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***129** SPECIALIZED ADR TO SETTLE FACULTY EMPLOYMENT DISPUTES

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INTRODUCTION

This article presents for consideration an innovative approach to the resolution of faculty employment disputes at institutions of higher education. We discuss the framework in which faculty employment issues arise, the current state of alternative dispute resolution (ADR) as it is relevant to employment disputes, and the substantial benefits that we believe would be achieved by developing a specialized version of ADR to resolve faculty employment cases. [FN1]

I. THE UNIQUE ASPECTS OF COLLEGE AND UNIVERSITY FACULTY EMPLOYMENT

A. Academic Freedom and Peer Review

Colleges and universities constantly strive for overall excellence by faculty in the areas of teaching, scholarly research and service. Employment decisions affecting faculty are viewed as crucial to attaining this desired excellence. Faculty employment decisions are approached as among the most important decisions made by an institution, decisions to be made only after the most serious deliberations and extensive debate have taken place. In part ***130** because these decisions are viewed as so critical, and because these institutions guard vigorously their independence:

> College and university administrators almost universally believe that reappointment, promotion, and tenure decisions are the prerogative of peer review committees, department heads, deans, and others in the institution's administrative hierarchy. Judicial intrusions are not welcome. [FN2]

The fierceness with which the academic community guards its right to make decisions regarding admission to and advancement within its ranks is also explained by principles of academic freedom. The Supreme Court enumerated four essential academic freedoms of a university in the 1957 decision of Sweezy v. New Hampshire: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [FN3] The American Association of University Professors ("AAUP") expresses its commitment to academic freedom as follows: "A college or university is a marketplace of ideas, and it cannot fulfill its purposes of transmitting, evaluating, and extending knowledge if it requires conformity with any orthodoxy of content and method." [FN4]

One of the cornerstones of the aspect of academic freedom described as the right "to determine for itself on academic grounds who may teach," is the process of peer review. Through peer review, decisions about a candidate regarding appointment,

promotion and tenure are reached "on the basis of frank and unrestrained critiques" of an academic's qualifications by his or her peers. [FN5] The process requires that candid evaluations of one's peers be submitted in order that advancement be granted only to those who are most qualified for the job. [FN6] In its Statement on Government of Colleges and Universities, the AAUP maintains that "faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure and dismissal." [FN7] Allowing faculty governance of these matters through the peer review process furthers the AAUP goals of protecting academic freedom and preventing arbitrary decisions. [FN8]

The courts have recognized that peer review decisions deserve deference if academic freedom is to be preserved. [FN9] As the United States Court of Appeals ***131** for the Seventh Circuit stated in EEOC v. University of Notre Dame du Lac, "[c]ourts have no more business in substituting their judgment for that of a legitimate peer review determination than they do in determining whether a particular physician or surgeon is qualified to practice in a particular hospital." [FN10]

When first enacted, Title VII of the Civil Rights Act of 1964 exempted higher education from its coverage at the faculty level. [FN11] This exemption later gave way to the present state of the law allowing court challenges to these decisions. With no alternative forum available, disappointed faculty members now routinely turn to the courts when negative decisions are made by their peers. Most frequently, they challenge these decisions as the products of racial or gender discrimination. The result has been the serious diminishment of judicial deference to academic peer review decisions.

Some would argue that academic freedom is impacted little if at all by judicial review of promotion and tenure decisions. Even if that were so in the abstract, in practice the impact can be profound. Academics serving on peer review committees who harbor doubts about the value of a candidate's scholarly work are less than anxious to raise subtle questions knowing that lawyers, judges and juries are waiting to cross-examine the reviewers as to their concerns about quality. The academic world has little confidence that on subjects such as the quality of university level teaching and scholarly research and publication, the courts are better equipped to make accurate assessments. The end result of the spectre of judicial reassessment of peer review actions is a growing reluctance of academics and institutions to exercise their right to determine on academic grounds who will become part of their permanent faculties.

***132** B. Tenure Defined

Tenure has been defined as "an arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or physical disability, subject to dismissal for adequate cause or unavoidable termination on account of financial exigency or change of institutional program." [FN12] There are two types of full-time faculty appointments: 1) probationary appointments, and 2) appointments with continuous tenure. [FN13] In order to be granted tenure, faculty must complete a probationary period in which they are evaluated by their peers. [FN14] Tenure is granted after certain criteria have been met, including length of service, demonstrated excellence in teaching, the generation of notable scholarly research, and a record of collegiality and service to the university and broader communities. Tenure brings with it increased prestige, compensation and academic freedom. There is generally no single dispositive factor in awarding tenure; the decision is based on an evaluation of the overall performance of the faculty member. [FN15] Although universities often describe objective criteria to evaluate tenure candidates, the process is still to a large degree discretionary. [FN16] The merits of the candidate are considered in tandem with the needs of the university, budget considerations, course needs, and projected enrollment. [FN17] The primary goals of tenure are fulfilled even when denials of tenure are based on financial exigency because the primary purpose of tenure is to prevent arbitrary or retaliatory dismissal based on the university's dislike for statements or views expressed by the

professor, either in the classroom or ***133** outside of it. [FN18] Advocates of tenure in American colleges and universities defend the system because in their view, it serves the public by protecting academic freedom, [FN19] and academic freedom has the express support of the Supreme Court. [FN20] The crucial point is that professors who are free to research, instruct and comment without the fear of censure for their ideas are best able to serve the public by pressing forward on the frontiers of knowledge. Those who support the tenure system think of it less as a means of providing job security for one segment of the population and more as a way to ensure the free exchange of ideas in the academic setting. Whether one agrees or not, clearly our system of tenured faculty is a permanent part of academia and it raises unique legal considerations that should be addressed.

C. University Litigation

1. Employment Decisions Affecting Faculty

Faculty employment disputes involving higher education continue to increase in number. These claims include those arising under the First Amendment, race and national origin discrimination, sex discrimination, pay equity, accommodation under the disability laws, due process violations, and more recently, issues under collective bargaining agreements. [FN21] Although not all of these issues are implicated in hiring, promotion and tenure decisions, these disputes, like discharge cases in non-university settings, present an ever-increasing concern to higher education.

As discussed above, these challenged actions place squarely at issue the judgments of peer review committees and presently require that those decisions be defended in a judicial setting. Unless an impartial and more well-suited alternative to judicial review is established, the freedom to make academic judgments will be impaired by the threat of judicial intervention.

2. Special Considerations for Public Institutions

Denial of promotion or tenure raises contractual and regulatory issues in both the private and public sector. However, in the context of public institutions, such actions also raise constitutional issues, specifically the right to free speech found in the First Amendment and the constitutional right to due process. [FN22] Public universities therefore face additional and complicated constitutional challenges following adverse employment decisions, a condition which should further encourage the consideration of alternatives to traditional forms of litigation.

