# Dismissals, Layoffs, and Tenure Denials in Colleges and Universities


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Job security is a vital concern for many employees. Losing a job can be financially burdensome; the loss may involve a period of unemployment while searching for work and additional expenses for job hunting and relocation. The employee, meanwhile, must still cover fixed costs such as rent, car payments, and health insurance premiums. Finding a new job may entail a pay cut, especially if the person has non-transferable skills, such as knowledge of an individual employer's unique procedures or equipment. A successful job search may also result in a loss of seniority-related benefits, such as vacation time or paid disability leave.

Job loss can also cause psychological stress. Loss of opportunities for social interaction and self-actualization provided by work may accompany a blow to the person's self-esteem. Absent suitable alternative nearby jobs, the employee's family may be uprooted from the local community. Connections to friends, schools, fellow members of a religious congregation, or perhaps a softball league are lost. Dual-career couples may face anew the challenges of coordinating two job searches.

Managers have legitimate concerns too. They may impose discipline to rehabilitate a potentially satisfactory employee, to deter employees from breaking employer rules in the future, or

protect profitability or academic quality, in the case of higher education. Managers can eliminate positions to stay within their budgets and reallocate resources from low-priority to high-priority uses. Effective job performance, they argue, can require a defense of management rights.[1]

These conflicting concerns often lead to disputes over an employer's authority to dismiss employees for cause or to impose layoffs. Dismissal for cause can occur when the employer believes that an employee's job performance or behavior is unsatisfactory. A dismissal based on alleged employee misconduct, such as sexual harassment, may stigmatize the employee and make it difficult to find another job. Less stigmatizing is denial of tenure, because it usually implies insufficiently good job performance or, occasionally, budget or enrollment problems, not misconduct. Layoffs refer to suspension of employment for reasons unrelated to an individual employee's job performance or behavior. Layoffs at a college or university may result from reduced state appropriations for public higher education, enrollment declines that lower the need for personnel, or a decision to close an academic program to free up funding for others.

This chapter focuses on fiercely contested terrain: dismissals, layoffs, and tenure denials in colleges and universities.[2] Beginning with an overview of employment at will, a legal doctrine that weakens job security, it explains just cause as a constraint on dismissing employees covered by a collective bargaining agreement, followed by constitutional due process requirements for public employees. It analyzes how the duty to bargain may affect layoffs of bargaining unit employees, and then reviews tenure and academic freedom, dismissals or layoffs of tenured faculty or dismissal during the term of a faculty appointment, and denial of tenure. Finally, the chapter describes how the growth of non-tenure track faculty appointments erodes the protections provided by tenure.

## EMPLOYMENT AT WILL

A prominent employment law expert bluntly described the extent to which American law protects most employees from unfair dismissals:[3]

> Your boss wants to speak to you. You are fired! Why? You may suspect a personality conflict with the boss, or maybe you feel that the company wants to replace you with a recent college graduate at half your pay, or maybe even with the boss's brother-in-law. But you know your job performance and attendance are not the cause. It does not matter. You are fired. No reason or warning is needed. That is the law.

The expert refers to "employment at will," a common-law doctrine that developed in the 19th century and gained wide adoption by American courts. Under this doctrine, an employer or an employee may terminate an employment relationship at any time for any reason or for no reason. The formal symmetry of this doctrine—the boss may fire the worker, and the worker may quit—ignored the typical inequality of bargaining power. Being fired is usually worse for a worker than having a worker quit is for a boss.

Most U.S. employees are subject to the doctrine of employment at will, but broad and narrow exceptions exist. The broad exceptions cover four employee groups: (1) employees with individual contracts restricting dismissal; (2) employees covered by collective bargaining agreements permitting discipline only for just cause; (3) public employees covered by civil service or K-12 teacher tenure laws; and (4) residents of Montana, protected by that state's Wrongful Discharge from Employment Act, passed in 1987.[4]

The narrow exceptions leave the doctrine of employment at will in place but prohibit dismissals for certain reasons. Statutes specify some prohibited grounds. The National Labor Relations Act (NLRA) declares it an unfair labor practice to discharge an employee for

union activity or for filing an unfair labor practice charge. The Occupational Safety and Health Act and other federal laws include whistleblower protections. Title VII of the Civil Rights Act of 1964 prohibits dismissals based on race, color, sex, national origin, or religion, except where religion is a *bona fide* occupational qualification, such as clergy or religious educators. Many state and local governments prohibit dismissals based on sexual orientation. The Age Discrimination in Employment Act prohibits dismissals for being too old. The Americans with Disabilities Act prohibits dismissals on grounds of disability, provided that the employee can perform the essential duties of the job if the employer makes a reasonable accommodation for the employee's disability.

State courts, led by California's, have made three exceptions to the doctrine of employment at will.[5] The public policy exception, first recognized by a California court in 1959, prohibits an employer from dismissing an employee for refusing to commit a crime or for exercising a right granted by statute. Few dismissals fall in this category. The implied contract exception asserts that documents such as employee handbooks and even oral promises made by a hiring official bind the employer. But courts will not overturn dismissals that violate an employee handbook if the handbook clearly states that no contractual rights have been created.[6] Even absent such language, some state courts find that employee handbooks are not binding contracts.

