
FACULTY DISCIPLINE: LEGAL AND POLICY ISSUES IN DEALING WITH FACULTY MISCONDUCT*

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INTRODUCTION

The vast majority of U.S. college and university faculty are hard-working professionals who take their responsibilities seriously. Occasionally, however, a college or university must deal with a faculty member whose behavior is problematic. Serious misconduct, such as plagiarism, falsification of credentials, or sexual harassment of students or colleagues, may justify dismissal of a tenured faculty member. Misconduct that is less serious, but that falls short of the standards of conduct expected of a faculty member, may require some form of discipline short of dismissal. Although some colleges and universities have explicit policies concerning the discipline of faculty short of termination, many institutional policies are silent on this issue, and address only the termination of a tenured appointment.

This issue is particularly problematic in the case of a tenured faculty member who engages in a pattern of misconduct, or commits one serious transgression, that needs to be addressed by the institution. Whether the faculty member is employed at a public institution, where constitutional due process protections attach,¹ or at a

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1. For a discussion of the due process rights of faculty employed at public institutions, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION*, 280-96 (3d ed. 1995).

private institution, where policies and procedures may have contractual status,² faculty disciplinary procedures must comply with these standards. At most institutions where faculty have a role in governance, faculty expect to participate in the creation or modification of faculty codes of conduct and disciplinary policies and procedures, as well as their implementation.

This article discusses the function of discipline in business and academic organizations and the development of standards of professional conduct for faculty. It reviews litigation challenging various forms of faculty discipline and suggests a set of issues for faculty members and administrators to consider before developing and implementing a policy on faculty discipline. Finally, the article discusses a variety of design issues for faculty disciplinary policies,³ including the allocation of responsibilities in implementing such policies, the use of informal resolution and alternative dispute resolution (ADR) mechanisms, and drafting strategies for encouraging judicial deference to internal decision-making regarding disciplinary decisions.

I. PROGRESSIVE DISCIPLINE

“Progressive discipline has long been a hallmark of enlightened employee relations.”⁴ It requires that employers impose “progressively more severe penalties for successive violations” of employment rules and regulations.⁵ Dismissal is viewed “as a last resort.”⁶ Progressive discipline may be embodied in faculty

2. For a discussion of the procedural rights of faculty employed at private institutions, see *id.* at 296–98.

3. A Google search was performed in order to locate faculty discipline policies. Only those policies that specifically addressed faculty discipline short of dismissal were included in the policy review. Twenty-five such policies were identified through this web-based search. It is very likely that additional institutions have adopted the American Association of University Professors (AAUP) policy statements on minor and major sanctions less than dismissal. For a discussion of this issue, see *infra* text accompanying notes 72–78.

4. *McClaskey v. U.S. Dep’t of Energy*, 720 F.2d 583, 592 (9th Cir. 1983) (Reinhardt, J., dissenting). See generally FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 966 (Alan Miles Ruben ed., 6th ed. 2003) (noting that arbitrators prefer to apply progressive discipline “when there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or has failed to follow, progressive discipline procedures”). See also BUREAU OF NAT’L AFFAIRS, PERSONNEL POLICIES FORUM SURVEY NO. 139: EMPLOYEE DISCIPLINE AND DISCHARGE 10–11 (1985) (finding that 94% of unionized and 93% of nonunionized employers require progressive discipline).

5. *Norfolk Shipbuilding & Drydock Corp. v. Local No. 684*, 671 F.2d 797, 799 (4th Cir. 1982). See also *NLRB v. Gen. Warehouse Corp.*, 643 F.2d 965, 970 n.18 (3d Cir. 1981) (noting that the purpose of progressive discipline is to make “employees more secure in their jobs”); *Capital Airlines, Inc. v. International Association of Machinists, Airline Division*, 25 Lab. Arb. Rep. (BNA) 13, 16 (1955) (Stowe, Arb.) (observing in the labor arbitration context that it is “axiomatic that the degree of penalty should be in keeping with the seriousness of the offense”).