***134** (a) Tenure and Free Speech

Tenure detractors often urge that the protections afforded by the First Amendment in the context of public employment serve the same functions as the tenure system, therefore rendering tenure superfluous. As at least one commentator has pointed out, this theory is flawed because it presumes that these two protections are coextensive, when in fact, they may not be. [FN23] The First Amendment protects speech that is significant and/or in the public interest, while tenure provides protection to faculty for speech on broader, including insignificant, matters.

For the First Amendment to protect academic freedom as broadly as tenure does, thereby rendering tenure superfluous to the goal of academic freedom, faculty would need to be as willing to enforce their First Amendment rights in court as they are to enforce their tenure rights, which may not be the case. [FN24] Additionally, tenure protects activities such as research and administrative duties which are not protected by the First Amendment, the focus of which is the freedom of expression. [FN25]

Furthermore, because First Amendment claims are not dependent upon vested property

rights, these claims are available to nontenured faculty as well as tenured.

(b) Tenure and Due Process

Initially, the courts adhered to the notion that public employment was not a property right and therefore no due process protection need be afforded public employees. [FN26] However, the Supreme Court began to grant due process protection to public employees in the 1950's. [FN27]

Due process protection is provided by the Fifth Amendment, which provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment which states that "no State ... shall ... deprive any person of life, liberty or property, without due process of law." [FN28] Due process is comprised of both substantive and procedural due process. When applied to tenure decisions, the former limits the reasons for which tenure can be revoked, essentially requiring that the motivations for revocation are fair. The latter requires that faculty be informed of the possibility that tenure might be lost and be provided with suitable hearing proceedings and impartial decision-makers. [FN29]

***135** (c) Pre-tenure Due Process

Although the courts have rejected outright attempts by plaintiffs to assert that the denial of tenure affected their property rights, pre-tenure employment can become an entitlement in certain circumstances. [FN30] In the twin cases of Board of Regents of State Colleges v. Roth [FN31] and Perry v. Sinderman, [FN32] the Supreme Court addressed the due process protection that should be afforded professors in the public university setting. In Roth, the Court held that no property interests were taken away when a state university failed to renew a first-year professor's contract, because the state law that created that property interest did so for only one year. [FN33] However, in Perry, the Court found that when a state college that employed an untenured professor for ten years failed to renew that contract, the professor was entitled to due process protection. [FN34] The difference between Roth and Perry, therefore, was that the state statute in Perry created a "de facto" tenure system which did in fact create a property interest requiring due process protection. The Perry court held that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." [FN35]

Thus, in limited circumstances, nontenured faculty may be deemed to have property rights in a tenure status which they have not yet formally attained. Perry does, however, hold that, in evaluatingsubstantive due process claims of nontenured faculty, courts will not review the decision of the university de novo to determine if tenure should have been granted. Review instead will focus on whether evidence was presented to support the decision, a rather lenient standard.

Regardless of this more lenient standard, the case law suggests that even nontenured faculty at public institutions have the ability in some instances to assert constitutional claims for adverse employment decisions. As demonstrated in the following section, universities face even greater constitutional problems when terminating the employment of tenured faculty.

(d) Tenured Faculty

Once tenure is granted, faculty members at public institutions have a property right in their tenured position. [FN36] Therefore, decisions regarding dismissal of tenured faculty are subject to stricter scrutiny than of those for their non-tenured colleagues. The courts review the evidence to determine if "just cause" existed for the dismissal, and the burden of proof is on the institution ***136** to show their decision was supported by "just cause." [FN37] Essentially, the courts are

substituting their judgment for that of the peer review group in arriving at this determination, and a degree of academic freedom is thereby compromised.

The law also affords tenured faculty the protection of procedural due process. Procedural due process requires: 1) a hearing; 2) before an impartial decision-maker; 3) after reasonable notice of charges; and 4) an opportunity to prepare and present a defense. [FN38] These protections are deemed essential to preventing arbitrary dismissals. [FN39]

3. Increases in Litigation

In recent years, the amount of litigation involving post secondary institutions has increased dramatically. In 1999, a study found that claims filed per institution had risen from less than one per year to three per year over the previous five years. [FN40] Although not all of these claims are tenure-related, the increase in discrimination cases means that any negative tenure decision brings with it the potential for a legal challenge on discrimination grounds.

In part, the overall increase in litigation is due to the enactment of the array of laws against discrimination. [FN41] Also contributing to the increased number of cases are the increased efforts by colleges and universities to employ a more diverse faculty, in the context of an "up or out" system, leading to more negative tenure and promotion decisions involving minorities and women. [FN42] Another reason is the general increase in sex and race discrimination cases. As one court put it, "[t]oday almost every employee is a member of a protected statutory class based on age, race, gender, national origin, handicap or perception of handicap or something else, and those few who are not can, assert the judge-made protection against reverse discrimination." [FN43]

II. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative dispute resolution, or ADR, refers to any alternative to litigation that is provided privately, outside the judicial system. ADR includes arbitration, mediation, early neutral evaluation, summary jury trials, mini trials, and a variety of other forms. These methods of ADR can be undertaken voluntarily, by contract or agreement, or provided by judicial referral within the existing judicial system as a method of alleviating an already overburdened system and providing a more appropriate forum.

***137** One of the most prevalent forms of ADR is voluntary arbitration, defined as a voluntary adjudicative dispute resolution process in which parties refer their disputes to an impartial third party selected by them to hear their evidence and arguments and render a determination in settlement of their dispute outside the judicial system. [FN44] This method of ADR is usually a creature of contract, and most voluntary arbitrations are binding, unless they are specifically designated otherwise.