In 1980, a California court recognized a potentially broad exception to employment at will: the implied covenant of good faith and fair dealing. This covenant prohibits, for example, firing a long-standing employee to avoid payment of promised retirement benefits. But courts in only a few states ever recognized this exception and, by 1988, even California had restricted the exception for the covenant of good faith and fair dealing.[7]

Individual employment contracts, collective bargaining agreements, civil service rules, tenure, or employee handbooks protect some college and university employees. But many academic employees are subject to the doctrine of employment at will and have little protection against dismissal or layoff.

## JUST CAUSE CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

The employment at will doctrine does not apply when collective bargaining agreements require employers to have just cause to discipline employees. Most union contracts today have just cause clauses, despite strong management resistance during the early days of collective bargaining.[8] Grievance arbitrators often infer a just cause standard even when the collective bargaining agreement does not expressly establish one. But how do arbitrators define just cause?

A 1964 arbitration ruling set forth seven tests for just cause, asserting that an employer has just cause for discharge only if the answer to each question is "yes." Many arbitrators have adopted tests 1, 2, 6, and 7 but view tests 3, 4, and 5 as unduly restrictive. The seven tests are:

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?
3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management?
4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service?[9]

The first test for just cause implies an expectation of progressive discipline. The employer applies increasingly severe sanctions—oral warning, written reprimand, unpaid suspension, and, finally, dismissal—to repeated instances of inadequate job performance or misconduct. Progressive discipline is rooted in the belief that "industrial discipline is corrective rather than punitive."[10] The employee has an opportunity to improve before termination. Rehabilitating an employee benefits the employer by avoiding costs of recruiting and training a replacement. But notwithstanding the expectation of progressive discipline, arbitrators usually will sustain discharges for the first offense in cases of serious misconduct such as theft from the employer,[11] physically fighting on the job (particularly if an employee attacks a supervisor),[12] serious violations of work-place safety rules, equipment sabotage, or "significant violations of law on the employer's time or premises."[13]

"Progressive discipline of faculty is unusual," note two experts. "Many of the transgressions for which employees in business organizations are disciplined, such as tardiness, insubordination, or excessive absences, may not translate to the academic workplace or may be tolerated, at least for a period of time."[14] But more widespread use of progressive discipline, these experts argue, would improve faculty personnel administration.

The second test for just cause requires that a legitimate employer objective underlie the rule whose violation is the basis for discharge. An employer can require "(1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of conduct that would interfere with the employer's ability to operate the business successfully."[15] What if the employee believes that a management order is not rooted in a legitimate objective or violates the collective bargaining agreement? "Obey now, grieve later," say arbitrators: "The employee must obey the order or rule so that work may continue. An employee who wins a grievance will be made whole for any losses."[16] Arbitrators make exceptions in cases of significant and irreparable losses to the employee, such as an order endangering employee safety.

Off-duty conduct can be the basis for discharge only if this conduct harms the employer.[17] Arbitrators, for example, do not usually consider off-duty use of illegal drugs to be grounds for discharge. But "the discharge of a university employee was upheld when he had been arrested for selling amphetamines on campus."[18] Arbitrators have also sustained discharges of employees for public attacks against their employer outside the workplace. One arbitrator asked, "Can you bite the hand that feeds you, and insist on staying for future banquets?"[19] His answer was no. The case did not involve faculty, so that an academic freedom defense did not apply.

The third, fourth, and fifth tests relate to an expectation of due process. Arbitrators do not provide the full extent of due process required in criminal trials because employers and unions want arbitration to be relatively quick and inexpensive.[20] But arbitrators usually require "(1) timely action by the employer; (2) a fair investigation; (3) a precise statement of the charges; (4) a chance for the employee to explain before the imposition of discipline; and (5) no double jeopardy; that is, employees may not be punished twice for the same offense."[21] Most arbitrators will reduce the penalty imposed on the employee—awarding back pay but not reinstatement to an employee whose conduct was not acceptable, for example—if management has significantly violated due process requirements. Some arbitrators will overturn the disciplinary penalty entirely.[22]

A "no" answer to question 3, 4, or 5 in the seven tests does not necessarily mean that

the employer lacked just cause to dismiss an employee:

> [A]rbitrators differ radically on the issue of whether a failure to accord a complete and fair investigation and hearing prior to the arbitration requires an invalidation of discipline under the just cause standard... [Many arbitrators measure] the significance of the claim of procedural deficiency (even those based on the terms of the contract, much less those derived from the so-called "common law" of arbitration) against the harm done to the interests of the grievant by the omission.[23]

In this view, arbitration more resembles a trial court than an appellate court; the hearing needed for due process can occur at arbitration rather than prior to imposing discipline.

Arbitrators often enforce a due process claim based on federal labor law. In 1975, the U.S. Supreme Court recognized *Weingarten* rights under the NLRA. Upon request, employees in an established private-sector bargaining unit have the right to have a union representative present during investigative interviews that could potentially lead to discipline.[24] Since then, the National Labor Relations Board (NLRB) has periodically changed its position—depending on which president appointed a majority of the board members—on whether nonunion employees have *Weingarten* rights. In 2004, the Bush-appointed NLRB majority ruled 3-2 that private-sector employees who are not in an established bargaining unit have no right to have a coworker present at an investigative hearing that might lead to discipline.[25] State law, which does not necessarily mirror the NLRA, determines whether public employees have *Weingarten*-type rights.

