

Article

***833 THE ROLE OF COLLEGIALITY IN HIGHER EDUCATION TENURE, PROMOTION, AND
TERMINATION DECISIONS**

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I. INTRODUCTION [\[FN3\]](#)

Courts have upheld the right of a college or university to consider a faculty member's working relationship with his or her colleagues as a valid basis upon which to make a tenure, promotion, or termination decision for many years. [\[FN4\]](#) However, the word "collegiality" was not the focus of court decisions until 1981, when the Court of Appeals for the Fourth Circuit in *Mayberry v. Dees* [\[FN5\]](#) introduced into higher education case law, seemingly with approval, the defined concept of "collegiality" [\[FN6\]](#) as a distinct criterion upon which to base tenure and promotion decisions. [\[FN7\]](#)

From the time of *Mayberry* on, provocative discussions and debates have increased on college and university campuses and in the literature over the appropriate role of collegiality in faculty tenure, promotion, and termination [*834](#) decisions. [\[FN8\]](#) While most institutions do not specify collegiality as a distinct criterion for tenure or promotion, many include within the teaching or service components a requirement that the candidate "work well with colleagues," "demonstrate good academic citizenship," or "contribute to a collegial atmosphere." [\[FN9\]](#)

As members of the academy continue to ponder the subject, many difficult-to-answer questions continue to present themselves: Should the ability to [*835](#) "get along," to "fit in," or to "work well" with one's colleagues be a requirement for tenure? Should collegiality be a separate factor in tenure decisions or should it be considered as a part of the evaluation of teaching, research, and service? If collegiality is to be considered in tenure decisions, what weight should it be given? Is the college or university professor supposed to be a congenial coworker or a competent professional--or, to a degree, both? Are academic freedom and free speech stifled or even threatened by an emphasis on civility and cordial working relationships among faculty? What can and what should a college or university do about a faculty member whose speech or conduct lacks appropriate civility and destroys the collegial environment necessary for the institution to maintain a harmonious and efficiently functioning department? Does the use of collegiality as a criterion for tenure serve as a means for concealing discriminatory treatment of women and minorities?

Collegiality has been increasingly used as a criterion in tenure and termination decisions. [\[FN10\]](#) While its use has been carefully scrutinized by the courts and consistently upheld, [\[FN11\]](#) collegiality has not been without its critics. [\[FN12\]](#) The American Association of College and University Professors ("AAUP") has recently adopted a statement, *On Collegiality as a Criterion for Faculty Evaluation*, [\[FN13\]](#) in which it recognizes that collegiality is an important aspect of faculty performance, but asserts that to isolate collegiality as a distinct criterion for

tenure poses a potential danger to academic freedom. [FN12] Faculty plaintiffs have argued that consideration of collegiality in tenure and termination decisions constitutes a breach of contract when it is not identified as a *836 distinct criterion for evaluation in the employment contract or the institutional tenure policy. [FN13] Courts and legal scholars have cautioned that the subjective nature of collegiality permits it to be easily used as a pretext for discrimination. [FN14]

This article will present an analysis of the policy arguments for and against consideration of collegiality in higher education tenure, promotion, and termination decisions and a review of the relevant case law that discusses and analyzes the issue. [FN15]

II. ARGUMENTS FOR CONSIDERATION OF COLLEGIALITY

The benefits to the campus of a more civil, collegial faculty are enormous. [FN16] Productivity and job satisfaction increase, and the institution is much better served when faculty assist each other in a collegial and cooperative manner. *837 One writer has commented: "The successful governance of the academic business of the university depends on cooperation." [FN17] For the college or university to function at its best, faculty should interact in a cooperative and collaborative manner.

The arguments in support of the consideration of collegiality as a factor in tenure, promotion, and termination decisions focus on three main propositions: (A) There is a legitimate expectation that faculty will and should cooperate with their colleagues; (B) Reason and common sense dictate the consideration of collegiality in any significant employment decision; and, (C) Courts considering the issue of use of collegiality in faculty employment decisions have consistently upheld the importance of its consideration.

A. Legitimate expectation that faculty will cooperate with colleagues

Faculty do not operate in isolation from their departmental colleagues or from other faculty in related disciplines. They must discuss, cooperate, compromise, and act as a group in making decisions regarding the development of curriculum, the scheduling and teaching of classes, the advising of students, and the allocation of resources and space. These important aspects of the work of academics require cooperation and collegial interaction. [FN18] None of these responsibilities can be carried out successfully if each faculty member acts in isolation and solely in his or her own personal interest. [FN19]

Colleges and universities have legitimate and long-recognized expectations that faculty will cooperate and work in a positive manner in the best interests of the institution. In 1972, the Court of Appeals for the Fourth Circuit in *Chitwood v. Feaster* [FN20] upheld the nonrenewal of several nontenured faculty members whose own affidavits reflected a pattern of "bickering and running disputes with the department heads," [FN21] and said: "A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department." [FN22] Other cases have echoed this point. [FN23] This expectation is even stronger as interdisciplinary *838 programs increase and rigid barriers between academic disciplines diminish. [FN24]

Even though resisting the identification of collegiality as a distinct, fourth criterion for tenure, the AAUP has counseled faculty members in its Statement on Professional Ethics to have due respect for the opinions of others. [FN25] Other AAUP policy statements also refer to the need for faculty to demonstrate respect for each other. [FN26]

B. Reason and common sense

Reason and common sense require the consideration of collegiality in every

important employment decision. [FN27] A person's ability to work with others in a civil and positive manner is taken into account in almost all hiring and promotion decisions. Whether one is a secretary in an office setting, a carpenter building homes, a bus driver, or a lawyer, the nature of nearly every occupation requires a significant amount of contact with others and a basic level of civility and cooperation in the workplace. The college or university campus is no exception. [FN28]

C. Support given by the courts to consideration of collegiality

The great majority of courts that have addressed the issue of a faculty member's working relationship with his or her colleagues as a factor in a tenure, *839 promotion, or termination decision have concluded that collegiality is an appropriate element for consideration. [FN29] In fact, the authors have found no case in which a court rejected consideration of collegiality unless there was evidence of discrimination or a violation of free speech or academic freedom. [FN30] Courts have recognized that the ability to be collegial is an essential element of being able to carry out the more explicitly stated criteria of teaching, scholarship, and service. [FN31] Collegiality is not an unrelated or independent *840 criterion; it is, instead, a partial means of evaluating or successfully performing the other criteria. [FN32]

III. ARGUMENTS AGAINST CONSIDERATION OF COLLEGIALITY

While the benefits to the college or university community flowing from civility, cooperation, and collegiality among its faculty are significant, these benefits at times may come with a cost. Those who express genuine concerns over the increased emphasis placed on civility and collegiality as factors in tenure, promotion, and termination decisions raise three main arguments: (A) Consideration of collegiality constitutes a breach of contract when collegiality is not stated as a distinct criterion in the institutional tenure policy; (B) Collegiality, because of its subjective nature, can easily be used as a pretext for unlawful discrimination; and, (C) The isolation of collegiality as a distinct criterion for evaluation poses a significant threat to academic freedom.

These arguments have been raised by faculty plaintiffs in numerous cases involving tenure, promotion, and termination decisions. Exemplar cases are set forth below. While the cases are presented under the heading of the primary legal issue raised by the plaintiff in each, it is important to note that in many instances multiple arguments were made by the faculty member involved.

A. Breach of contract

The most persistent argument raised by faculty denied tenure or promotion because of a lack of collegiality is that the university's consideration of his or her personality, collegiality, or "fitting in" in the tenure evaluation violated either the employment contract or institutional tenure policy, when those factors were not specifically defined as part of the criteria for tenure. [FN33]

Although the plaintiff also raised constitutional and civil rights violations, a breach of contract argument was central to her case in *University of Baltimore v. Iz*. [FN34] Dr. Peri Iz, an assistant professor in the university's business school, was reviewed for tenure in 1993. The tenure and promotion policies of the University of Maryland System, the University of Baltimore, and the Merrick School of Business set forth criteria for tenure and promotion as: teaching effectiveness; research/scholarship; and service to the university, the *841 profession, and the community. [FN35] During the course of her tenure review, concerns about Iz's collegiality were raised. The department chair described her as inflexible, defensive, and unwilling to take constructive advice. A departmental faculty member expressed the view that although she was a good teacher, had publications, and was involved in professional activities, he was concerned about "her attitude and

collegiality." [FN36] The dean recommended against tenure and promotion, expressing concerns about Iz's teaching and noting that she was reluctant to accept peer evaluation. The provost and president concurred with the dean, basing their decisions in significant part on Iz's difficulties with her departmental colleagues. [FN37]

Iz based her breach of contract claim on the assertion that, under her contract, the university was required to evaluate her for tenure and promotion solely upon the three explicitly stated criteria (teaching, research, and service) and was estopped from considering the issue of her collegiality since collegiality was not specifically included as a criterion for tenure in the relevant tenure policies. The university contended that the concept of collegiality was inherently included in the criteria of teaching, research, and service and was, therefore, appropriate for consideration in the tenure and promotion review process.