A. Arbitration v. Litigation

The advantages of arbitration over litigation are numerous when invoked in the proper setting. These advantages include the speed and economy with which a matter can proceed to hearing, procedural informality, better controls on expensive and abusive discovery, greater expertise of the decision-maker, flexibility in granting relief, privacy and confidentiality, finality of result, and in most instances, a lower level of belligerence and adversity. [FN45]

The rising costs of litigation and the potential for exposure to substantial adverse judgments have led many parties in many different settings to agree in advance to arbitrate their disputes. [FN46] The courts are often called upon to compel arbitration by one party when arbitration was specified in the contract, and they normally do so unless the evidence clearly indicates that the parties did not

intend the subject matter of the dispute to be arbitrable. In fact, courts are inclined to resolve any doubts in favor of arbitration where it appears the parties have agreed in advance to have their disputes arbitrated. [FN47]

One of the most attractive features of arbitration is that the parties can select a forum considered better equipped to resolve the differences between the parties. For example, for many years the construction industry has very successfully incorporated arbitration as a means of dispute resolution, employing as arbitrators experienced contractors, engineers, construction attorneys or consultants. The benefits of such a system are clear: the parties agree upon arbitrators who are skilled in the field and are able to understand the complex nature of construction disputes. The result is that highly fact- specific cases are resolved by those whose understanding of the issues vastly exceeds that of the average judge or jury. [FN48]

One of the additional benefits of arbitration over litigation is the limitation of and control over discovery, which can streamline and expedite the resolution of the dispute. Discovery is a hallmark of litigation and one of the ***138** most lengthy and expensive of its aspects. Any attorney who has had to answer numerous onerous interrogatories and requests for production can testify to this burden. Contrary to litigation, arbitration generally does not provide for such extensive discovery "in keeping with the policy ... speed, efficiency, and reduction of litigation expense." [FN49] Because extensive discovery and motion practices are avoided, arbitration results are achieved more quickly, often resulting in lower actual damages. The extent of discovery permitted can be specified in the arbitration agreement, however, as can the application of the relevant state's version of the Uniform Arbitration Act (UAA) or the Federal Arbitration Act (FAA) (both discussed in more detail below).

The FAA makes no provision for discovery and the courts have held that the Federal Rules of Evidence and of Civil Procedure do not apply, making the procedure much more informal. In place of the detailed, formal rules of the Federal Rules of Evidence, any and all relevant evidence, including hearsay, is generally permitted in arbitration proceedings, unless the contract between the parties provides otherwise. [FN50] The UAA also does not provide for discovery, although it does permit limited depositions in cases where a witness would "otherwise be unavailable" for the hearing. [FN51]

Because of the lack of unrestrained discovery and the informality of arbitration proceedings generally, arbitration often resolves disputes more quickly than traditional litigation. Additionally, arbitration frequently results in more predictable results than do jury trials, particularly with respect to damage awards, which tend to be more realistic than jury awards. This is largely due to the fact that arbitrators are less likely than a jury to make emotional decisions or to punish institutions simply because they are large and well-funded. As a result, arbitrators rarely award excessive punitive and/or compensatory damages. In fact, the commentators point out that there is a disincentive for arbitrators to impose such awards unless the circumstances are egregious because a professional arbitrator has to maintain a reputation for being reasonable or he or she will be unlikely to be selected in the future. [FN52]

***139** B. Mechanics of Arbitration

A well-drafted arbitration agreement should provide a simple and straightforward method for the selection of arbitrators. If a particular pool of experts is cited or a specific panel is referred to, then the arbitrator or arbitrators will be chosen from that group. Some arbitrations are conducted with one arbitrator, some with a panel of three or more, with three being by far the most common number in multi-arbitrator panels. In such a case, the arbitration agreement generally provides either that there will be three neutral arbitrators, or that each party will select its own arbitrator, and then those two will select the third arbitrator, who will be the true "neutral" deciding the case.

One of the grounds under most statutes for overturning an arbitration award is

"bias" of any of the arbitrators. The way to avoid such uncertainty is to select an arbitrator who, after full disclosure of any potential conflicts, is fully satisfactory to all of the parties. The rule of thumb is that any matter in the arbitrator's past, whether personal or professional, that might even have the appearance of influencing his impartiality should be disclosed to the parties. [FN53]

C. Appealability of Arbitration Decisions

Although the losing party may appeal an arbitration award to a court of competent jurisdiction on certain limited grounds, successful appeals are rare. [FN54] This is largely due to the fact that the parties have agreed in advance that the arbitration award will be final and binding, and the statutory grounds for overturning a decision are always very narrow, in light of the strong policy in favor of arbitration. In Fairchild & Co. v. Richmond, Fredricksburg & Potomac R.R. Co [FN55]., the U.S. District Court for the District of Columbia held that arbitration awards can be set aside for legal error by the arbitrators only if it resulted from "manifest disregard of the law," [FN56] and most courts will not even review the substance of an arbitration award at all.

D. Federal Arbitration Act

The Federal Arbitration Act [FN57] is a broad modern arbitration act that declares written arbitration provisions to be valid, irrevocable and enforceable whenever they are made in connection with a transaction "involving commerce" between the states, and maritime or foreign commerce. The FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." [FN58]

***140** Of primaryconcern for the purposes of this discussion is the language of § 1 of the FAA, which states in pertinent part: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [FN59] Historically, such language had been cited by some courts as a barrier for application of FAA rules to arbitration agreements in the employment context. [FN60]

The Supreme Court initially left the issue undecided in the landmark decision of Gilmer v. Interstate/Johnson Lane Corp. [FN61] Later, in a 1998 First Circuit case, Brennan v. King, [FN62] the court, in characterizing the burden on the employer, Northeastern University, stated: "a party seeking to substitute an arbitral forum for a judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate some claims." [FN63] In this case, the court held that Northeastern had met this burden because its faculty handbook contained a regular grievance procedure for binding arbitration and was therefore a part of the contract between the parties. [FN64] The First Circuit was joined by the majority of circuits that had considered the matter in holding that the FAA does in fact apply to contracts of employment, and construing the exclusion in § 1 narrowly to apply only to workers in the transportation industry. [FN65] The Ninth Circuit, however, had previously held that the FAA was inapplicable to employment contracts. [FN66] Had the Ninth Circuit position been universally adopted, arbitration would still have been available, although ***141** its availability would have had to flow from the states under their versions of the UAA. [FN67] Uncertainty would have remained over the enforceability of arbitration agreements because some states have not adopted UAA-based statutes while others have differing statutes. [FN68]

However, the 2001 Supreme Court decision in Circuit City Stores, Inc. v. Adams, [FN69] largely eliminated the uncertainty regarding the future of arbitration in the employment context. In Circuit City, a provision in the employee's application for work at a Circuit City store required all employment disputes to be settled by arbitration. [FN70] The employee later filed a discrimination lawsuit against Circuit City, prompting Circuit City to sue to enjoin the suit and to compel arbitration pursuant to the arbitration provision. [FN71] The Ninth Circuit held

that the agreement to arbitrate employment disputes could not be enforced by Circuit City under § 1 of the FAA because it covered a class of workers engaged in interstate commerce. [FN72] The Supreme Court reversed that interpretation of § 1 holding that the exclusion should be narrowly construed as covering only transportation employees. [FN73] In its opinion, the Court specifically addressed the benefits of arbitration in the employment context, including avoidance of litigation costs and avoidance of bifurcated proceedings in which state law precludes arbitration of some types of claims. [FN74] It is now clear that the Court's decision in this case will have far-reaching effects on arbitration in the employment context, and that the Supreme Court's reading of the FAA will encourage the adoption of employer-employee arbitration agreements.