The sixth test, evenhanded application of rules, requires employers to make their expectations clear. "Lax enforcement of rules may lead employees to reasonably believe that the conduct in question is sanctioned by management."[26] Arbitrators require management to give employees adequate notice of any transition from lax to strict enforcement. Also, arbitrators will overturn a discharge if there is evidence of discriminatory enforcement of the employer's rules. But the severity of discipline may vary according to reasonable factors, such as the seriousness of the offense, the extent to which the employee is at fault, mitigating circumstances, or the employee's past record.[27]

The seventh test has two elements. First, to warrant discharge, an employee must either have committed a serious offense or a continued stream of minor offenses. Second, arbitrators are reluctant to sustain the discharge of an employee with many years of service, few prior disciplinary infractions, and a record of good job performance. "Nonetheless, even long service with the company will not save an employee's job if other factors strongly justify discharge."[28]

The seriousness of an offense must be assessed according to organizational norms. The military considers insubordination a cardinal sin; it expects soldiers to obey all lawful orders, even if obeying endangers their lives. Industrial and commercial employers are typically less hierarchical, but insubordination can still lead to discipline or discharge. Colleges and universities, in contrast, place a high value on academic freedom and creativity; they often do not discipline faculty for behavior that other employers might consider insubordinate.

## CONSTITUTIONAL DUE PROCESS RIGHTS OF PUBLIC EMPLOYEES

The U.S. Constitution guarantees procedural and substantive due process rights to public employees faced with dismissal. But the extent of those rights depends on the employee's "property" and "liberty" interests in continued employment. Employees who are entitled to a stream of future employment income have a property interest. In 1972, the U.S. Supreme Court issued two rulings on the need for hearings prior to decisions not to renew the contracts of untenured faculty

members at state universities or junior colleges. A public employee with "no possible claim of entitlement to reemployment," the Court ruled, lacked a constitutional right to a hearing prior to a non-renewal decision effective after the contract termination date.[29] But due process required a hearing prior to (a) dismissal of staff or faculty during the terms of their contracts, or (b) dismissal of tenured faculty. A second case involved a junior college that lacked an explicit tenure system. The Court ruled that a hearing would be required prior to a nonrenewal decision if the faculty member could demonstrate possession of *de facto* tenure, based on past college practices.[30]

Regardless of whether a public employee has a property interest in continued employment, the Constitution requires due process when a dismissal could affect liberty interests—the employee's reputation or free speech rights, for example. A 1997 federal appeals court ruling concerned the head basketball coach at a public university. The university suspended the coach and stated that it would terminate him for making ethnic slurs against a basketball player of Polish ancestry.[31] A university press release described the circumstances of the termination, leading to stories published in the student newspaper, a local paper, and a major metropolitan paper in the same state. The court ruled that a public employee had a liberty interest in his or her reputation when: (1) stigmatizing statements are made when an employee is terminated, (2) the statements go beyond allegations of "improper or inadequate performance, incompetence, neglect of duty or malfeasance" to include a "moral stigma such as immorality or dishonesty," (3) the stigmatizing statements are made public, (4) the terminated employee claims that the statements are false, and (5) the public dissemination was voluntary. The court ruled against the coach, on the grounds that he had not made sufficiently clear to the university that he wanted a name-clearing hearing.

A 2003 federal appeals court case concerned an untenured faculty member at a public university. The university found his comments to female graduate students attending an out-of-state professional conference with him constituted sexual harassment. Denied reappointment, the faculty member alleged the university had interfered with his freedom of speech. The court disagreed, noting that he was "attempting to solicit female companionship" while drinking in a bar rather than addressing matters of public concern in his capacity as a teacher or scholar.[32] The court found that the dismissal did not endanger any constitutionally protected liberty interest.

A public employer is under no constitutional obligation to hold a hearing before imposing a paid suspension. A federal appeals court ruled in 1998 that a public university professor who was suspended with pay for one semester had no liberty interest justifying a due process claim; the professor had not appealed a district court ruling that he had no property interest.[33] It is sometimes constitutionally permissible to impose an *unpaid* suspension without a prior hearing. In 1997, the U.S. Supreme Court upheld the immediate suspension without pay of a public university police officer arrested on felony drug charges.[34] An unpaid suspension can sometimes lead to a valid due process claim, but a public college or university administration can immediately suspend an employee with pay, hold a hearing, and dismiss the employee after the hearing without infringing on constitutional due process rights.

Due process rights from the U.S. Constitution do not constrain dismissals by private employers. The Constitution constrains the actions of governments, not of private citizens, with two exceptions: the 13th Amendment prohibited slavery, and the now-repealed 18th Amendment prohibited the manufacture, sale, or transportation of alcohol. Individual contracts, employee handbooks, collective bargaining agreements, and labor law provide the only applicable due process rights when a private college or university dismisses an employee.

## DUTY TO BARGAIN AND LAYOFFS OF BARGAINING UNIT MEMBERS

Layoffs for economic reasons (enrollment declines, or cutbacks in state appropriations for community colleges, for example) or for educational policy reasons (a decision to abolish the geography department, for instance) are not forms of employee discipline. The just-cause standard and *Weingarten* rights therefore do not apply. But labor law may require bargaining before layoffs affect members of established collective bargaining units.

Federal labor law and many state labor laws distinguish among mandatory, permissive, and prohibited subjects of bargaining.[35] Employers and unions must bargain over mandatory subjects. Unilateral changes are impermissible, even if the collective bargaining agreement is silent about a mandatory subject, unless the parties have bargained to impasse. The parties may, but need not, bargain about permissive subjects; and they may not bargain about prohibited subjects.