After a three week trial in July 1996, the jury rejected Iz's civil rights and constitutional claims, but determined that the university had breached her employment contract and awarded her \$425,000 in compensatory damages. [FN38] The university appealed, arguing that the trial court erred in failing to rule, as a matter of law, that collegiality is a factor that may be considered in promotion and tenure review even though not expressly included in the university's promotion and tenure policies. [FN39]

Agreeing with the university, the appellate court said: "We are persuaded that collegiality is a valid consideration for tenure. Although not expressly listed among the School's tenure criteria, it is impliedly embodied within the criteria that are specified. Without question, collegiality plays an essential role in the categories of both teaching and service." [FN40]

In reaching its decision, the Iz court noted the wide discretion inherent in the tenure process and the reluctance of the courts to become ensnared in an academic institution's decision with regard to tenure. [FN41] The Court of Special Appeals reversed the trial court's refusal to grant the university's motion for *842 judgment as a matter of law, concluding that "the University did not breach [her] contract when it considered Dr. Iz's collegiality." [FN42] The Maryland Court of Appeals declined to review the case, thereby making the decision of the Court of Special Appeals final. [FN43]

The plaintiff raised a breach of contract argument in *Kirsch v. Bowling Green State University*. [FN44] Kirsch was denied tenure by the university in its College of Business Administration after having received negative recommendations from the tenured faculty in his department, from the dean, from the university's review committees, and from the vice president for academic affairs. The president agreed with the negative recommendations and denied tenure. [FN45]

The tenured departmental faculty noted in their review that, among other things, Kirsch had not participated extensively in departmental discussions regarding course focus and content, had not seemed open to suggestions for improvement in his teaching, and had demonstrated little interest in such areas as advising and curriculum development. [FN46] In addition, the department had received far more student complaints about Kirsch's classroom behavior (described as nasty and arbitrary) than it had received in years about any other faculty members. Kirsch had been warned about these problems in his annual evaluations over the previous five years. [FN47]

Kirsch contended that the university breached his employment contract by using improper criteria in his tenure review, which were not contained in the university's Academic Charter. [FN48] The charter provided that candidates for tenure would be granted or denied tenure solely on the basis of "teaching effectiveness, scholarly or creative work, service to the University and attainment of the terminal degree or its professional equivalent." [FN49] Kirsch asserted that the university's consideration of his personality, collegiality, and his ability to "fit in" were additional criteria above and beyond those identified in the charter. [FN50] The trial court held that Kirsch's collegiality and personality were properly considered

by the university because they necessarily permeated his ability to contribute to teaching, research, and service and were, therefore, properly considered by the university. [\[FN51\]](#)

***843** The Ohio Court of Appeals agreed and upheld judgment for the university saying: "[W]e conclude that the extent to which BGSU considered appellant's personality and/or collegiality was not such that it constituted an additional criterion but, rather, personality and collegiality was properly considered only as it affected appellant's performance with regard to teaching, research and service." [\[FN52\]](#)

"While we do not endorse the use of a candidate's personality as a separate and distinct criterion in a case like this, personality and collegiality, as they effect [\[sic\]](#) teaching, research and service, are proper considerations." [\[FN53\]](#)

The legitimacy of using collegiality as a criterion for tenure was also at issue in *McGill v. Regents of University of California*. [\[FN54\]](#) McGill, a professor of mathematics, was denied tenure because of his lack of current research and because of his lack of collegiality. In particular, both departmental faculty and the chair stated that McGill had denigrated his colleagues to candidates for new teaching positions, had not interacted well with graduate students, and had not worked in a collegial fashion with some of his departmental colleagues. [\[FN55\]](#) McGill insisted that his denial of tenure was based solely on his lack of collegiality, which was not one of the stated criteria [\[FN56\]](#) upon which tenure decisions were to be based. [\[FN57\]](#) The appellate court disagreed: "Although not expressly listed as one of the tenure criteria, it is inescapable that collegiality is an appropriate consideration. The American Association of University Professors' Statement on Professional Ethics contemplates as much." [\[FN58\]](#)

In this well-reasoned opinion, the court also pointed out that when decisions such as tenure are made, there are both objective and subjective components which the university must address. Often included within the subjective component is "'an analysis of the candidate's personality.'" [\[FN59\]](#) The court further cautioned of the inappropriateness of judicial determination of the merits of a tenure case, stating: "The University may even have shown poor judgment in not granting McGill tenure. But nothing in the record suggests its decision was made for illegal or improper reasons. We cannot interfere with it." [\[FN60\]](#)

***844** Again, addressing the question of whether a college or university has the discretion to use collegiality in its tenure, promotion, and termination decisions, the court in *Romer v. Board of Trustees of Hobart & William Smith Colleges*, [\[FN61\]](#) rejected the notion that listing specific criteria in the faculty handbook somehow limits the types of information that the college may assess in its tenure review process. Frank Romer held a tenure track position in the classics department. He was reviewed for tenure and evaluated on the stated criteria in the faculty handbook and tenure guidelines--professional competence as a teacher, noteworthy service to the college community or curriculum, and scholarly and professional contributions. [\[FN62\]](#) The college-wide tenure and promotion committee recommended against granting tenure, the president concurred, and Romer was given a terminal contract.

As part of the review process, the dean of the college wrote to the tenure and promotion committee expressing her concerns about Romer's "extremely volatile relationship" with another classics professor. The dean related that one student, who was serving on Romer's tenure review committee, had made a "complete retreat" from her classics studies because of the strain produced by the "'public enmity between her two teachers.'" [\[FN63\]](#) Furthermore, the dean added that as a private and personal opinion (not to be taken as advice on the tenure decision), she found it "highly problematic for faculty members not to be able to keep their private difficulties contained." [\[FN64\]](#) She also stated that the "highly public nature of Professor Romer's and Sage's problems with one another ... is highly debilitating in terms of their relationships-- both singly and as a department--to the community." [\[FN65\]](#) She closed by saying that the committee must decide what bearing all of this has on the processes of review for tenure and renewal of contract. [\[FN66\]](#) She closed by saying that the committee must decide what bearing all of this has on the

processes of review for tenure and renewal of contract. [FN67]

The tenure and promotion committee declined to discuss the dean's letter, stating that it "contains no information relevant to a tenure decision as described in our bylaws" and that the problems between Romer and Sage, while unfortunate, did not involve teaching, scholarship, or service. [FN68] The committee recommended against tenure, finding that Romer's candidacy was deficient in teaching, scholarship, and service. Tenure was denied, and Romer sued, alleging that the college breached his contract by using criteria that were not explicitly stated in the handbook and tenure guidelines. [FN69]

***845** The question before the court was whether the handbook expressly limits or precludes the colleges' right to consider Romer's relationship with Sage. The court found no such limitation. It found, instead, that language in the bylaws stated specifically that "relationships with students and faculty are an important aspect of a teacher's function" and that "'teaching involves not only one's students but one's colleagues, and requires mutual respect and consideration.'" [FN70] The court noted further that there was no indication that the tenure and promotion committee was motivated by "malicious curiosity into Romer's personal affairs. Rather, the information related to the effect that Romer's problems with Sage had on his students, other faculty members, and the Colleges as a whole." [FN71] The court denied Romer's breach of contract claim. [FN72]

In *Schalow v. Loyola University of New Orleans*, [FN73] the university issued a terminal contract to Schalow, a non-tenured, probationary faculty member. Schalow sued Loyola for breach of his employment contract, complaining that his employment was not continued because of a lack of collegiality. He argued that consideration of collegiality was not a valid basis for his dismissal, because it was not one of the specifically enumerated tenure criteria, i.e., teaching, research, and service, set forth in the faculty handbook. [FN74]

The appellate court upheld judgment for the university and affirmed the non-renewal of Schalow's contract for lack of collegiality. Construing wording in the handbook regarding evaluating the suitability of a faculty member as a professional colleague, the court stated that the language was "certainly broad enough to include collegiality." [FN75] The court concluded by saying: "No one was calling into question Dr. Schalow's competence as a philosopher. All admit that he is very good. All admit that he is a popular teacher The problem is one of collegiality." [FN76]

In *Bresnick v. Manhattanville College*, [FN77] the plaintiff sued when he was denied tenure in the dance and theater department. The by-laws of the college stated that tenure was to be awarded on the basis of teaching excellence, scholarship and service. At no place was collegiality or working well with one's colleagues mentioned.