Aside from the question of basic enforceability, an issue remains as to whether arbitration agreements that require arbitration of claims brought under the antidiscrimination statutes, such as Title VII, preclude actions by the EEOC to enforce these laws on behalf of aggrieved individuals. The Supreme Court will address this issue in its term beginning this fall in the case of EEOC v. Waffle House, Inc. [FN75]

In Waffle House, the Fourth Circuit addressed the effect of private arbitration agreements on the EEOC's ability to enforce federal antidiscrimination laws by suing employers on behalf of employees. Despite strong objections from the EEOC, the Fourth Circuit held that where an employee has signed ***142** an arbitration agreement, the EEOC cannot sue the employer on behalf of the employee for relief specific to the employee, such as backpay, reinstatement, or money damages. [FN76] The court also held, however, that the EEOC can sue the employer for broad-based injunctive relief, such as a permanent injunction barring the employer from engaging in discriminatory practices because such relief serves the greater public interest. [FN77] In reaching its decision, the Fourth Circuit attempted to strike a fair balance between the strong federal policy favoring enforcement of arbitration agreements and the EEOC's right to sue employers in federal court to "advance the public interest in preventing and remedying employment discrimination." [FN78]

Three Circuits have addressed this issue. The Fourth and Second Circuits agree that the EEOC cannot seek employee-specific relief in court if a private arbitration agreement exists, while the Sixth Circuit has held that the EEOC may pursue any type of relief, including employee-specific relief, despite the existence of an arbitration agreement. [FN79] The Supreme Court is expected to resolve the division among these Circuit Courts sometime during the 2001-02 Term. In the meantime, the EEOC continues to challenge the validity of mandatory arbitration of employees' statutory discrimination claims. [FN80]

E. The Future of Arbitration

Even prior to the Supreme Court's decision in Circuit City, the increase in commercial arbitration was evident in many arenas. The construction industry now provides for the arbitration of most of its disputes, having found the specialized knowledge of construction arbitrators to be useful and citing quality of performance as the major advantage of arbitration. [FN81] Currently, the standard contract of the American Institute of Architects (AIA) widely used in construction projects provides for arbitration under the rules of the American Arbitration Association.

The securities industry has for many years used arbitration to resolve internal disputes of the securities exchange and its employees. [FN82] Currently, the New York Stock Exchange and the National Association of Securities Dealers use a special Uniform Arbitration Code for employment disputes, and almost all broker/customer agreements contain arbitration clauses. [FN83]

***143** Additionally, the international setting has seen a dramatic increase in the use of ADR due to the increasing globalization of markets and international commerce. [FN84] Not only do international cases pose special problems for the courts, including differences in procedure and logistical concerns, but the complexity of international cases often makes arbitration a more efficient and

favorable alternative by providing a neutral forum and impartial procedures. [FN85] Thus there are several international tribunals in place to hear international arbitration disputes, including the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Settlement of Investment Disputes, and the Arbitration and Mediation Center World Intellectual Property Organization. [FN86]

Having already been widely adopted in the construction, securities and unionized settings, arbitration is becoming so favored by businesses both large and small that the American Arbitration Association, the largest private provider of ADR services, has developed a new "eCommerce dispute management protocol" with such notable signatories as Microsoft Corp., AT&T, FedEx, DaimlerChrysler and PepsiCo, Inc. [FN87] Also, the CPR Institute for Dispute Resolution is a very active and widely respected alliance of 500 global corporations and leading law firms that encourage the use of ADR, and particularly arbitrations, to help resolve business and public disputes. Large corporations undoubtedly have the wherewithal to conduct expensive litigation, but as Bill Slade, the President and CEO of the American Arbitration Association has stated: "[t]raditional companies have long recognized the enormous benefits of alternative dispute resolution ... experiencing resolutions that are less expensive than litigation, are private, and enable them to preserve and even enhance relationships and uphold the continuity of business." [FN88] Colleges and universities could also benefit from this approach.

III. SPECIALIZED ADR TO RESOLVE UNIVERSITY FACULTY EMPLOYMENT DISPUTES

A. General Discussion

Tenure and other faculty disputes present issues that are particularly suited for resolution through arbitration. Judgments regarding what constitutes notable scholarship, excellent teaching, and significant service are best made by academics, not juries, as such judgments go to the heart of academic ***144** freedom. Arbitration works well for cases that are highly-fact specific, with little or no need for judicial precedent. [FN89] Additionally, arbitration is confidential, which is ideal for universities and faculty members seeking to avoid the public airing of their differences. As discussed in Part II of this article, arbitration clauses can provide that any arbitration proceedings be conducted in reliance on the customs and norms of the trade or profession, which for tenure cases would call for a panel of academics experienced in the tenure system and knowledgeable in the relevant field. Finally, arbitration would be less costly for both the faculty member and the institution, and the dispute would most certainly be resolved more quickly.

Disputes over faculty employment decisions would be resolved better for all concerned if resolved through specialized arbitration. A panel of arbitrators could be selected from a pool of academicians who are experts in the particular field of the candidate and experienced in the peer review process. These academicians could include professors, deans, and administrators of universities. They could be selected from a permanent pool which reflected racial and gender diversity.

B. The Benefits of Arbitration for Faculty

Institutions considering using arbitration as a means of resolving tenure disputes must face the issue of how faculty members will view substitution of arbitration for access to the courts. Simply because ADR provisions are enforceable does not mean that faculty will embrace the concept and the loss of the right to a jury trial. For arbitration to provide a solution, faculty, as well as administrators, must accept this approach as better than what now exists.

The arguments in favor of arbitration are compelling in the academic setting. First, and most importantly, you gain a more well-suited decision-making body. Judges and juries are not generally familiar with the academic fields of the candidates and the intricacies of academic tenure procedures. It is true that we submit involved anti-trust, patent and securities cases to juries, but that does not

compel the conclusion that specialized tribunals in tenure cases would not provide a better forum for faculty disputes. At best, efforts to explain a candidate's substantive speciality and the quality of research to a jury is a difficult undertaking. With an experienced body of academics, guided by a fair but private process, the quality of decision making would improve with less potential harm to the principles of peer review.

Second, although there have been complaints about the cost of arbitration, the costs of litigation have been shown to be much higher, and cost reductions would certainly be beneficial to both universities and individual faculty. Moreover, an individual faculty member faced with instituting litigation against a large university with greater financial means would clearly be more likely able to bear the reduced costs of arbitration.

***145** Third, arbitration proceedings are not open to the public, which would benefit both faculty and university. [FN90] A faculty member ostensibly denied tenure for unremarkable research efforts might very well be better served by having that issue aired privately. [FN91] Similarly, public judicial proceedings could prove difficult for colleges and universities for which positive image is important. The opportunity to resolve disputes with former employees in the privacy of an arbitration proceeding should be a welcome prospect.