Do college and university administrations have a management right to make unilateral decisions resulting in layoffs? It depends on the circumstances in private institutions—most of which are governed by federal labor law. Contracting out of work performed by unionized employees, the U.S. Supreme Court ruled in 1964, is a mandatory subject of bargaining for private employers if the contractor's employees perform the work at the same site under similar employment conditions.[36] But the Supreme Court ruled in 1981 that a private employer's decision to close an operation, resulting in layoffs of bargaining unit members, was a permissive subject.[37] Private employers may have a legal duty to bargain about the *impact* of a decision resulting in layoffs—severance pay and recall rights, for example—even when a layoff decision is a management prerogative.[38]

Federal labor relations laws do not apply to state agencies, so public-sector rules vary with state law. Legislatures and courts, eager to protect public-sector management rights, often declare decisions about the need for a reduction in force to be prohibited subjects of bargaining. But most states with public-sector bargaining laws require public employers to bargain about the impact of a layoff decision. The Kansas Supreme Court, for example, ruled that decisions about the need for retrenchment were reserved to management. But Pittsburg State University, in Kansas, had to bargain with the NEA faculty union over procedures by which to implement these decisions—whether to reduce weekly work hours for all employees or terminate some employees, for example.[39] The Massachusetts Supreme Judicial Court prohibited bargaining over whether a school system would reduce the number of janitors it employed. But it also ruled that the school system must bargain over whether it could effect this reduction by layoffs and, if so, over the impact of the layoffs on bargaining unit members, including which employees were affected.[40] Michigan provides an exception: a 1994 anti-union law prohibits bargaining in K-12 education over decisions to subcontract non-instructional school support services *and* over the impact on employees or the bargaining unit of subcontracting decisions.[41]

An administration could still bring about a layoff after bargaining to impasse, even where a duty to bargain prevents unilateral administration decisions. But if a union has won contract language restricting layoffs, then the restrictions remain in effect until the contract expires or the parties agree to change the language.

## TENURE AND ACADEMIC FREEDOM

Tenure significantly constrains employment decisions regarding faculty. Tenured faculty members can be dismissed only after due process including peer review. Institutions normally award tenure only after a long probationary period allowing for careful observation of the candidate's job performance. Conferring tenure thus establishes "a rebuttable presumption of the individual's professional excellence."[42] The administration therefore bears

the burden of proof in proceedings seeking the dismissal of a tenured faculty member. Faculty members who believe the administration has not respected their rights under the tenure system may sue for breach of contract.

An effort to protect academic freedom limits the grounds for dismissing tenured faculty. In 1940, the American Association of University Professors (AAUP) and the Association of American Colleges (AAC, now the Association of American Colleges and Universities, or AAC&U) issued a joint "Statement of Principles on Academic Freedom and Tenure."[43] Faculty members, asserted this statement:

> are entitled to full freedom in research and in the publication of the results...[and] to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject...When they speak or write as citizens, they should be free from institutional censorship or discipline.

"After the expiration of a probationary period," the statement added, "teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies." The provision about retirement is outdated; an amendment to the Age Discrimination in Employment Act banned mandatory retirement. But most faculty and administrators accept the other provisions in the 1940 statement.

Defenders of academic freedom point to valuable scholarly contributions, such as those of Galileo, that were initially viewed as heresy.[44] Practices in the Brezhnev-era Soviet Union (1964–82) illustrate the importance of economic security in fostering academic freedom. The Soviet government squelched dissent by controlling employment opportunities; it dismissed most government critics from their jobs. But physicist Andrei Sakharov, a full member of the USSR Academy of Sciences, would continue to receive a comfortable salary and housing unless the other academy members revoked his membership by a secret-ballot vote. Sakharov was freed to criticize Soviet policies without fearing material hardship because the other members respected his work as a physicist.[45]

The U.S. is a far more open society than the former Soviet Union, but some American professors have lost their jobs after expressing controversial ideas. Lawrence Klein's pathbreaking scholarly work at the University of Michigan in the early 1950s ultimately won him the 1980 Nobel Prize in economics. But the university denied tenure to Klein in 1954 because he belonged to the Communist Party in the 1940s, though the quality of his scholarship was recognized at the time of the tenure denial.[46] After leaving Michigan, Klein accepted faculty positions at Oxford and the University of Pennsylvania.

A recent academic freedom controversy involves a professor whose scholarship is less esteemed than Klein's. Ward Churchill, a professor of ethnic studies at the University of Colorado, wrote that the victims who died in September 11, 2001, terrorist attack on the World Trade Center were "little Eichmanns" (referring to Nazi war criminal Adolf Eichmann). He condemned these victims for supporting "America's global financial empire."[47] The press reported these statements beginning in January 2005.[48] The governor of Colorado called for Churchill's dismissal from his tenured position, and the university began to investigate the honesty of his "writing, speeches, tape recordings and other works."[49] A March 2005 report from the university's interim chancellor stated that Churchill could not be fired for his controversial opinions, but that he could be fired if allegations of academic misconduct proved true.[50] In July 2007, the University of Colorado regents voted to fire Churchill, stating that he engaged in plagiarism and research fraud in

works unrelated to the September 11 attacks. Churchill claimed that the firing was political. Litigation in this case is pending.[51]

The threat of job loss because of controversial political views can have a chilling effect on academic freedom. But we have relatively few cases in which outstanding scholars were denied tenure because of their political affiliations or in which abhorrence of the political views of tenured professors triggered an investigation into their research ethics. Most disputes about dismissal of tenured faculty stem from budgetary crises, elimination of academic programs, or allegations of misconduct, such as sexual harassment. Most tenure denials result from perceived shortcomings in job performance, low enrollments in the faculty member's field, or personality conflicts. Still, tenure standards and associated due process requirements constrain tenure denials or dismissals of tenured faculty even when academic freedom is not at stake.