The faculty committee that recommended that Bresnick be granted tenure noted, however, that they were concerned with the lack of interdisciplinary dance/theater productions. The provost recommended against tenure, specifically noting Bresnick's difficulty working with colleagues. The president denied tenure, likewise expressing concern about the unwillingness of Bresnick ***846** to work with colleagues "'in a sufficiently collegial and collaborative manner.'" [FN78]

In addressing Bresnick's arguments that collegiality, or working well with colleagues in a collaborative manner, was not part of the criteria listed in the college's tenure documents, the court rejected his claim that the documents had to spell out every consideration that could form the basis for a judgment regarding his qualifications for tenure, saying:

Cooperation and collegiality are essential to a department which may be called upon to work with other departments, and to train students to collaborate in the difficult task of orchestrating dance or drama programs in the outside world. Where what is mentioned is clearly within a relevant category, it would be blind in the extreme to require the category to be specified in haec verba. [FN79]

Upon reconsideration, the court reaffirmed its earlier decision in favor of the college and once more addressed Bresnick's contention that because collegiality was not specifically stated as a criterion for tenure, it could not be considered:

Tenure was denied, based upon what the College considered to be a deficiency in ability to work with other faculty members in an atmosphere of cooperation and collegiality so that dance and drama could be integrated with other activities. There is nothing in any contractual agreement preventing the institution from considering such matters in evaluating "service to the College." It is predictable and appropriate that in evaluating service to an institution, ability to cooperate would be deemed particularly relevant where a permanent difficult-to-revoke long-term job commitment is being made to the applicant for tenure. [FN80]

The Bresnick court was deferential to the decisions of the college. The opinion rests to a significant degree on the ability of the college to convince the court of the importance of collegiality by a professor who must work with other faculty and departments of the institution. [FN81]

***847** The plaintiff in Hammond v. Board of Trustees of Southern Illinois University, [FN82] raised due process, free speech, and breach of contract claims when his tenure evaluation included consideration of his collegiality (or lack thereof). The court expressed little doubt that considerations beyond those stated in the faculty handbook and the School of Music Operating Papers-- service, teaching, and creative ability--were used against plaintiff, stating:

The concept of "collegiality" does not appear in any guidelines for tenure. Tact and cordiality, although implicitly desirable traits, are not matters of concern according to stated criteria; yet plaintiff's perceived shortcomings in those areas were considered against him as strongly as any poor teaching evaluation or sour note from his French horn would have been. [FN83]

Although appearing to be bothered by the consideration of collegiality in plaintiff's tenure evaluation, the court found in favor of the defendants on all claims and held: "No due process violations occurred when matters outside the stated criteria for considering tenure applications were used against [the plaintiff]." [FN84]

B. Pretext of discrimination

Faculty and others who disagree with the consideration of collegiality in higher education employment decisions, or who are troubled by its possible misuse, assert that its use can easily become a mask for race, gender, age, religious, national origin, or disability discrimination. [FN85] They also argue that since the word collegiality, and its companion words civility and academic citizenship, are vague and amorphous terms, difficult to define precisely, [FN86] their use in employment policies and decisions can easily serve as a cover-up for refusing to hire, to promote, to tenure, and to renew women, minorities, individuals with disabilities, and others in protected classes. There is a related argument that, even in the absence of intentional discrimination, the use of collegiality can subtly and adversely affect the chances for tenure of women and members of minority groups. It has been asserted that because there are real differences between the way men and women view the world ***848** and relate to others, it is much harder for tenured men to see women faculty as collegial or as "fitting in," and it is much harder for those men to be comfortable mentoring junior female faculty members. [FN87]

A review of the cases that were brought by plaintiffs alleging collegiality as a pretext for discrimination reveals that the universities involved prevailed in almost every situation. [FN88] Even with the noted success rate of the institutions, however, a recognized authority on higher education law has cautioned that "[w]hile the courts may be unsympathetic to reversing negative tenure decisions that were based on lack of collegiality, the addition of a discrimination claim can substantially change the mix." [FN89]

In Babbar v. Ebadi, [FN90] Sunil Babbar, an assistant professor in the Department of Management of Kansas State University's College of Business Administration, was

denied tenure because of inadequacies in his research and a lack of collegiality. He sued, alleging reverse sex, religious, and national origin discrimination. The district court granted summary judgment for the defendants on all claims. [FN91] The Court of Appeals for the Tenth Circuit affirmed. [FN92]

The appellate court recounted the facts surrounding Babbar's tenure review. The department faculty and department chair voted to deny him tenure, expressing concerns about the quality of his research and about his lack of collegiality [FN93] toward his colleagues. They "describ[ed] him as "'two- faced," "'zero collegiality," "'superiority complex," "'will say one thing and do another," and "'engages in tactless and inaccurate self- promotion.'" *849 [FN94] The college's advisory committee on promotion and tenure voted against tenure. They described Babbar's research as weak and, although acknowledging his teaching as good, they found him to be a poor colleague within his department. [FN95] The dean and the provost concurred. [FN96]

Babbar then filed a grievance. The hearing panel determined that the department failed to follow established procedure in evaluating Babbar's research and improperly applied collegiality as a criterion for tenure and promotion. [FN97] Despite these findings, the panel still recognized that professional relationships between Babbar and the department were so permanently and irreparably broken that his continued employment was not in the best interest of the university. The panel recommended that the university negotiate a settlement with Babbar that would include his resignation or, as a last resort, grant him tenure. The president declined to offer a settlement since Babbar was employed on an annual contract, and he denied tenure. [FN98]

In affirming the trial court's grant of summary judgment to the university, the appellate court noted that Babbar presented no evidence that the denial of tenure was due to his national origin or religion and that the record was replete with evidence that Kansas State University denied him tenure because of his inability to get along with a number of his colleagues and perceived deficiencies in his research. [FN99] In reaching its conclusion, the court reiterated that "[f]ederal courts are not particularly well-suited to the task of evaluating the criteria for successful tenured professors and are particularly ill-suited to determine the best candidates." [FN100]

In *Stein v. Kent State University*, [FN101] the plaintiff alleged that her contract was not renewed because of gender discrimination and in retaliation for her filing an internal grievance with the university and an external charge with EEOC. Kent State maintained that the plaintiff was not reappointed because she demonstrated only average performance in teaching and research and because she lacked collegiality, which was exhibited in her filing of internal and external suits and charges that were consistently judged as frivolous. [FN102] The district court granted summary judgment for the university saying: "The ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions. Plaintiff Stein makes no showing that the lack of collegiality was a pretext." [FN103] The *850 Court of Appeals for the Sixth Circuit affirmed, also finding the university's reasons for non-renewal to be legitimate and nondiscriminatory. [FN104]

One of the most widely discussed higher education cases involving discrimination is *Fisher v. Vassar College*. [FN105] Cynthia Fisher was denied tenure in the college's biology department because of her lack of scholarship, teaching ability, service and leadership. [FN106] She sued, alleging that the college discriminated against her in violation of Title VII because she was a married woman and because of her age--fifty-three.

The Court of Appeals for the Second Circuit vacated the judgment of the district court in Fisher's favor. [FN107] The pertinent part of the appellate court's opinion for purposes of this article addressed Fisher's leadership abilities and found that the biology department based its decision to deny plaintiff tenure, in part, upon her lack of requisite leadership qualities and her "'difficulty in establishing straightforward, open, trusting, collegial relationships with others in the

department.'" [FN108] The court found these to be valid nondiscriminatory reasons for a negative tenure decision. [FN109] Acknowledging that Fisher's colleagues were in the best position to judge her collegiality and personal relationships, the court wrote: "The leadership section of the report makes clear that the senior members of the biology department simply did not like Fisher and did not wish to establish a career-long professional association with her. It is arguable that such grounds alone justified the department's recommendation against tenure." [FN110]

Although not using the word collegiality in its opinion, the court in *Ogunleye v. State of Arizona* [FN111] denied a preliminary injunction to the plaintiff, a non-tenured professor, who was denied reappointment in the Africana Studies Program at the University of Arizona on the ground that she was "a *851 disruptive force within her department." [FN112] The decision recounts Ogunleye's efforts, along with two tenured colleagues, to undermine an acting program director by refusing to recognize that he had any authority over the program or to cooperate with him in any manner; by declining to participate in mediation; and by writing numerous letters designed to interfere with the acting director's management of the program. They referred to him as a "'chameleonesque moral reprobate'" and accused him of "'willfully committ [ing] ... racist, sexist, unscrupulous, and tom-foolery acts aimed at destroying faculty members.'" [FN113]

After a series of such comments and events, the provost "decided not to renew [Ogunleye's] contract so that order and civility could be restored to the Program." [FN114] Ogunleye sued under Title VII, contending that she was treated more harshly than her two colleagues. The university asserted that Ogunleye was a disruptive force within her department and that because she was a non-tenured professor, she could be treated differently than the two male tenured colleagues who engaged in similarly unprofessional conduct. The court found sufficient evidence to support the position of the university and said: "The use of insults, a harsh tone, and sarcasm also constitute legitimate, non-discriminatory reasons for the nonrenewal of an employee's contract." [FN115]