It should be noted that this approach would not preclude a faculty member from invoking governmental examination of a university's employment practices. The Court in Gilmer v. Interstate/Johnson Lane Corp., [FN92] addressed this issue, stating that an individual "claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." [FN93]

C. Criticism of Arbitration in the Employment Context

Much of the criticism of arbitration in the employment context centers on two arguments: 1) arbitration agreements are contracts of adhesion and 2) arbitration results in pro-employer results. While this article by no means attempts to address all of the arguments for and against arbitration in the employment context as a whole, this section will address these two issues as they relate to faculty employment disputes.

Critics of arbitration to resolve employment disputes begin from the premise that arbitration is inherently bad, and, as such, these critics search for ways by which employees can "escape" the evils of arbitration. Finding none, as arbitration agreements are, with limited exceptions, enforceable, such critics urge that arbitration agreements are contracts of adhesion. Limiting this discussion to the faculty context, the authors suggest that not only are arbitration agreements in this area not burdensome or adhesive, but on the contrary, confer myriad benefits upon faculty members. These benefits are addressed above.

A contract of adhesion, is by definition, a "[s]tandardized contract form offered to consumers of goods and services on essentially [a] 'take it or leave ***146** it' basis." [FN94] The trend is to relieve parties from onerous conditions imposed by such contracts. [FN95] The concept is that the consumer is the "weaker" party, unable to negotiate the terms and conditions of a contract, and lacking realistic options. [FN96] The average employee, one commentator argued, "[i]n her ignorant position ... is most likely to undervalue the right to a judicial forum." [FN97] It is noteworthy that in the tenure context, consumers, who may or may not be educated or knowledgeable about the advantages or disadvantages of an arbitration clause, are replaced by educated professionals, including even some of whom are professors of law. A faculty member is not as likely to enter into a contract of employment without having read it, as a consumer might be when signing an invoice for the purchase of a television, for example. The consumer protection model propounded by critics of arbitration for employment disputes simply does reflect the conditions relevant to faculty contracts.

Moreover, the authors envision a system in which professors and universities alike would administer a carefully designed arbitration model that would cause them to prefer the resolution of disputes outside of the traditional judicial system. In contrast to contracts of adhesion, which are frequently invalidated on public policy grounds, a system of specialized arbitration for tenure disputes would further public policy tenets by better preserving and protecting academic freedom.

One critic of arbitration of employment disputes described the existence of arbitration agreements in the employment context as "waiver of so important a right as access to the courts," and, as such, urged that such agreements should be presumptively unenforceable. [FN98] However, in the university employment context, court proceedings lose some of their luster. As discussed in this article, not only do judges and juries lack full understanding of tenure, but the costs to convey this information to the fact-finder may be prohibitive. Arbitration provides for improved resolution of disputes in this setting.

Many critics of arbitration in the employment context believe the right of access to the courts to be so valuable because these critics believe that arbitration is pro-employer, and that plaintiff employees obtain better results in court. [FN99] Yet with respect to higher education cases, the opposite may be true. As at least one commentator has pointed out, "the outcomes of the reported court decisions clearly favor the defendant college or university rather than the plaintiff faculty member." [FN100] While this study is by no means definitive, the fact that well-funded, institutional defendants fare well against individual ***147** plaintiffs in the court system is by no means a surprise, nor one that is limited in application to higher education cases. Whereas critics cite lower defense costs as a reason arbitration favors defendants, lower litigation costs are beneficial for the plaintiffs as well as defendants. In some cases, the benefit to the plaintiff is far greater. For example, a moderate cost savings would certainly be appreciated by a large university defendant, but for an individual plaintiff, that savings may mean the difference between instituting an action and not. [FN101]

In fact, faculty may well favor arbitration, if designed properly. At least one in-depth survey of employees who went to court over employment issues found that while one-third were "very satisfied" with the outcome, and twenty-three percent were somewhat satisfied, thirty-four percent were either "not too satisfied" or "not satisfied at all," and fifty-five percent said they would prefer an alternative system to deal with disputes in which an outside arbitrator would resolve the dispute. [FN102]

Another concern of critics is that the arbitrators will be drawn from the "industry," thus purportedly jeopardizing the employee's chances of a fair and unbiased outcome. [FN103] However, as this article suggests, in the context of tenure and promotion disputes, a panel of arbitrators from academia may prove more effective in evaluating disputes arising in this context than a jury. In fact, one major problem with the critics of arbitration is that in denigrating arbitration as inherently biased and unlikely to lead to fair outcomes, the critics must defend the court system as outcome-neutral, which it is not. [FN104]

David S. Schwartz urges that plaintiffs are disadvantaged in arbitration, as evidenced by the fact that damage awards tend to be smaller in arbitration than in jury trials, yet Schwartz admits that "there appear to be no systematic studies comparing results of arbitration and litigation for cases arising out of employment or other regulated relationships." [FN105] Furthermore, the data Schwartz does cite does not address the accuracy of the results; it hardly helps the average plaintiff if one in five plaintiffs are awarded a windfall in court, but the other four are left with nothing for their claims. As such, fewer windfalls to a handful of plaintiffs (which often are overturned, on appeal) and more accurate overall results would be the best outcome for all concerned.

Critics are also troubled by the privacy which shrouds arbitration. However, the very privacy that troubles the critics is likely to benefit both the defendant-university, which may wish to avoid negative publicity, and the ***148** plaintiff-professor, who may be seeking, or have already obtained, other employment and may

not wish the details of his or her previous employment to become public fodder.

Some very valid concerns that Schwartz and others raise are the prohibitive clauses sometimes found in arbitration agreements, including provisions that allow the employer to unilaterally select the arbitrator and provisions that preclude, for example, discovery, punitive damages, reinstatement or other remedies that might be available in court, the right to a record of the proceedings, and the right to be represented by counsel during arbitration proceedings. Obviously, such provisions are unfair and the authors do not advocate these provisions in this or any other context. Unfortunately, these valid concerns are often cloaked in exaggerated terms that portray arbitration as a hand-picked, employer-sponsored tribunal in which no employee can succeed, which are inaccurate at best. [FN106]

The introduction of arbitration into the faculty setting could also create concern among employees that their statutory rights might be eclipsed, for many of the tenure-related cases that are brought today are essentially sex and race discrimination claims, specifically provided for by federal statute. First, concern over whether Congress intended to preclude the arbitration of statutory claims such as sex and race discrimination was largely allayed in Gilmer. [FN107] The Gilmer court held that the party resisting arbitration would have the burden of proving such an intent on the part of Congress, noting the FAA's purpose to "reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." [FN108] Additionally, the Supreme Court emphasized what it termed a "liberal federal policy favoring arbitration agreements," in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. [FN109] Furthermore, both the Americans With Disabilities Act and Title VII contain provisions encouraging resolution of disputes through alternative dispute resolution, including arbitration, where appropriate and to the extent authorized by law. [FN110] In addition, as discussed above, the existence of an arbitration agreement may not preclude the EEOC's ability to institute suit challenging a university's employment practices. [FN111] Finally, no arbitration agreement is going to be enforceable if it prescribes application of substantive rules that deprive claimants of statutorily-protected rights.