## FACULTY DISMISSALS AND LAYOFFS

In 1958, AAUP and AAC issued a joint "Statement on Procedural Standards in Faculty Dismissal Proceedings." The statement recommends these due process guidelines for dismissal of tenured faculty or of faculty during the term of an appointment:

- A meeting between administrators and the faculty member to discuss the faculty member's fitness to continue work,
- If this meeting does not resolve the matter, an informal inquiry by an elected faculty committee to determine whether formal dismissal proceedings should begin,
- If the committee recommends dismissal proceedings, or if the president wants dismissal proceedings notwithstanding the committee's recommendation, formulation by the president of "a statement with reasonable particularity of the grounds proposed for the dismissal,"
- An opportunity for the faculty member to present a defense at a hearing before a faculty committee,
- If the faculty member wants a hearing, a written answer to the president's statements regarding the grounds for the dismissal, and, normally, the right to question witnesses who testify at the hearing,
- A recommendation by the faculty hearing committee; "acceptance of the committee's decision [by the institution's governing body] would normally be expected," and
- Announcement of the hearing committee's recommendation and the final decision.

The 1958 statement also recommends against suspending the faculty member while the case is pending unless "immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay."[52]

There are several substantive grounds for dismissal of tenured faculty or for dismissals during the term of faculty appointments. In 1973, the Commission on Academic Tenure in Higher Education—established by AAUP and AAC—recommended that:

> "adequate cause" in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities. The burden of proof in establishing cause for dismissal rests upon the administration.[53]

Colleges can also lay off tenured faculty in cases of financial exigency or program discontinuation.

Faculty dismissals for cause often fall into the category of moral turpitude. In 1970, AAUP and AAC defined moral turpitude as follows:

> the exceptional case in which the professor may be denied a year's teaching or pay in

> whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or [severance] pay. The standard is not that the moral sensibilities of persons in that particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.[54]

Grounds for moral turpitude charges include sexual harassment, fraudulent research, plagiarism, and theft of college funds. Religiously affiliated institutions sometimes contend that homosexual behavior constitutes moral turpitude.

Does a sexual relationship between a faculty member and a student amount to moral turpitude? A sexual relationship between a faculty member and a supervised student is often seen as inherently coercive because of the power imbalance. Some observers would extend that reasoning to ban all faculty-student sexual relationships; others argue that employers should not interfere with sexual relationships between consenting adults. But most observers agree that cases involving sexual assault or a *quid pro quo*—trading favorable grades or letters of recommendation for sexual favors—constitute moral turpitude.

Many institutions have separate procedures for sexual harassment cases and for faculty dismissal cases. The faculty dismissal procedure often provides more extensive protections. A university that dismissed a tenured faculty member for sexually harassing a student, the Ohio Supreme Court ruled in 1995, had to provide all the due process rights promised by the faculty dismissal procedure. Following the sexual harassment complaint procedure did not suffice.[55] A woman who subsequently filed a sexual harassment complaint against another faculty member at the same university reported that the additional due process rights made it difficult for her to pursue her complaint.[56]

Terminations for financial exigency, unlike those for moral turpitude, imply no fault on the part of the faculty members. The 1940 AAUP/AAC statement lists, but does not define financial exigency. AAUP subsequently provided a stringent definition—not endorsed by AAC—that excludes most instances of budgetary difficulties: "an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means."[57] Such crises are especially common during business cycle downturns, including the Great Depression that occurred prior to the 1940 AAUP/AAC statement.

Judges tend to accept a broader definition of financial exigency. Faculty members have difficulty prevailing in court if they challenge a determination that financial exigency exists. The Nebraska Supreme Court ruled that budget difficulties in a single department or school qualified as financial exigency, even if the university as a whole did not face financial exigency.[58] A federal appeals court ruled that owning a large endowment and valuable land did not preclude financial exigency if a college had a large operating deficit.[59] But in 1974, a lower court in New Jersey overturned a college's determination of financial exigency and ordered the reinstatement of 13 faculty members.[60]

AAUP's recommendations accompanying its stringent definition of true financial exigency seem aimed at ensuring fairness and preventing use of false financial exigency claims to target individual faculty members for dismissal. The recommendations in AAUP Regulation 4c included the following:

> As a first step, there should be a faculty body that participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued...The burden will rest on the

> administration to prove the existence and extent of the condition...
>
> If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.
>
> Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution...
>
> In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it.[61]

AAUP also recommended notice or severance salary for faculty terminated for financial exigency: at least three months during the first year of service, six months during the third semester, and one year during the fourth or subsequent semester or if the faculty member is tenured. Some administrations accept these AAUP recommendations.