The court in *Jawa v. Fayetteville State University* [FN116] upheld the termination of a tenured professor, who had sued claiming that the university had dismissed him because of his race and national origin. The court found, however, that the professor was a poor teacher unwilling to prepare for class; that he had difficulty interacting with students; that he failed to keep office hours and to advise properly his students; that he was uncooperative with his colleagues; that he was unwilling to follow appropriate directives of his superiors and to comply with university policies and procedures; and that he recklessly, and with little regard for the truth, accused his superiors of incompetence and discriminatory practices against him. [FN117] In particular, Professor Jawa demonstrated unprofessional conduct toward his department chair when he stopped speaking to the chair except when they were in meetings, and then he frequently caused a disturbance. On one occasion, he burst into the chair's office, on another he called the chair a liar, and on another he refused to come to the chair's office when requested to do so, responding that he "was not an office boy." [FN118] These incidents, said the court, "clearly *852 reflect unprofessional conduct and a continuing pattern of noncooperation on the part of plaintiff." [FN119]

In denying Jawa's claim of discrimination, the court held that Jawa "was discharged because of a series of incidents, disruptive to and obstructive to the educational effort, purpose, and harmony of and at Fayetteville State University." [FN120] Furthermore, the court said, Jawa's "vituperative and false statements" made about his colleagues were not protected speech. [FN121] "Bickering and running disputes with colleagues does [sic] not constitute a form of protected speech under the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship." [FN122]

As in breach of contract and academic freedom cases, there are continuing complaints expressed by a number of legal writers over the deference given to colleges and universities in discrimination cases. [FN123] The persistent rationale from the courts for this hands-off approach with respect to college and university decision-makers is the usage of subjective and intangible criteria. Critics of both

the use of subjective criteria, such as collegiality, and of the judicial abstention of the courts are not persuaded by the courts' arguments, however. Since courts do not shy away from tackling similar judgments in other employment settings and regularly make decisions involving discretionary and subjective actions on the part of management, why should they feel less competent to do so in academia? [\[FN124\]](#)

C. Danger to academic freedom and to free speech

The argument that use of collegiality in higher education employment decisions poses a danger to academic freedom and to free speech has been raised in a number of cases by faculty who were denied tenure or terminated. [\[FN125\]](#) *853 Several legal writers have raised concerns that the use of collegiality as a factor in these decisions operates to chill faculty debate and to stifle dissent on campus. [\[FN126\]](#) These concerns have also been advanced recently by AAUP in its statement On Collegiality as a Criterion for Faculty Evaluation. [\[FN127\]](#)

While AAUP recognizes that collegiality, in the sense of collaboration and constructive cooperation, is an important aspect of a faculty member's overall performance, the Association asserts that to isolate collegiality as a distinct dimension of evaluation poses a potential danger to academic freedom and "should not be added to the three traditional areas of faculty performance." [\[FN128\]](#) In the heat of making important academic decisions regarding hiring, promotion, and tenure, it would be easy to confuse collegiality with the expectation that a faculty member display "enthusiasm," or evince "a constructive attitude" that "will foster harmony." [\[FN129\]](#) Such expectations are contrary to basic principles of academic freedom and will contribute to a college or university "replete with genial Babbitts." [\[FN130\]](#) The Association takes the position in this Statement that the development of collegiality as a fourth criterion in faculty evaluation is "highly unfortunate" and should be discouraged. [\[FN131\]](#) Collegiality should not be assessed independently of teaching, research, and service but should rather be understood as a virtue "whose value is expressed in the successful execution of these three functions." [\[FN132\]](#)

Alvin Snider, a Professor of English at the University of Iowa, expressed a similar opinion in a Point of View piece in the May 7, 1999, issue of The Chronicle of Higher Education. [\[FN133\]](#) Professor Snider stated grave concerns over the efforts of the higher education community to achieve universal "niceness" to the extent that free and open debate is stifled. He focused his remarks specifically on the proposal at the University of Iowa that a candidate for tenure in the College of Liberal Arts would ordinarily be expected "'to have interacted successfully with colleagues and students in achieving the mission of the department and the institution.'" [\[FN134\]](#) Such language, Snider argued, while appearing innocuous enough, could easily be read to reward conformity, stifle dissent, and weaken meaningful discussion. Snider added that he was glad to see that, after vigorous objection from a number of his colleagues, the proposed language had been quietly dropped. [\[FN135\]](#)

*854 Concern that the use of collegiality in tenure decisions poses a threat to academic freedom and to free speech has also been expressed by Edgar Dyer, Professor of Politics and University Counsel at Coastal Carolina University. In Collegiality's Potential Chill Over Faculty Speech, [\[FN136\]](#) Dyer argues the need for a new judicial standard of academic free expression tailored specifically to faculty at public institutions, which would provide them greater protection than currently exists when collegiality is used as a factor in their employment decisions. [\[FN137\]](#)

Dyer finds collegiality to be a vague and ambiguous term, which does little to provide specific guidelines for behavior. He asks pointedly, "What does 'collegiality' mean?" [\[FN138\]](#) He is concerned that its use is so subjective that there is no way to evaluate whether it is being used fairly or whether it is being used to punish faculty who disagree with those in control of the tenure process.

There are several points to be made in analyzing Professor Dyer's arguments. Although collegiality is a vague and subjective term, there is no question that evaluation of scholarship, research, and teaching is also very subjective. No one

would seriously suggest that the standard for granting tenure be made strictly objective, i.e., publication of one book or five articles in peer reviewed journals. Clearly, the quality of the book or the publications and the importance of the research are far more important than the numbers, and evaluation of quality and importance are very subjective. [FN139]

Furthermore, the standards for academic free speech that Professor Dyer suggests-- that the academician be speaking within his or her discipline for the purposes of advancing the truth [FN140]--would not have changed the result in any of the cases where the plaintiff has raised a First Amendment argument, because most of the cases involved petty or personal disputes. [FN141] Dyer himself acknowledges this fact, [FN142] which suggests that the existing judicial view of collegiality is not misplaced or in error.

Perry A. Zirkel, Professor and former Dean of Education at Lehigh University, argues in *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us* that the courts have inappropriately used personality as a criterion in *855 tenure denial cases. [FN143] He equates collegiality with personality and asserts that the use of this criterion is a serious threat to individual academic freedom.

Professor Zirkel finds that often the so-called "uncollegial" behavior of faculty who are denied tenure because of a lack of collegiality is simply unpopular conduct, such as supporting teacher organizations, holding Marxist beliefs, or participating in other anti-establishment causes. [FN144] Instead of affording almost unbridled deference to institutional autonomy in decision-making, Zirkel suggests that the courts treat universities like other employers in Title VII cases and require the institutions to provide legitimate nondiscriminatory reasons for their decisions not to grant tenure. [FN145]

Even though critics exist, courts have continued to uphold the use of collegiality as a factor in tenure and other higher education employment decisions where First Amendment claims are raised. The first case to discuss tenure and collegiality in depth was *Mayberry v. Dees*. [FN146] Robert Mayberry sued East Carolina University, alleging that the denial of tenure to him was retaliatory to punish him for his criticisms of the department chair. [FN147]

The university defended by producing evidence that the chair had expressed reservations about granting Mayberry tenure before Mayberry made any of the criticisms at issue and that the chair was unaware of the criticisms prior to the denial of tenure. The Court of Appeals for the Fourth Circuit upheld the tenure denial for these reasons. In so doing, the court addressed the role of collegiality in considerations of tenure and cited with approval a number of factors noted by the Commission on Academic Tenure in Higher Education as being important to the consideration of tenure, including collegiality:

Demonstration of factors well beyond the mere passage of time in service, namely (a) creditable scholarship, (b) accomplished pedagogy, (c) able service to the university in matters associated with its maintenance, operation, and growth and continued endurance, and (d) developed collegiality-- the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the *856 university rests-- is required by the university, and should be established before a candidate is granted tenure. [FN148]

While *Mayberry* has been widely cited as the first case to isolate and identify "collegiality" as a distinct criterion for tenure, it has not been without its critics. Professor Zirkel criticized the court's deference to the university, writing: "Reviewing courts should be vigilant in keeping such criteria [collegiality] within the narrow boundaries of their supporting policy and evidence." [FN149] Zirkel concludes that "the court should have protected Mayberry's academic freedom, narrowly construed the collegiality criterion, and strictly scrutinized the evidence regarding his qualifications for tenure." [FN150] Zirkel has also criticized the reasoning in *Mayberry*, arguing that the court's opinion seems "to encourage the uncritical use of collegiality as overt or even covert criterion for faculty tenure decisions and perhaps for other stages of faculty employment decision making as well, thus threatening from inside the protected

tradition of the robust exchange of ideas at public institutions of higher education." [\[FN151\]](#)

There are a number of other cases in which courts have balanced First Amendment claims of faculty plaintiffs against contentions of universities that the behavior in question caused disharmony in the workplace and a disruption of the educational process. [\[FN152\]](#) In *Sinnott v. Skagit Valley College*, [\[FN153\]](#) Sinnott, a tenured welding instructor, had a long history of making derogatory remarks about other faculty members, of accusing the chair of the welding department of theft (which was never substantiated), of repeatedly using profanity, and of engaging in ongoing criticism of his supervisors and coworkers. The president of the college met with Sinnott and gave him a letter outlining conditions for his continued employment, namely, that he make no derogatory statements about institutional employees, other faculty members, or the welding program, that he cooperate in the welding curriculum modification, and that he team-teach a coordinated program. Sinnott refused to sign the letter and to agree to the conditions. He was terminated on grounds of insubordination and unprofessional conduct. [\[FN154\]](#)