***149** D. Suggested ADR Procedure for Tenure Decisions

The premise of this paper being that tenure and other faculty employment disputes would be much more appropriately decided in the private context, we would suggest that the appropriate procedural format for resolving these disputes could be structured along the following general guidelines.

1. The Specialized Tribunal

It is submitted that the AAUP would be the appropriate body to administer the suggested program of private dispute resolution given that the AAUP "has historically played a major role in formulating and implementing the principles that govern relationships in academic life," [FN112] and its members, including university faculty members and administrators, are already important in the peer review process. [FN113] The procedures to be followed, including specific guidelines for the arbitration provisions to be included in faculty contracts, could be made part of the AAUP's Statement on Procedural Standards in the AAUP's Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, or otherwise promulgated by the AAUP. A distinguished pool of faculty from all fields of academia who would serve as arbitrators for resolving tenure and other faculty employment disputes would be created, maintained and administered by AAUP. The criteria for inclusion in this pool would be recognized academic excellence evidenced by having achieved tenured status and high academic rank at a teaching and research institution. It is suggested that appointments to the pool would be made by the various participating institutions and would be regularly reviewed by AAUP.

When a challenged tenure decision or other faculty employment dispute arose at an institution that has opted for the arbitration process and after any internal

avenues of review have been exhausted, the matter could be submitted by the aggrieved faculty member to the AAUP ADR process. A list of proposed arbitrators, with at least some on the list having expertise in the substantive academic field of the candidate, would be named by the AAUP for consideration by the faculty member and the institution, and an attempt ***150** would be made to agree on a panel of three from the submitted list. If no panel could be named by agreement, the parties would each be allowed to strike names from the list, and AAUP would appoint a panel of three from the remaining names on the list, naming one as panel chair.

2. Basic Guidelines For The Agreement

The Agreement to arbitrate could be incorporated into an institution's standard faculty contract or made part of a faculty handbook. It would be drafted to satisfy basic principles of state contract law, include due process and fundamental fairness protections, be written in plain language and include a mutual obligation by the faculty member and the institution to resolve all employment disputes through arbitration. While institutions would be free to craft their own arbitration provisions, compliance with published AAUP guidelines would be required.

3. Discovery

Adequate discovery to allow for the fair presentation of claims would be provided for, including the availability of written interrogatories, requests for documents and other relevant materials, and some number of depositions of witnesses. The goal, however, would be to eliminate, to the extent possible, the discovery abuses that often characterize civil litigation.

4. Procedure

It is suggested that a preliminary hearing be conducted by the panel (probably by conference call) in order to arrange for the production of documents and the preparation of witness lists in order to organize more efficiently the procedure. Written submissions prior to hearing would also be allowed. The ability to compel the attendance of witnesses would apply. Within a prescribed period of time the panel would conduct a hearing and receive testimony and other evidence, including some level of participation by designated experts if desired. The panel would then render a written final and binding decision within a relatively brief period setting forth the reasons for their decision including findings and conclusions.

5. Remedies

There would be no limit on statutory remedies. Whatever relief would be available had the matter proceeded in court could be awarded by the arbitration panel, including. where appropriate, granting of tenure, promotion, backpay, compensatory and punitive damages, and attorney's fees.

6. Expenses

It is suggested that the participating institution involved would bear the expenses of the panel and the hearing, except for the costs of counsel for the faculty member, where not ordered paid to a prevailing faculty member by the panel.

***151** CONCLUSION

A variety of industries, including construction, securities, and international trade have embraced ADR as a means of dispute resolution. For the reasons discussed here, universities and colleges, and their faculties, may well find that their

mutual interests would be well-served by following these examples. The United States Supreme Court has set the stage for this type of reform with its decisions in Gilmer and Circuit City. This development presents an opportunity for academia worthy of very careful consideration.

The ultimate accomplishment of this new approach would be to keep academic decisions within academia while at the same time protecting the rights and providing a better forum for faculty members who believe decisions have been made for improper reasons.

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[FN1]. The faculties of some universities are or have been subject to the terms of collective bargaining agreements (CBA's) that provide for arbitration of certain employment disputes. See, e.g., Central State Univ. v. American Ass'n of Univ. Professors, 426 U.S. 124 (1999); Nelson v. Univ. of Maine Sys., 914 F. Supp. 643 (D. Me. 1996); Karetnikova v. Trustees of Emerson Coll., 725 F. Supp. 73 (D. Mass. 1989); Kaplan v. Ruggieri, 547 F. Supp. 707 (E.D.N.Y. 1982). Our approach addresses the vast majority of institutions where the faculties are not covered by CBA's. Additionally, even in those instances where faculty are covered by a CBA, the scope of the arbitration clause generally covers only those disputes involving claims of breach of the agreement itself. Our approach is broader and would apply to all employment related disputes between faculty and university, including statutory discrimination claims.

[FN2]. John D. Copeland & John W. Murry, Jr., Getting Tossed from the Ivory Tower: the Legal Implications of Evaluating Faculty Performance, 61 MO. L. REV. 233, 246 (1996).

[FN3]. 354 U.S. 234, 263 (1957).

[FN4]. American Ass'n of Univ. Professors, Recommended Institutional Regulations on Academic Freedom and Tenure, available at http:// www.aaup.org/rbrir.htm.

[FN5]. EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983). See also Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977).

[FN6]. See Notre Dame, 715 F.2d at 331.

[FN7]. American Ass'n of Univ. Professors, Statement on Government of Colleges and

Universities, available at http://www.aaup.org/Govern.htm

[FN8]. See id.

[FN9]. See Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3rd Cir. 1980). See also Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974).

[FN10]. Notre Dame, 715 F.2d at 339. In that dispute over a tenure denial allegedly motivated by racial discrimination, the University argued that a qualified privilege existed, protecting the unfettered disclosure of peer review materials sought by the EEOC through a subpoena. The Seventh Circuit held that the University was entitled to a qualified privilege. Although the Supreme Court later held that no such privilege existed in Univ. of Pennsylvania v. EEOC, 493 U.S. 182 (1990), the Supreme Court did not minimize the importance of peer review. It held only that the burden of producing peer review materials to the EEOC does not unduly infringe on that important value system. See id. at 201.