Dismissal resulting from program discontinuance, like financial exigency, is not based on the individual faculty member's conduct or job performance. An institution can dismiss tenured faculty members if it terminates an entire department or program for financial or educational policy reasons. "If, however, a university were free to reallocate resources at will—to terminate a tenured professor of classics in order to hire a professor of accounting, to build a bigger athletic facility, or merely to reduce operating costs—then the 'tenure' afforded would be no tenure at all."[62] AAUP Regulation 4d therefore states: "Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position."[63] Again, some administrations agree.

## DENIAL OF TENURE

Courts are much more reluctant to find a breach of contract or infringement of constitutional due process rights in cases of tenure denial than in cases of dismissal of tenured faculty or of dismissal during the term of an appointment. Still, disputes often arise in tenure denial cases because of the high stakes for the individual faculty member. Many colleges have experienced internal appeals or grievances regarding tenure denial; some have faced lawsuits.

Criteria for tenure decisions vary considerably. Elite research universities typically emphasize scholarship and, in some fields, external grant funding. Other colleges and universities place equal or greater weight on teaching and some weight on service and collegiality. Religiously affiliated colleges or universities may—and sometimes do—legally assert that religion is a *bona fide* occupational qualification for faculty hiring and tenure.

How do colleges determine whether a faculty member meets tenure criteria? The college can quantify some aspects of professorial job performance: number of articles in leading refereed journals, citations to the author's work reported in the *ISI World of Knowledge,* total dollars of grant money, and average scores on student evaluations of teaching. But performance appraisal also entails subjective judgments that often require highly specialized expertise.

Judges tend to be deferential regarding subjective assessments by faculty committees, deans, and presidents.[64] Many grievances or lawsuits challenging tenure denial therefore allege that the college failed to follow the proper procedure. Faculty committee, decanal, or presidential non-compliance with the tenure review process in the faculty handbook could violate contract law. The decision making process in public colleges or universities could violate Constitutionally protected due process rights.

Other tenure denial grievances or lawsuits allege discrimination on grounds prohibited by Title VII of the Civil Rights Act of 1964 or other employment discrimination laws. Many are "mixed-motive" cases. The faculty member alleges the college or university denied tenure based on race, color, religion, sex, national origin, age, or (in some jurisdictions) sexual orientation. But the employer contends that the faculty member would have been denied tenure on permissible grounds—inadequate job performance or low enrollment in the faculty member's courses, for example—regardless of membership in a protected class.

A 1989 U.S. Supreme Court decision made it easier for employers to avoid liability in mixed-motive cases. The Court ruled that employers only needed to demonstrate by a preponderance of the evidence—rather than by clear and convincing evidence—that they would have made the same employment decision even in the absence of illegal discrimination.[65] The Civil Rights Act of 1991 provided that the employer would be found liable if race, color, religion, sex, or national origin were a motivating factor for the employment practice. But the plaintiff could win only injunctive relief and attorney's fees—not damages, back pay, or reinstatement—if the employer could demonstrate that it also had a sufficient nondiscriminatory motive for the practice. A unanimous 2003 U.S. Supreme Court made it easier for plaintiffs to establish employer liability by ruling that circumstantial evidence sufficed to prove discrimination in a mixed-motive case.[66] But the limits on reinstatement or on a monetary award remain in effect when the employer can also demonstrate a nondiscriminatory motive.

A crucial question in any grievance or lawsuit is: "If the allegations are true, then what is the proper remedy?" A person denied tenure often seeks an award of tenure. But courts rarely grant that remedy. The exception: federal courts have done so when they determined that illegal discrimination has occurred.[67] More often, a grievance or lawsuit results in a procedural remedy: the college or university must conduct the tenure review again, perhaps the following year, and adhere scrupulously to all procedural requirements. This procedural remedy may be of little value to the grievant or litigant; the decision makers may still feel that the candidate's work is not good enough and may resent the challenge to their previous decision. The grievant or litigant endures the stress of a second tenure denial. An accompanying "trouble maker" brand may make other employers reluctant to hire the candidate. To avoid this fate, persons denied tenure in a procedurally incorrect process sometimes settle their grievance for, say, one or two semesters' salary and seek work elsewhere.

## EROSION OF THE TENURE TRACK

Critics have long argued that union grievance representatives make it too hard to fire employees who deserve dismissal. Critics of tenure present similar complaints.[68] A confrontation over tenure policies at the University of Minnesota gained national attention in fall 1996. The university's regents proposed to give themselves more latitude to cut faculty salaries and to lay off tenured faculty in eliminated or restructured programs. Many professors saw the proposal as tantamount to eliminating tenure.[69] The controversy led to a union organizing drive among university faculty, even though tenure track faculty at major research universities usually do not unionize. The regents relented on

their layoff proposal after the union almost won the representation election.[70] Faculty members received an 8.5 percent pay increase for 1997–98 after receiving two percent increases in each of the two previous years.[71]

To avoid provoking this kind of faculty reaction, many administrations attack tenure indirectly by shifting employment from more protected to less protected categories. Observers note the growth in the percentage of faculty jobs that are part-time—few of which are eligible for tenure—or are full-time, non-tenure track.[72] The share of faculty appointments off the tenure track, predict these observers, will continue to grow; tenure would remain for a shrinking minority. These shifts in faculty employment may affect not only faculty, but also educational outcomes. A recent study found that increases in the share of faculty employed part-time or in the share of full-time faculty that is non-tenure track were associated with lower graduation rates for undergraduates, especially at public institutions.[73]

The staff counterpart to the erosion of the tenure track for faculty: shifting work from unionized college or university employees to nonunion outside contractors. This replacement does not directly attack existing just cause clauses; it merely limits their applicability.