Sinnott sued, contending that he was terminated because he had exercised his First Amendment rights in criticizing the quality of the program of which *857 he was a part. The court engaged in the Pickering balancing test and determined that although Sinnott's comments concerning the program were protected speech, they had to be balanced against the interest of the college in maintaining harmony among coworkers and an efficient work place. In upholding the termination, the court noted the fact that the college had admonished Sinnott on a number of occasions to discontinue his profanity and his criticism of fellow faculty members, and had warned him that he would be terminated if he continued this activity. The court also found that the college produced sufficient evidence that it would have terminated Sinnott even in the absence of protected speech. [\[FN155\]](#)

In *Stastny v. Board of Trustees of Central Washington University*, [\[FN156\]](#) Stastny, a tenured professor of political science, had a history of unauthorized absences, late returns from approved trips, cancellation of classes without authorization, and failure to handle his registration responsibilities. He had been disciplined by the university by having his pay docked and by receiving departmental censure from his colleagues. [\[FN157\]](#)

Stastny requested permission to travel to Israel to give a lecture. The department chair and dean denied permission because Stastny would miss eight classes plus advisory duties during registration of students at the beginning of a new semester. The dean warned Stastny that, if he ignored the university's directive, appropriate disciplinary measures would be taken against him. [\[FN158\]](#) Stastny ignored the warning, made the trip to Israel without authorization, and missed several class days at the beginning of the term. Upon his return, he was terminated. [\[FN159\]](#) Stastny sued, contending that he had been disciplined and ultimately terminated for exercising First Amendment rights of free speech and academic freedom.

While paying its respects to the concept of academic freedom and recognizing its protected status under the First Amendment, the court entered judgment for the university stating that "[i]t does not follow that because academic freedom is inextricably related to the educational process, it is implicated in every employment decision of an educational institution," [\[FN160\]](#) and noting further that "[a]cademic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process." [\[FN161\]](#)

IV. CONCLUSION

There has been much discussion within the academic community over the use of collegiality in higher education employment decisions. Those who *858 support its use make three arguments: that there is a legitimate and longstanding expectation that faculty will work together in a cooperative and collaborative manner in the

best interests of the institution; that this expectation is a reasonable part of all employment decisions in the private business world and should be the same within the academy; and that the courts have given overwhelming support to the consideration of collegiality.

The most frequent argument raised against the use of collegiality is that it is a breach of contract for a college or university to consider collegiality unless it has been specified as a separate and distinct criterion in the faculty contract or handbook. Faculty who have been denied tenure or who have been terminated for a lack of collegiality have also asserted that since it is such a vague and amorphous term, its use can easily be a pretext for discrimination on the basis of race, gender, religion, or national origin. Finally, the AAUP and others have argued that the use of collegiality as a factor in faculty employment decisions poses a real danger to academic freedom and free speech.

Courts have considered these arguments for at least the last twenty years, when collegiality was first referenced with approval in *Mayberry v. Dees*. With respect to the breach of contract argument, courts have unanimously rejected that claim, regardless of whether the institution specified collegiality as a separate criterion or it did not. Courts have concluded that collegiality is implicitly embodied in consideration of the traditional criteria of teaching, research, and service.

When addressing the assertion that the use of collegiality can be used as a pretext for discrimination, the courts have recognized that this can indeed take place. However, in the overwhelming number of reported cases dealing with such an allegation, the courts have rejected the claim that collegiality was used as a pretext and have upheld college and university decisions based on a lack of collegiality.

Finally, while the courts have taken seriously assertions that the use of collegiality was a violation of academic freedom or free speech, they have held in favor of the college or university in the great majority of the cases, finding often that the faculty conduct in question involved petty, personal disputes not protected by the First Amendment.

In conclusion, the courts have affirmed at every turn the use of collegiality as a factor in making decisions concerning faculty employment, promotion, tenure, and termination, usually because of the recognition that collegiality is an important factor in the ability of colleges and universities to fulfill their missions. Given the weight of the decisions by the courts on the issue of collegiality, the authors have concluded that institutions of higher learning should feel confident in considering collegiality in faculty decisions and that it is unnecessary for them to specify collegiality as a separate and distinct criterion.

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[FN1]. The authors acknowledge that this paper is based significantly on two outlines which they prepared for presentations at the Stetson University College of Law Conferences on Law and Higher Education, February 14, 1998, and February 11, 2000. They further acknowledge with appreciation the contribution Robert Dale Bickel, Professor of Law, Stetson University College of Law, made in recognizing the importance of the subject of collegiality in higher education employment decisions

and in encouraging them to develop their work on this subject into this article.

[FN2]. See generally TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* 107-12 (2d ed. 1995).

[FN3]. 663 F.2d 502 (4th Cir. 1981), cert. denied, 459 U.S. 830 (1982).

[FN4]. The Mayberry court defined "collegiality" as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." *Id.* at 514. Collegiality has also been defined as "cooperative interaction among colleagues." RANDOM HOUSE WEBSTER'S DICTIONARY (1993).

[FN5]. Interestingly, the actual decision in Mayberry was that there was no basis to conclude that the plaintiff was denied tenure due to his exercise of First Amendment rights. Collegiality was addressed by the court in a detailed discussion of tenure in response to the apparent suggestion by Mayberry that if he had been a satisfactory teacher for five years, he must be entitled to tenure. See Mayberry, 663 F.2d at 513. In addition, East Carolina University, unlike most universities, also had an explicit reference in its policies on promotion and tenure to the consideration of a faculty member's "constructive relationship with colleagues." *Id.* at 514.

[FN6]. For a general overview of the role of collegiality in tenure and dismissal situations, see Kent M. Weeks, *Contentious Professors and Collegiality*, in *MANAGING DEPARTMENTS: CHAIRPERSONS AND THE LAW* 78-86 (1997).

[FN7]. By contacting their counterparts and performing a limited Internet search, the authors conducted an informal survey of the tenure and promotion policies at a number of public and private universities. From these efforts, they found that the great majority of institutions make no reference to the term collegiality, nor use phrases comparable to collegiality, in describing the factors evaluated for promotion or tenure. Those institutions that do not reference the concept of collegiality in their policies include, among others: Cornell University, Grand Valley State University, Massachusetts Institute of Technology, Monmouth University, Nassau Community College, Northwestern University, Occidental College, Princeton University, Shepherd College, South Dakota Board of Regents, Stanford University, University and Community College System of Nevada, University of Akron, University of Alabama, University of California, University of Cincinnati, University of Florida, University of Georgia, University of Illinois, University of Kentucky, University of Maryland, University of Michigan, University of Mississippi, University of North Carolina at Asheville, Chapel Hill, Charlotte and Greensboro, University of Oklahoma, University of the South, University of Tennessee, University of Texas, University of Tulsa, University of Virginia, University of Wyoming, Virginia Commonwealth University, and Vanderbilt University.

On the other hand, Auburn University requires that a candidate for tenure demonstrate "professional collegiality," which it states should not be confused with sociability or likeability. "Collegiality is a professional, not personal, criterion relating to the performance of a faculty member's duties within a department. The requirement that a candidate demonstrate collegiality does not license tenured faculty to expect conformity to their views." AUBURN UNIVERSITY, *TENURE CRITERIA AND CONSIDERATIONS*, available at http://www.auburn.edu/academic/provost/faculty_handbook/policies.html.

Although not mandating consideration of collegiality, Kansas State University permits departments "to consider it in evaluation, either as part of the more traditional areas or as a separate domain of achievement." KANSAS STATE UNIVERSITY, *EFFECTIVE FACULTY EVALUATION: ANNUAL SALARY ADJUSTMENTS, TENURE, AND PROMOTION*,

available at <http://www.ksu.edu/uau/depthhead/promotion/chap2.html> (emphasis added).

While not specifically including collegiality as a criterion for tenure or promotion, Arizona State University includes within its service requirement the following: "Service to the university includes the individual's expected contributions to internal committee work, faculty governance activities, and the preservation of a collegial atmosphere at all levels of interaction within the university." ARIZONA BOARD OF REGENTS POLICY MANUAL 6-201, available at asu.edu/aad/manuals/acd/acd506-07.html.

Similarly, the University of Florida does not specify collegiality as a distinct criterion for tenure. It is, however, a legitimate factor for consideration under the Florida Board of Regents' rules delineating academic responsibilities and requiring that faculty "[c]ontribute to the orderly and effective functioning of the academic unit and/or the University and act in a collegial manner in all interactions." FLA. BD. OF REGENTS R. 6C- 5.945(6)(B)(3), available at http://www.borfl.org/chn/rules_index.asp. These rules also include compatibility and collegiality in the factors to be considered in layoffs. See UNIV. OF FLA. R. 6C1-1.017(4)(B), available at <http://www.aa.ufl.edu/aa/rules>.

