-making process; *see also Handler v. Arends*, 1995 Conn. Super. LEXIS 660 (Conn. Super. Ct. 1995) (holding that a professor's personnel file might be exempt from disclosure requirements under state law and the faculty collective bargaining agreement because disclosure would constitute an invasion of privacy).

The American Association of University Professors developed a thoughtful policy balancing the need to preserve confidentiality with allowing access for review. *See* "Access to Faculty Personnel Files," *AAUP Policy Documents and Reports 67-72* (10th ed., 2006). In addition, the Reporters Committee for Freedom of the Press has published the Open Government Guide, a summary of open records laws by state, available at http://www.rcfp.org/ogg/.

Risk Avoidance

A. Tort Liability for Foreseeable Criminal Acts

Although this brief guide cannot fully examine standards for tort liability, one aspect is particularly worthy to note in reference to a discussion of our case study. A criminal act must have been reasonably foreseeable to impose civil liability for negligence. In *Nero v. Kansas*, 861 P.2d 768 (Kan. 1993), the court allowed a jury to determine the issue of "foreseeability" in a negligence case arising from an alleged campus rape, where the university was aware that the alleged rapist had been accused of an earlier sexual assault and allowed to live in a coed residence hall. *Nero* has been distinguished in *Gragg v. Wichita State University*, 934 P.2d 121 (Kan. 1997), where university police did not know that an assailant was on campus, nor that he had a criminal record. Knowledge by university officials that a person with a violent criminal record is on campus and has threatened university personnel in the past may well satisfy the foreseeability standard.

B. Duty to Warn

Concerns about rising campus crime has prompted Congress and state legislatures to adopt laws to provide information on campus crime statistics and policies The "Crime Awareness and Campus Security Act," 20 U.S.C. § 1092(f), and its amendments require universities to prevent, report, and investigate sex offenses on campuses, as well as provide annual statistics on all campus crime. Several states also have passed laws mandating the reporting of crime statistics and opening law enforcement logs to the public. These laws establish the principle of warning the campus community about criminal activity and may well be interpreted as creating a legal duty to timely warn staff, students, faculty, and others about persons on campus with a criminal record that could pose a danger to the campus community. The failure to provide a timely warning about such individuals could result in successful negligence claims where a student or employee is injured by someone who campus administrators knew had engaged in criminal activity of a similar nature in the past. Kaplin & Lee at 885-887. In the wake of the Virginia Tech tragedy, administrators should be particularly alert to emerging expectations to timely warn the campus community of individuals with records that indicate a propensity for violence.[5]

[5] The U.S. Department of Education and the U.S. Secret Service have produced two reports and an interactive CD-ROM outlining a process for identifying, assessing, and managing students who may pose a threat of targeted violence in schools. The reports are accessible at http://www.ed.gov/admins/lead/safety/training/responding/crisis_pg34.html and the CD may be ordered by e-mailing edpubs@inet.gov. The publication ID is ED0027383.