But existing policies do not constrain new entrants to an industry. The growing market share of new nonunion plants built in the U.S. by Japanese companies has eroded unionization in the American auto industry during the past 25 years.[74] Similarly, competition from new entrants like the University of Phoenix that rely heavily on part-time, non-tenure track faculty may erode the tenure track at less selective American colleges and universities.

The elite segment of higher education is also subject to competition from new entrants. In 1997, a wealthy new college with high scholarly standards was created: the Franklin W. Olin College of Engineering. Olin's per student endowment and admission standards are among the highest in the U.S. But members of Olin's faculty have renewable term contracts; none are on a tenure track. Traditional tenure systems, Olin's president argued in 2001, "may contribute to attitudes and perspectives that result in resistance to change and avoidance of risk."[75]

Whether other elite academic institutions will follow Olin's lead by abolishing the tenure track remains to be seen. But it seems likely that a shrinking share of the employees of colleges and universities will have strong protection against dismissals or layoffs.

## NOTES

*The author thanks Theodore St. Antoine, Barry Winograd, and Ruthanne Okun for helpful comments on a draft of this chapter.*

[1] Abrams and Nolan, 1985, 603-605.

[2] See Euben and Lee, 2006, for a review of legal and policy issues related to disciplinary actions other than dismissal in faculty misconduct cases.

[3] Fisher, 1994, 80.

[4] *Montana Code Annotated,* § 39-2-901.

[5] Muhl, 2001.

[6] Kaplin and Lee, 2006, 1: 266.

[7] Muhl, 2001.

[8] McKelvey, 1984.

[9] Arbitration ruling by Carroll Daugherty, 1964, summarized in Brand, 1998, 31-32.

[10] Nolan, 2005, 185.

[11] Brand, 1998, 226-227.

[12] Ibid., 272.

[13] Nolan, 2005, 184.

[14] Euben and Lee, 2006, 243.

[15] Abrams and Nolan, 1985, 597.

[16] Nolan, 2005, 188.

[17] Brand, 1998, 303-316.

[18] Ibid., 307.

[19] Arbitration ruling by Calvin L. McCoy, 1972, quoted in Nolan, 2005, 183.

[20] Brand, 1998, 35-36.

[21] Ibid., 37.

[22] Oldham, 2005, 217.

[23] Dunsford, 1989, 31.

[24] *NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975).

[25] *IBM Corporation,* 341 NLRB 1288 (2004).

[26] Brand, 1998, 395.

[27] Ibid., 81-85 and 397-398.

[28] Ibid., 399.

[29] *Board of Regents v. Roth,* 408 U.S. 564 (1972) at 578.

[30] *Perry v. Sindermann,* 408 U.S. 593 (1972).

[31] *Ludwig v. Board of Trustees of Ferris State University,* 123 F.3d 404 (6th Cir. 1997) at 410.

[32] *Trejo v. Shoben,* 319 F.3d 878 (7th Cir. 2003) at 887.

[33] *Edwards v. California University of Pennsylvania,* 156 F.3d 488 (3rd Cir. 1998).

[34] *Gilbert v. Homar,* 520 U.S. 924 (1997).

[35] *NLRB v. Wooster Division of Borg-Warner Corporation,* 356 U.S. 342 (1958).

[36] *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964).

[37] *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

[38] See, for example, *NLRB v. Pan American Grain Co.,* 432 F.3d 69 (1st Cir. 2005).

[39] *Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association,* 667 P.2d 306 (Kan. 1983).

[40] *School Committee of Newton v. Labor Relations Commission,* 447 N.E.2d 1201 (Mass. 1983).

[41] Saltzman and Sperka, 2001.

[42] Van Alstyne, 1971; 5 in 1996 reprinted version.

[43] Accessed online on September 19, 2007, at http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm. Also available in AAUP, 2006.

[44] Van Alstyne, 1971.

[45] Professor Evsey Domar, MIT Department of Economics, personal communication, 1975-76.

[46] Anderson, 1990.

[47] Riccardi, 2007.

[48] York, 2005.

[49] Johnson, February 11, 2005.

[50] Johnson, March 26, 2005.

[51] Riccardi, 2007.

[52] Accessed online on September 19, 2007, at http://www.aaup.org/AAUP/pubsres/policydocs/statementon+proceduralstandardsinfaculty+dismissal+proceedings.htm. Also available in AAUP, 2006.

[53] Commission on Academic Tenure in Higher Education, 1973, 75.

[54] "1970 Interpretive Comments" to "1940 Statement of Principles on Academic Freedom and Tenure," accessed online on September 19, 2007, at http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm. Also available in AAUP, 2006.

[55] *Chan v. Miami University,* 652 N.E.2d 644 (Ohio 1995).

[56] Lawton, 2007.

[57] AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure,* accessed online on September 20, 2007, at http://www.aaup.org/AAUP/pubsres/policydocs/RIR.htm Also available in AAUP, 2006.

[58] *Scheuer v. Creighton University*, 260 N.W.2d 595 (Neb. 1977).

[59] *Krotkoff v. Goucher College,* 585 F.2d 675 (4th Cir. 1978).

[60] *AAUP v. Bloomfield College,* 322 A.2d 846 (N.J. Super. 1974), aff'd 346 A.2d 615 (App. Div. 1975).