[FN8]. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 166 (Supp. 2000).

[FN9]. See, e.g., Levi v. University of Tex. at San Antonio, 840 F.2d 277, 282 (5th Cir. 1988) (recognizing that "the future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty"); Bresnick v. Manhattanville College, 864 F. Supp. 327, 329 (S.D.N.Y. 1994) (stating that in evaluating service to an institution, ability to cooperate is particularly relevant especially where long-term grant of tenure is involved); University of Baltimore v. Iz, 716 A.2d 1107 (Md. Ct. Spec. App. 1998) (holding that collegiality is valid consideration for tenure review); McGill v. Regents of Univ. of Cal., 52 Cal. Rptr. 2d 466 (Cal. Ct. App. 1996) (concluding that collegiality is an appropriate consideration for tenure review).

[FN10]. See Alvin Snider, *Stifling the Naysayer in an Age of Compulsory Niceness*, CHRON. HIGHER EDUC., May 7, 1999, at A64 (opposing adding expectation of successful interaction with colleagues or good institutional citizenship as criteria for tenure); Edgar Dyer, Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education, 119 EDUC. L. REP. 309 (1997) (arguing that use of collegiality is threat to academic free speech and to integrity of higher education); Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. STATE L. REV. 223 (1984-85) (advocating more exacting judicial review of tenure cases based on collegiality).

[FN11]. American Association of University Professors, *On Collegiality as a Criterion for Faculty Evaluation*, ACADEME, Sept.-Oct. 1999, at 69, reprinted in POLICY DOCUMENTS & REPORTS 39 (9th ed. 2001).

[FN12]. See *id.* For review and comment on the AAUP Statement, see Courtney Leatherman, *Report Laments Rise of 'Collegiality' as a Factor in Tenure Reviews*, CHRON. HIGHER EDUC., Sept. 22, 1999.

[FN13]. See, e.g., Bresnick v. Manhattanville College, 864 F. Supp. 327 (S.D.N.Y. 1994); University of Baltimore v. Iz, 716 A.2d 1107 (Md. Ct. Spec. App. 1998); Kirsch v. Bowling Green State Univ., No. 95API11-1476, 1996 Ohio App. LEXIS (Ohio Ct. App. May 30, 1996); McGill v. Regents of Univ. of Cal., 52 Cal. Rptr. 2d 466

(Cal. Ct. App. 1996); Schalow v. Loyola Univ. of New Orleans, 646 So. 2d 502 (La. Ct. App. 1994).

[FN14]. See, e.g., Namenwirth v. Board of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1243 (7th Cir. 1985) (cautioning that subjective judgments of faculty should not be permitted to camouflage discrimination); Cooper v. University of Tex. at Dallas, 482 F. Supp. 187, 195 (N.D. Tex. 1979) (acknowledging that subjectivity is not in itself illegal but that it does present potential for discrimination); see also LEAP, supra note 2, at 71-79 (discussing possibility that discriminatory attitudes may hide behind use of subjective standards); Ann H. Franke, The Courts Assess Faculty Collegiality, ACADEME, Sept.-Oct. 1996, at 72, 72 ("Evaluating collegiality is a subjective undertaking, and it takes on a special importance when we evaluate people who are different from ourselves.").

[FN15]. The focus of this article is on the views of the courts on the use of collegiality in faculty employment decisions. It is important to note, however, that many courts are reluctant to substitute their judgment for that of the faculty and academic administrators charged with responsibility for making tenure, promotion, and termination decisions and give great deference to the academic decision-makers because of the highly subjective nature of those decisions. See, e.g., Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 422 (1st Cir. 1986) (holding that "in view of the substantial commitment a university makes to an individual by granting him tenure, universities have a strong need for, and traditionally have enjoyed a wide discretion in, exercising what is largely a subjective judgment in deciding to whom to grant tenure"); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); see also 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) ("Traditionally, the courts have been reluctant to interfere in what has been basically deemed an academic exercise."); Jonathan M. Paretsky, Judicial Review of Discretionary Grants of Higher Education Tenure, 83 EDUC. L. REP. 17, 21 (1993) (commenting on exceeding reluctance of courts to re-weigh administrative evaluation of faculty merit and deference to superior experience and expertise of higher education administrators).

[FN16]. For a general overview of the costs and benefits of increasing calls for civility among faculty and academic administrators, see Mary Ann Connell & Robert M. O'Neil, The Role of Civility, Collegial Relationships, and Good Academic Citizenship among Faculty on the College/University Campus, in conference papers of Tenth Annual Conference on Legal Issues in Higher Education, University of Vermont (October 3, 2000).

[FN17]. See Ralph D. Mawdsley, Collegiality as a Factor in Tenure Decisions, 13 J. PERSONNEL EVALUATION IN EDUC. 167, 176 (1999).

[FN18]. See id. at 173 (noting that "one of the most important reasons supporting collegiality as a factor in tenure decisions is that universities must rely for academic governance on the cooperative and corporate action of its faculty.").

[FN19]. See generally Weeks, supra note 6, at 78 (concluding that "without collegiality, departments can develop camps of teachers who do not relate to each other").

[FN20]. 468 F.2d 359 (4th Cir. 1972).

[FN21]. Id. at 360.

[FN22]. Id. at 361.

[FN23]. See, e.g., Peacock v. Board of Regents of Univs. & State College of Ariz., 597 F.2d 163, 165 (9th Cir. 1979) (upholding district court's recognition of university's need to maintain cooperation and loyalty among surgical team members as prerequisite to safe and efficient operation of medical school); Watts v. Board of Curators, Univ. of Mo., 495 F.2d 384, 389 (8th Cir. 1974) ("A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration."); Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1973) (recognizing legitimate interest of university in limiting teacher's right to say what he pleases in order to maintain discipline or harmony among co-workers); McCauley v. South Dakota Sch. of Mines & Tech., 488 N.W.2d 53, 57 (S.D. 1992) (affirming observations of other courts that college has right to expect teacher to follow instructions and to work cooperatively and harmoniously with administration).

[FN24]. See Bresnick v. Manhattanville College, 864 F. Supp. 327, 328 (S.D.N.Y. 1994) (noting that "[c]ooperation and collegiality are essential to a department which may be called upon to work with other departments.").

[FN25]. See American Association of University Professors, Statement on Professional Ethics, ACADEME, July-Aug. 1987, at 49, reprinted in POLICY DOCUMENTS & REPORTS supra note 11, at 133, 134. The Statement provides:

As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.
Id.

[FN26]. See, e.g., American Association of University Professors, A Statement of the Association's Council: Freedom and Responsibility, 56 AAUP BULL. 375, reprinted in POLICY DOCUMENTS & REPORTS, supra note 11, at 135, 135 ("Membership in the academic community imposes on students, faculty members, administrators, and trustees an obligation to respect the dignity of others ...").

[FN27]. See Perry A. Zirkel, The Personality Problem, 80 PHI DELTA KAPPAN 622, 638 (1999) (quoting Dawna Cobb, attorney for the university in University of Baltimore v. Iz, who, in discussing the case, said that the appellate decision represents "'common sense that in making a lifetime appointment, it is necessary and proper for the institution to evaluate how the faculty member performs the job, including whether any behavioral difficulties are not in the best interests of the department or the university'").

[FN28]. See BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 664 (1996); see also Leap, supra note 2, at 107-08.

[FN29]. See, e.g., Newberry v. East Tex. State Univ., 161 F.3d 276, 279 (5th Cir. 1998) (affirming jury verdict in favor of university on professor's disability claim and finding that university dismissed professor because of his work performance and lack of collegiality); Levi v. Univ. of Tex. at San Antonio, 840 F.2d 277, 282 (5th

Cir. 1988) (recognizing that "the future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty"); Curtis v. University of Houston, 940 F. Supp. 1070, 1075 (S.D. Tex. 1996) (granting summary judgment for university and saying: "In considering a decision to grant that ultimate achievement [promotion] to a professor, the committee must take into account not only his quantifiable productivity but also his unquantifiable personality, collegiality, and future or projected performance, among myriad other factors about which the court can only speculate."), aff'd, 127 F.3d 35 (5th Cir. 1997) (without opinion); Garvey v. Dickinson College, 775 F. Supp. 788, 798 (M.D. Pa. 1991) (upholding termination of faculty member described by college witnesses as being unwilling to cooperate with colleagues, divisive presence within department, and unable to cooperate productively with departmental faculty); Johnson v. Michigan State Univ., 547 F. Supp. 429, 439-40 (W.D. Mich. 1982) (upholding university's tenure denial to black female described by colleagues as having abrasive personality, engaging in repeated clashes with students and faculty, being ineffective teacher, and failing to pass medical board examinations); Perham v. Ladd, 436 F. Supp. 1101, 1107 (N.D. Ill. 1977) (recognizing that "[p]rofessional disagreements with members of an academic department are sufficient, nondiscriminatory reasons to deny tenure"); Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 229 (E.D.N.C. 1976) (holding that faculty member's lack of cooperation with departmental colleagues and administration was disruptive to educational effort of university and constituted legitimate non-discriminatory ground for termination of tenure); De Simone v. Siena College, 663 N.Y.S.2d 701, 702 (N.Y. App. Div. 1997) (recognizing right of college not to renew probationary faculty member for inability to get along with colleagues); In re Brantley, 518 N.E.2d 602, 605 (Ohio Ct. App. 1987) (holding that in deciding whether to grant tenure, educational institution may lawfully consider collegial relationships, unless that criterion is shown to be facade for discrimination).'