[FN11]. See, e.g., Susan L. Pacholski, Comment, Title VII in the University: the Difference Academic Freedom Makes, 59 U. CHI. L. REV. 1317 (1992). Title VII of the Civil Rights Act of 1964 forbids employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1994). When first enacted, Congress exempted academic institutions from the scope of this Act. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (1994)) (Congress exempted "educational institutions with respect to the employment of individuals to perform work connected with the educational activities of such institution"). In 1972, Congress removed this exemption. Equal Employment Opportunity Act of 1972, Pub. L No. 92-261 § 3, 86 Stat. 103-04. The House Committee Report accompanying the amendment stated: "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment." HR Rep. No. 92- 238, at 19-20 (1971).

[FN12]. Daniel E. Hall, Issues in Higher Education: the First Amendment Threat to Academic Tenure, 10 U. FLA. J.L. & PUB. POL'Y 85, 89 (1998).

[FN13]. See American Ass'n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure, available at http://www.aaup.org/1940stat.htm.

[FN14]. See Copeland & Murry, supra note 2, at 250.

[FN15]. See Hall, supra note 12, at 89-90.

[FN16]. See id. The AAUP, in its Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments Part I, states:

> At many institutions ... the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the morale and the professional future of the faculty member.

American Ass'n of Univ. Professors, Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, available at http://

www.aaup.org/rbrenew.htm.
The AAUP policies on academic freedom have been said to directly influence "the development of a doctrine of academic freedom in the United States." Jim Jackson, Express and Implied Contractual Rights to Academic Freedom in the United States, 22 HAMLINE L. REV. 467, 469 (1999). Jackson notes that the AAUP has investigated many complaints against universities, has provided language that is now part of many academic employment contracts, and has been so involved that it has achieved a "common law of the University." Id. at 470

[FN17]. See Copeland & Murry, supra note 2, at 251.

[FN18]. See Jackson, supra note 16, at 480.

[FN19]. See Hall, supra note 12, at 89.

[FN20]. See Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1995) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[FN21]. See Lelia B. Helms, Postsecondary Education, 31 URB. LAW. 973 (1999).

[FN22]. See Hall, supra note 12, at 90.

[FN23]. See id. at 95-97.

[FN24]. See id. at 95.

[FN25]. See id.

[FN26]. See, e.g., McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892). This notion has been termed the "doctrine of privilege," indicating that it is a privilege, rather than a right, to retain government employment. Corinne D. Kruft, Note, McDaniels v. Flick: Terminating the Employment of Tenured Professors - What Process is Due?, 41 VILL. L. REV. 607, 609 n.7 (1996). Without any rights to employment, the government could deny the individual due process in employment decisions. See id.

[FN27]. See Kruft, supra note 26, at 611.

[FN28]. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1 (emphasis added).

[FN29]. See generally Kruft, supra note 26, at 607.

[FN30]. See Copeland & Murry, supra note 2, at 254.

[FN31]. 408 U.S. 564 (1972).

[FN32]. 408 U.S. 593 (1972).

[FN33]. See Roth, 408 U.S. at 566-67.

[FN34]. See Perry, 408 U.S. at 603.

[FN35]. Id. at 601.

[FN36]. See Copeland & Murry, supra note 2, at 259.

[FN37]. Id. Some examples of "just cause" for termination include: immorality, abusive conduct, insubordination, violations of university rules and regulations, incompetence, and financial exigency of the university. See id. at 260.

[FN38]. See Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976).

[FN39]. See Copeland & Murry, supra note 2, at 277.

[FN40]. See Helms, supra note 21, at 973. This figure excludes personal injury and property damage claims. Id.

[FN41]. See Copeland & Murry, supra note 2, at 252.

[FN42]. See Barbara A. Lee, Employment Discrimination in Higher Education, 26 J.C. & U. L. 291, 296 (1999).

[FN43]. Bickerstaff v. Vassar Coll., 992 F. Supp. 372, 377 (S.D.N.Y. 1998).

[FN44]. DOUGLAS H. YARN, ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA § 8-2 (2d ed. 1997).

[FN45]. COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS xxiii (Thomas J. Stipanowich and Peter H. Kaskell eds., 2001).

[FN46]. See James J. Tansey, The Principal Differences between Arbitration and Litigation, in COMMERCIAL ARBITRATION FOR THE 1990'S 41-42 (Richard J. Medalie ed., 1991).

[FN47]. Michael F. Hoellering, Arbitrability, in COMMERCIAL ARBITRATION FOR THE 1990'S 1 (Richard J. Medalie ed. 1991).

[FN48]. See John A. Sherrill, ADR In Your Trial Practice, Institute of Continuing Education in Georgia; Successful Trial Practice Seminar (1999).

[FN49]. Tansey, supra note 46, at 42. However, arbitrators will normally allow

reasonable discovery, including depositions, if the parties agreebetween themselves.

[FN50]. See Sherrill, supra note 48, at 9.

[FN51]. Id. at 12. The jurisdictions which have adopted arbitration statutes based on the UAA are: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming. Other jurisdictions may have arbitration statutes that are not modeled after the UAA.

[FN52]. See, e.g., Thomas J. Piskorski & David B. Ross, Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes, 19 EMP. REL. L.J. 2 at 205 (1993).

[FN53]. See Sherrill, supra note 46, at 5.

[FN54]. Matthew M. Bodah, Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician, 29 J. L. & EDUC. 317, 323 (2000).

[FN55]. 516 F. Supp. 1305 (D.D.C. 1981).

[FN56]. Id.

[FN57]. 9 U.S.C. § § 1-16 (2001).

[FN58]. State of New York v. Oneida Indian Nation of N.Y., 90 F.3d 58, 61 (2d Cir. 1996).

[FN59]. 9 U.S.C. § 1 (2001) (emphasis added).

[FN60]. See, e.g., Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd by 532 U.S. 105 (2001).

[FN61]. 500 U.S. 20 (1991). The Supreme Court in this case enforced an arbitration agreement that required a nonunion employee to arbitrate any disputes with his employer.

[FN62]. 139 F.3d 258, 264 (1st Cir. 1998) (citing McCarthy v. Azure, 22 F.3d 351, 354-55 (1st Cir. 1994). Michael Louis Brennan was a tenure-track faculty member at Northeastern University who alleged in his suit against the university that he was eligible for promotion to tenure rank but was denied tenure because he was gay and HIV-positive. His suit alleged that the university violated federal and state anti-discrimination laws and breached his contract of employment. Northeastern moved for summary judgment on the ground that Brennan failed to pursue the grievance procedure specified in his contract.