[61] AAUP, *Recommended Institutional Regulations,* op. cit.

[62] Finkin, 1996, 128.

[63] AAUP, *Recommended Institutional Regulations,* op. cit.

[64] Kaplin and Lee, 2006, 475.

[65] *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

[66] *Desert Palace v. Costa,* 539 U.S. 90 (2003).

[67] Kaplin and Lee, 2006, 510.

[68] These attacks led Matthew Finkin, a labor law professor formerly on the staff of AAUP, to write a book-length defense of tenure (Finkin, 1996).

[69] Magner, 1996.

[70] The union lost the February 1997 vote by 692 to 666.

[71] Magner, 1997.

[72] Baldwin and Chronister, 2002.

[73] Ehrenberg and Zhang, 2005.

[74] Saltzman, 1995.

[75] Miller, 2001.

## REFERENCES


Abrams, R.I., and D.R. Nolan. "Toward a Theory of 'Just Cause' in Employee Discipline Cases," *Duke Law Journal,* 1983 (June-September 1985), 594-623.

American Association of University Professors (AAUP). *Policy Documents and Reports,* 10th ed. Baltimore: Johns Hopkins University Press, 2006 (known as the "AAUP Redbook").

Anderson, W.H.L. "A Delinquent Account: Academics and Bourgeois Society, McCarthyism in the '50s," *Monthly Review,* 41 (February 1990).

Baldwin, R.G., and J.L. Chronister. "What Happened to the Tenure Track?" in R.P. Chait (ed.), *The Questions of Tenure.* Cambridge, Mass.: Harvard University Press, 2002, 125-159.

Brand, N. (ed.). *Discipline and Discharge in Arbitration* Washington: Bureau of National Affairs, 1998.

Commission on Academic Tenure in Higher Education. *Faculty Tenure: A Report and Recommendations.* San Francisco: Jossey-Bass, 1973.

Dunsford, J.E. "Arbitral Discretion: The Tests of Just Cause," in G.W. Gruenberg (ed.), *Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators.* Washington, D.C.: BNA Books, 1989, 23-50.

Ehrenberg, R.G. and L. Zhang. "Do Tenured and Tenure-Track Faculty Matter?" *Journal of Human Resources,* 40(3) (Summer 2005), 647-659.

Euben, D.R., and B.A. Lee. "Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct," *Journal of College and University Law,* 32 (2) (2006), 241-308.

Finkin, M.W. *The Case for Tenure.* Ithaca, N.Y.: ILR Press, 1996.

Fisher, S.M. "Legislative Enactment Process: The Model Employment Termination Act," *Annals of the American Academy of Political and Social Science,* 536 (November 1994), 79-92.

Johnson, K. "University Changes Its Focus in Investigation of Professor," *New York Times,* March 26, 2005, A9.

_____. "Incendiary in Academia May Now Find Himself Burned," *New York Times,* February 11, 2005, A13.

Kaplin, W.A., and B.A. Lee. *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making,* 4th ed. San Francisco: Jossey-Bass, 2006.

Lawton, A. "Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment," *University of Pennsylvania Journal of Labor and Employment Law,* 9 (Spring 2007), 603-655.

Magner, D.K. "Minnesota Regents' Proposal Stirs Controversy with Faculty," *Chronicle of Higher Education,* September 20, 1996.

_____. "Fierce Battle over Tenure at U. of Minnesota Ends Quietly," *Chronicle of Higher Education,* June 20, 1997.

McKelvey, J.T. "Discipline and Discharge," in A.M. Zack (ed.), *Arbitration in Practice.* Ithaca, N.Y.: ILR Press, 1984, 88-102.

Miller, R.K. "Keynote Speech: ICCEE Conference at Union College," October 19, 2001. Accessed online on September 14, 2007, at http://www.olin.edu/about_olin/docs/union_college.asp

Muhl, C.J. "The Employment-at-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January 2001), 3-11.

Nolan, D.R. "Standards for Discipline and Discharge," in T. St. Antoine (ed.), T*he Common Law of the Workplace: The Views of Arbitrators,* 2nd ed. Washington, D.C.: Bureau of National Affairs, 2005, 169-200.

Oldham, J. "Due Process in Discipline and Discharge," in T. St. Antoine (ed.), *The Common Law of the Workplace: The Views of Arbitrators,* 2nd ed. Washington, D.C.: Bureau of National Affairs, 2005, 201-220.

Riccardi, N. "University of Colorado Ousts Controversial Professor; The Board of Regents Says It Is Firing Ward Churchill over Fraud and Plagiarism, Not a Divisive Post-9/11 Essay," *Los Angeles Times,* July 25, 2007, A10.

Saltzman, G.M. "Job Applicant Screening by a Japanese Transplant: A Union-Avoidance Tactic," *Industrial and Labor Relations Review,* 49 (1) (October 1995), 88-104.

_____. and Shlomo Sperka. "Public-Sector Bargaining in Michigan: Law and Recent Developments," in J. Najita and J.L. Stern (eds.), *Public Sector Bargaining.* Armonk, N.Y.: M.E. Sharpe, 2001, 106-136.

Van Alstyne, W. "Tenure: A Summary, Explanation, and 'Defense,'" *AAUP Bulletin,* 57 (Autumn 1971), 329-351. Reprinted in Finkin, 1996, 3-9.

York, M. "Remark on 9/11 Sparks Storm at College," *New York Times,* January 31, 2005, B3.