[FN30]. For a similar finding, see Mawdsley, supra note 17, at 177. Professor Mawdsley has stated:

To date, no court has found that the use of collegiality in making tenure decisions is inappropriate. However, judicial conflicts arise not so much as to whether collegiality can be a legitimate factor in a tenure decision but as to whether collegiality has been invoked in a manner that is discriminatory or violative of free speech.
Id. at 176-77.

[FN31]. See Bresnick v. Manhattanville College, 864 F. Supp. 327, 329 (S.D.N.Y. 1994) (finding nothing to prevent institution from considering deficiency in ability to work with other faculty members as part of evaluating service to university); University of Baltimore v. Iz, 716 A.2d 1107, 1122 (Md. Ct. Spec. App. 1998) (holding that collegiality is impliedly embodied within specified criteria for tenure and plays essential role in both teaching and service); Kirsch v. Bowling Green State Univ., No. 95 API11-1476, 1996 Ohio App. LEXIS 2247, *25 (Ohio Ct. App. May 30, 1996) (concluding that plaintiff's personality and collegial relationship were considered during tenure review in context of their effect on his teaching, research, and service).

[FN32]. See AAUP, On Collegiality as a Criterion for Faculty Evaluation, supra note 11, at 39. ("[C]ollegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of scholarship, teaching, and service. It is rather a quality whose value is expressed in the successful execution of these three functions.").

[FN33]. See, e.g., Bresnick v. Manhattanville College, 864 F. Supp. 327 (S.D.N.Y. 1994); Romer v. Board of Trustees of Hobart & William Smith Colleges, 842 F. Supp. 703 (W.D.N.Y. 1994); McGill v. Regents of Univ. of Ca., 52 Cal. Rptr. 2d 466 (Cal. Ct. App. 1996); Schalow v. Loyola Univ. of New Orleans, 646 So. 2d 502 (La. App. 1994); see also University of Baltimore v. Iz, 716 A.2d 1107 (Md. Ct. Spec. App.

1998); Kirsch v. Bowling Green State Univ., No. 95API11-1476, 1996 Ohio App. LEXIS 2247 (Ohio App. May 30, 1996); LEAP, supra note 2, at 110.

[FN34]. 716 A.2d 1107 (Md. Ct. Spec. App. 1998).

[FN35]. See id. at 1118-20.

[FN36]. See id. at 1112.

[FN37]. See id. at 1112-13.

[FN38]. See id. at 1110.

[FN39]. See id. at 1114.

[FN40]. Id. at 1122.

[FN41]. See id. at 1117. Addressing both the subjectivity of the tenure review and its reluctance to intrude upon the process, the court said: "Because tenure decisions require subjective judgments regarding candidates' qualifications and because of the long-term commitment a decision of tenure necessarily entails, courts should be wary of intruding into the world of university tenure decisions, absent discrimination or other unlawful action by the university." Id. (quoting Stern v. University of Okla. Bd. of Regents, 841 P.2d 1168, 1172 (Okla. Ct. App. 1992)).

[FN42]. Id. at 1120.

[FN43]. See Iz v. University of Baltimore, 719 A.2d 1262 (Md. 1998). For a dissenting view of the Iz case, see Zirkel, The Personality Problem, supra note 27, at 638. Zirkel argues that the university should have factored the professor's personality into evaluations of her teaching, service, and scholarship, since collegiality was not stated as a separate criterion. He writes: "To the extent that her personality was displeasing but not part of these three criteria, it should have been taken in stride as part of the price that society pays for the higher education market place of ideas." Id.

[FN44]. No. 95API11-1476, 1996 Ohio App. LEXIS 2247 (Ohio Ct. App. May 30, 1996).

[FN45]. See id. at *5.

[FN46]. See id. at *13.

[FN47]. See id. at *15-16.

[FN48]. See id. at *10.

[FN49]. Id. at *7.

[FN50]. See id. at *10.

[FN51]. See id. at *10-11.

[FN52]. Id. at *11.

[FN53]. Id. at *25.

[FN54]. 52 Cal. Rptr. 2d 466 (Cal. Ct. App. 1996).

[FN55]. See id. at 468.

[FN56]. The university's stated criteria for tenure were "teaching, research and other creative work, professional activity, and University and public service." Id. at 470. However, the department chair commented during the tenure review process: "Another important criteria [sic] for a tenure case is Collegiality. It is here that I also find Paul McGill deficient." Id. at 468. The assistant vice president for academic personnel stated: "'Collegiality, the ability to get along with one's colleagues, is an appropriate consideration in evaluating a candidate.'" Id. at 470.

[FN57]. See id. at 472.

[FN58]. Id.

[FN59]. Id. at 473 (quoting Kathryn R. Swedlow, Suing for Tenure: Legal and Institutional Barriers, 13 REV. LITIG. 557, 563-64 (1994)).

[FN60]. Id. at 473.

[FN61]. 842 F. Supp. 703 (W.D.N.Y. 1994).

[FN62]. See id. at 705, 708.

[FN63]. Id. at 705.

[FN64]. Id.

[FN65]. Id.

[FN66]. See id. at 706.

[FN67]. See id.

[FN68]. Id.

[FN69]. See id. at 709.

[FN70]. Id.

[FN71]. Id.

[FN72]. See id.

[FN73]. 646 So. 2d 502 (La. Ct. App. 1994).

[FN74]. See id. at 505.

[FN75]. Id.

[FN76]. Id.

[FN77]. 864 F. Supp. 327 (S.D.N.Y. 1994).

[FN78]. Id. at 328 (quoting tenure review statement by President of Manhattanville College).

[FN79]. Id.

[FN80]. Id. at 329.

[FN81]. The Bresnick opinion is relied on and cited with approval by the court in *Boyce v. University of Alaska*, 4FA-96-266 CIV & 4FA-95-2273 CIV (consolidated) (Alaska Super. Ct., Jan. 3, 1997) (unpublished opinion on file with authors). In *Boyce*, the plaintiff received praise from all quarters for his teaching and research. However, he was found deficient in the area of service because of his unprofessional conduct on a number of occasions. (He assaulted a graduate student at an off-campus department party and verbally accosted the dean's secretary, calling her a "total idiot" and describing her in obscene terms.) Even though the university's criteria for tenure did not include professional conduct, the court held that it was reasonable for the university to consider a faculty member's ability to work with other faculty/staff and to demonstrate professional conduct as it evaluated candidates for tenure. In particular, the court stated: "It was reasonable for the University to consider incidents of unprofessional conduct committed by Professor Boyce when reviewing his application for tenure." Id.

[FN82]. No. CV 88-4026, 1988 WL 95923 (S.D. Ill. Aug. 26, 1988).

[FN83]. Id. at *10.

[FN84]. Id. at *14.

[FN85]. See Copeland & Murry, *supra* note 15, at 244 ("While lack of collegiality and inability to work with others can be a legitimate basis for denial of promotion or tenure, it can also be a pretext for illegal discrimination."); see also LEAP, *supra* note 2, at 71-79.

[FN86]. See Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, *supra* note 10, at 231 ("Evidence of personality or collegiality is not subject to precise measurement because personality itself is intangible; it is seen only indirectly in the form of behavior and its infringement."); Dyer, *supra* note 10, at 309 ("Collegiality itself could also use some refinement as a factor in employment decisions. It is not easily defined--not as hard to define as obscenity, but perhaps, like obscenity, it is easier to comprehend by observation than with words.").

[FN87]. See Marina Angel, Women in Legal Education: What It's Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 *TEMPLE L. REV.* 799, 827-31 (1988) (discussing generally the status of women faculty at five law schools in the New York-Philadelphia area and specifically criticizing the informal use of collegiality in tenure decisions as discriminatory or at least as having a discriminatory impact).

[FN88]. See, e.g., Stein v. Kent State Univ., 181 F.3d 103 (6th Cir. 1999) (unpublished table decision), text available at No. 98-3278, 1999 WL 357752 (6th Cir. May 11, 1999); Fisher v. Vassar College, 70 F.3d 1420 (2nd Cir. 1995); Ogunleye v. State of Ariz., 66 F. Supp. 2d 1104 (D. Ariz. 1999); Babbar v. Ebadi, 36 F. Supp. 2d 1269 (D. Kan. 1998), *aff'd*, 216 F.3d 1086 (10th Cir. 2000), (unpublished table decision), text available at No. 99-3040, 2000 WL 70248 (10th Cir. May 26, 2000); Javetz v. Board of Control, Grand Valley State Univ., 903 F. Supp. 1181 (W.D. Mich. 1995); University of Baltimore v. Iz, 716 A.2d 1107 (Md. Ct. Spec. App. 1998); Kirsch v. Bowling Green State Univ., 673 N.E.2d 137 (Ohio App. 1996); but see Pace College v. Commission on Human Rights, 339 N.E.2d 880 (N.Y. Ct. App. 1975) (holding that denial of tenure was based on sex discrimination and finding that actions of "troublesome" woman plaintiff that resulted in her termination would not have been considered "troublesome" if she had been a man).