[FN63]. Id. at 264.

[FN64]. See id. In a recent California case, the state Court of Appeals held that the evidence established the existence of an arbitration agreement between a former employer and former employee due to the fact that the employee had received mailings describing the plan and then returned to work. See Craig v. Brown & Root, Inc., 100 Cal. Rptr. 2d 818 (Cal. App. 2000). The court went on to hold the agreement enforceable. See id.

[FN65]. See Corion Corp. v. Chen, Civ. A. No. 91-11792-Y, 1991 WL 280288 (D. Mass. Dec. 27, 1991) (collecting cases); see e.g., Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984), cert denied, 469 U.S. 1160 (1985); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972); Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971); Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am., 235 F.2d 298 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437, 207 F.2d 450 (3d Cir. 1953).

[FN66]. See Circuit City, 194 F.3d at 1070, referring to its earlier decision in Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999), in which the court held that the FAA does not provide for the enforceability of arbitration agreements in labor or employment contracts.

[FN67]. See Piskorski & Ross, supra note 52, at 207.

[FN68]. The UAA has been explicitly stated to apply to the employment context and can be specified as the default statutory provision in an employment agreement. See Jamie K. Hunt et al., Recent Developments: The Uniform Arbitration Act, 1999 J. DISP. RESOL. 219, 224 (1999). Additionally, the parties to an arbitration agreement can specify that the American Arbitration Association (or some other provider) rules apply in order to preempt application of the UAA. See id. at 225.

[FN69]. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105 (2001).

[FN70]. See id.

[FN71]. Id.

[FN72]. See Circuit City, 194 F.3d at 1070.

[FN73]. See Circuit City, 532 U.S. at 105.

[FN74]. See id.

[FN75]. 193 F.3d 805 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (U.S. Mar. 26, 2001) (No. 99-1823).

[FN76]. See id. at 805.

[FN77]. See id.

[FN78]. Id. at 809 (citing General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980)).

[FN79]. See Waffle House, 193 F.3d at 805, EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298 (2d Cir. 1998). Compare EEOC v. Northwest Airlines, Inc., 188 F.3d 695 (6th Cir. 1999).

[FN80]. The Ninth Circuit remains the only circuit supporting the position that Title VII disputes cannot be made subject to compulsory arbitration agreements. See Craft v. Cambell Soup Co., 177 F.3d 1083 (9th Cir. 1998).

[FN81]. See Sherrill, supra note 48, at 1.

[FN82]. See Yarn, supra note 44, at 222.

[FN83]. See id.

[FN84]. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS, supra note 45, at 319. Between 1976 and 1987, the International Chamber of Commerce (ICC) saw less than 300 arbitration cases per year. Contrast those numbers with 1998, in which over 450 cases were brought to the ICC. Id.

[FN85]. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS, supra note 45, at 320.

[FN86]. Id. at 367-68.

[FN87]. American Arbitration Association, American Arbitration Association Announces New Ecommerce Protocol: Standards Developed for Online Business-to- Business Dispute Management, available at http:// www.adr.org/about/whatsnew/20000103aa.html (Jan. 4, 2001).

[FN88]. Id.

[FN89]. See ABRAHAM P. ORDOVER ET AL., ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 6 (1993); see also Lee, supra note 42, at 291.

[FN90]. See Piskorski & Ross, supra note 52, at 209. The American Arbitration Association National Rules state in Rule 18: "The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." Id.

[FN91]. See supra Part II. The AAUP states in its Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments at 4:

> In many situations, of course, a decision not to reappoint will not reflect adversely upon the faculty member. An institution may, for example, find it necessary for financial or other reasons to restrict its offerings in a given department. The acquisition of tenure may depend not only upon satisfactory performance but also upon a long-term opening. Nonrenewal in these cases does not suggest a serious adverse judgment.

American Ass'n of Univ. Professors, Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments Part I, supra note 16, at 21.

[FN92]. 500 U.S. 20 (1990).

[FN93]. Id.

[FN94]. BLACK'S LAW DICTIONARY, 40 (6th ed. 1990)

[FN95]. See id.

[FN96]. See id.

[FN97]. David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33, 57 (1997).

[FN98]. Id. at 36.

[FN99]. Id. at 38.

[FN100]. Perry A. Zirkel, Academic Freedom of Individual Faculty Members, 47 EDUC. L. REP. 809, 824 (1988).

[FN101]. In fact, one commentator even cited as one of the reasons "why corporate defendants like arbitration" the fact that there are "[l]ower plaintiff's attorneys fees," which in turn "mean less potential expense to the corporate defendant." Schwartz, supra note 94, at 60. Schwartz does not acknowledge that those lower fees, first and foremost, mean greater access to a dispute resolution mechanism for the plaintiff. Id.

[FN102]. See Joseph R. Grodin, Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer, 14 HOFSTRA LAB. & EMP. L.J. 1, 52 (1996).

[FN103]. See Schwartz, supra note 97, at 60.

[FN104]. See id. at 69.

[FN105]. See id. at 64.

[FN106]. The following language is an example, taken from a law review article castigating arbitration in the employment context:

> Note that what we think of as 'law' has become 'nonlaw' at least insofar as your legal rights have been rendered unenforceable in a judicial tribunal. Your rights are only enforceable in a system of private justice, in a forum crafted by your employer, and foisted upon you without any real bargaining or choice.

Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 DENV. L. REV. 1017, 1018 (1996).

[FN107]. See Gilmer, 500 U.S. 20.

[FN108]. Id. at 24.

[FN109]. 460 U.S. 1, 24 (1983).

[FN110]. See Grodin, supra note 102, at 28. (citing 42 U.S.C. § § 1981, 12212).

[FN111]. See Gilmer, 500 U.S. at 28.

[FN112]. American Ass'n of Univ. Professors, Statement on Collective Bargaining, available at http://www.aaup.org/rbcb/htm. Founded in 1915, the AAUP has been a leader in establishing standards for the academic profession. Its 1940 Statement of Principles on Academic Freedom and Tenure codified the profession's assertions of the need for academic freedom and tenure for professors. Since then, the statement has received nearly universal acceptance. Matthew W. Finkin, A Higher Order of Liberty in the Workplace: "Academic Freedom and Tenure in the Vortex of Employment Practices and Law" in FREEDOM AND TENURE IN THE ACADEMY 357 (Van Allstyne ed., 1993). The AAUP has also released a Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, which includes standards and criteria for tenure appointment. See generally AAUP, Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments Part I, supra note 16, at 21.

[FN113]. Of course, if the AAUP declined to oversee this program of private dispute resolution, a voluntary consortium of universities and colleges could assemble the necessary structure called for by this approach.

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