[FN89]. Franke, *supra* note 14, at 72.

[FN90]. 36 F. Supp. 2d 1269 (D. Kan. 1998), *aff'd*, 216 F.3d 1086 (10th Cir. 2000) (unpublished table opinion), text available at No. 99-3040, 2000 WL 702428 (10th Cir. May 26, 2000).

[FN91]. See Babbar, 2000 WL 702428, at *5.

[FN92]. See *id.* at *10.

[FN93]. The criteria used by the department to evaluate collegiality included: (1) interpersonal honesty and integrity, (2) effective management of conflict, (3) trust in continuing appropriate behavior after tenure is granted, and (4) behavior that helps other colleagues to contribute successfully to the mission of the institution. Id. at *2.

[FN94]. Id. (quoting Appellees' Supp. App. at 210, which contained a memorandum from the department head to the Dean of the College).

[FN95]. See id. at *3.

[FN96]. See id.

[FN97]. The grievance panel determined that collegiality had not been previously employed in evaluating tenure applications and that Babbar had not been sufficiently alerted to problems with collegiality in the previous evaluations he had received. See id. at *4.

[FN98]. See id.

[FN99]. See id. at *6.

[FN100]. Id. (quoting Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993)).

[FN101]. 994 F. Supp. 898 (N.D. Ohio 1998), aff'd, 181 F.3d 103 (6th Cir. 1999).

[FN102]. See Stein, 994 F. Supp. at 909-10.

[FN103]. Id. at 909.

[FN104]. See Stein, 181 F.3d at 103.

[FN105]. 70 F.3d 1420 (2d Cir. 1995).

[FN106]. See id. at 1428-29, 1434. The department faculty recommended unanimously against tenure and promotion. In their report on Fisher's evaluation, they raised "'serious questions about her independence as a scholar, about the depth of her mastery of the field in which she is working, and about whether or not she is seriously engaged in an effort that will continue to be productive.'" Id. at 1428. The report stated that the department was "'unanimous in the firm belief that Ms. Fisher does not meet the criterion for high quality teaching at Vassar College,'" id. at 1428-29, that it was not satisfied with Fisher's service to the department, and that her leadership qualities were "'a great disappointment.'" Id. at 1429.

[FN107]. For discussion of this case, see Barbara A. Lee, Employment Discrimination in Higher Education: A Review of the 1997 Judicial Decisions, 25 J.C. & U.L. 313, 314-17 (1998).

[FN108]. Id. at 1436 (quoting report of department on tenure and promotion evaluation of Fisher). The department report, in concluding that Fisher lacked necessary leadership abilities, said: "'Another part of the problem is that she just

doesn't often speak her mind on matters of departmental concern and thus falls short as an intellectually stimulating colleague and contributor to departmental policy-making. Her deferential attitude has been a continuing source of frustration." Id.

[FN109]. See id.

[FN110]. Id.

[FN111]. 66 F. Supp. 2d 1104 (D. Ariz. 1999).

[FN112]. Id. at 1106.

[FN113]. Id. at 1109.

[FN114]. Id. at 1110.

[FN115]. Id. at 1109; see also Kahn v. United States Sec'y of Labor, 64 F.3d 271, 279-80 (7th Cir. 1995) (holding that employee's sarcastic, argumentative, and condescending behavior, as well as abrasive and aggressive manner of association, constitute legitimate, nondiscriminatory reasons for termination).

[FN116]. 426 F. Supp. 218 (E.D.N.C. 1976).

[FN117]. See id. at 224.

[FN118]. Id. at 223.

[FN119]. Id.

[FN120]. Id. at 229.

[FN121]. Id.

[FN122]. Id. at 230.

[FN123]. See, e.g., Carol D. Rasnic, Litigating the Adverse Peer Review Decision, 66 EDUC. L. REP. 1, 13 (1991) ("The most perplexing characteristic recurring in equal protection and Title VII tenure denial lawsuits is the hands-off attitude of the courts, even when the plaintiff has presented unequivocal evidence of discriminatory treatment."); Zirkel, Personality as a Criterion for Faculty Tenure: The Enemy It Is Us, *supra* note 10, at 233, 237 (noting that in vast majority of cases in which courts have considered some element of personality, they have given great deference to the decision-making of institutions, holding in favor of colleges and universities in approximately two-thirds of the cases and arguing that courts have relied upon doctrine of institutional autonomy as way of avoiding looking beneath surface of decision-making process to see abuse of academic freedom and free speech which has taken place).

[FN124]. See Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945, 997 (1982) (arguing that courts have applied Title VII more strenuously and uniformly to lower paying, blue-collar jobs than to higher-paying, more prestigious jobs).

[FN125]. See, e.g., Webb v. Board of Trustees of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999); Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981); Adamian v. Lombardi, 608 F.2d 1224 (9th Cir. 1979); Megill v. Board of Regents of State of Fla., 541 F.2d 1073 (5th Cir. 1976); Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3d Cir. 1975); Watts v. Board of Curators, Univ. of Mo., 495 F.2d 384 (8th Cir. 1974); Sinnott v. Skaqit Valley College, 746 P.2d 1213 (Wash. Ct. App. 1987); Stastny v. Board of Trustees of Cent. Wash. Univ., 647 P.2d 496 (Wash. Ct. App. 1982).

[FN126]. See Dyer, *supra* note 10, at 309; Perry A. Zirkel, Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure, 12 EDUC. L. REP. 1053, 1059 (1983).

[FN127]. AAUP, *supra* note 11.

[FN128]. *Id.* at 40.

[FN129]. *Id.*

[FN130]. *Id.*

[FN131]. *Id.* at 39.

[FN132]. *Id.*

[FN133]. Snider, *supra* note 10, at A64.

[FN134]. *Id.*

[FN135]. See *id.*

[FN136]. Dyer, *supra* note 10, at 309.

[FN137]. See *id.*

[FN138]. *Id.*

[FN139]. See generally Kathryn R. Swedlow, Suing for Tenure: Legal and Institutional Barriers, 13 REV. LITIG. 557 (1994).

In all [tenure review] cases, there are objective and subjective components to the process. The candidate may be required to publish a certain number of articles;

this is the objective component. But the subjective component, which may include quality of writing, the article's subject matter, how the writing is received both popularly and academically, and the prestige of the journal in which the article is published, is also of vital importance in the tenure review.

Id. at 563.

[FN140]. See Dyer, *supra* note 10, at 320.

[FN141]. See *id.* at 322.

[FN142]. See *id.*

[FN143]. See Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, *supra* note 10, at 243.

[FN144]. See *id.* at 235.

[FN145]. See *id.* at 237-39. In fact, that is precisely the standard that is applied today to universities. The authors have found that no more deference is given to universities in faculty employment discrimination cases than is given to other employers where highly subjective standards are involved in evaluating a person's performance. On a related point, there are few employers who would tolerate the kind of outspoken criticism and contrarian behavior that colleges and universities routinely permit faculty to engage in.

[FN146]. 663 F.2d 502 (4th Cir. 1981).

[FN147]. See *id.* at 507-08. During the year in which he stood for tenure review, Mayberry had gone door-to-door to his colleagues in the Department of Romance Languages to complain about the chair's appointment of himself and his wife to a departmental decennial reaccreditation committee. Mayberry had also sent an anonymous questionnaire to the university's Self-Study Steering Committee, which was highly critical of the chair. See *id.*

[FN148]. *Id.* at 514 (citations omitted).

[FN149]. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, *supra* note 10, at 241.

[FN150]. *Id.* at 243.

[FN151]. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, *supra* note 126, at 1059.

[FN152]. See, e.g., Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988); Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985); Adamian v. Lombardi, 608 F.2d 1224 (9th Cir. 1979); Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3d Cir. 1975); Harris v. Board of Trustees of State Colleges, 542 N.E.2d 261 (Mass. 1989); Sinnott v. Skaqit Valley College, 746 P.2d 1213 (Wash. Ct. App. 1987); Stastny v. Board of Trustees of

Cent. Wash. Univ., 647 P.2d 496 (Wash. Ct. App. 1982).

[FN153]. 746 P.2d 1213 (Wash. Ct. App. 1987).

[FN154]. See id. at 1216-17.

[FN155]. See id. at 1218.

[FN156]. 647 P.2d 496 (Wash. Ct. App. 1982).

[FN157]. See id. at 500.

[FN158]. See id.

[FN159]. See id.

[FN160]. Id. at 504 (quoting Kunda v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980)).

[FN161]. Id.

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