6. *Am. Thread Co. v. NLRB*, 631 F.2d 316, 319 n.3 (4th Cir. 1983). See generally Sanford M. Jacoby, *Progressive Discipline in American Industry: Its Origins, Development, and Consequences*, in 3 *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* 213, 224 (D. Lipsky & D. Lewin eds., 1986).

personnel policies, whether or not the faculty is unionized.⁷

According to one scholar, “‘discipline’ is what an employer does to an employee to force a change in, or to control, behavior or performance.”⁸ Traditionally, employee discipline has had several purposes: 1) to punish the employee for violating an employer’s rule or for other forms of misconduct; 2) to educate the employee as to the proper standards of conduct to avoid future transgressions; and 3) to demonstrate to co-workers the consequences of misconduct.⁹ A “common law of discipline” has developed in the non-academic workplace, particularly in businesses where employees are represented by unions.¹⁰ This common law of discipline typically involves “progressive discipline,” in which a relatively minor form of discipline (such as a formal warning) is imposed for a first offense, and the discipline becomes progressively more severe for subsequent offenses.¹¹

This industrial model of progressive discipline may not transfer directly to the discipline of faculty; in fact, progressive discipline of faculty is unusual.¹² Many of the transgressions for which employees in business organizations are disciplined, such as tardiness, insubordination, or excessive absences, may not translate to the academic workplace or may be tolerated, at least for a period of time. Nevertheless, a disciplinary system of progressively more serious sanctions for repeated instances of misconduct appears helpful to faculty and administration: it provides important protections for faculty in both public and private institutions by building in additional safeguards of academic due process and an opportunity to deal with inappropriate conduct before it escalates.

Systems of progressive discipline in business organizations typically begin with an oral warning to the employee after the first violation, a written warning after the second violation, a suspension without pay for the third violation, and termination

7. For an example in a collective bargaining agreement, see SAN FRANCISCO STATE UNIV., PROGRESSIVE DISCIPLINE GUIDELINES, available at <http://www.sfsu.edu/~hrwww/directives/p206.htm> (last visited Jan. 23, 2006), which states that “[p]rogressive discipline establishes a process of clear, timely, consistent, and documented communications with an employee designed to ensure an understanding of job expectations, provide an opportunity to correct behavior, improve performance, and assure ‘due process.’” For an example in a faculty handbook for nonunionized faculty, see VANDERBILT UNIV., FACULTY MANUAL, DISCIPLINARY ACTIONS, available at <http://www.vanderbilt.edu/facman/actions.htm> (last visited Jan. 23, 2006). See also MASS. INST. OF TECH., FACULTY APPOINTMENT, PROMOTION, AND TENURE GUIDELINES, available at <http://web.mit.edu/policies/3.3.html> (last visited Jan. 23, 2006).

8. JAMES R. REDEKER, EMPLOYEE DISCIPLINE: POLICIES AND PRACTICES 4 (1989) (paraphrasing LAWRENCE STESSIN, EMPLOYEE DISCIPLINE viii (1960)).

9. *Id.*

10. See, e.g., Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594 (1985).

11. REDEKER, *supra* note 8, at 51.

12. Ann H. Franke, *Faculty Misconduct, Discipline, and Dismissal* at 5 (presented at the CLE Conference of the National Association of College and University Attorneys, Mar. 22, 2002), available at www.nacua.org.

for the fourth violation.¹³ If the violation is particularly serious, the employee may be suspended or terminated without the institution following the progressive discipline process.¹⁴ Under the industrial model of progressive discipline, the decision-maker, often an arbitrator interpreting a collective bargaining agreement, will review the employee's history of discipline and will take that into consideration in determining whether the discipline at issue is appropriate.¹⁵ The employer's failure to follow progressive discipline standards, or failure to warn an employee about performance or behavior problems before imposing discipline, may persuade an arbitrator to reduce or reject the proposed discipline.¹⁶

Progressive discipline also provides due process protections to employees in that they receive notice of the problematic behavior and have an opportunity to correct that behavior before severe sanctions are applied. Using progressive discipline also establishes a "paper trail" of the employer's attempts to resolve the problem without dismissing the employee. Given the appropriately extensive processes required to terminate the appointment of a tenured faculty member, institutions—administration and faculty—may wish to consider sanctions short of dismissal when they are faced with a faculty member who engages in misconduct. Furthermore, having sanctions available that are less severe than dismissal may enable faculty members and administrators to respond early to problematic faculty behavior, whereas they are hesitant, and rightfully so, to impose the ultimate sanction of dismissal for anything but the most serious misconduct.

The institution may also consider using discipline short of dismissal when dealing with a faculty member with a history of neglect of teaching, research, or service obligations, or mild but repeated inappropriate behavior with staff or students, as a way of establishing a record of the individual's misconduct and the institution's response in the event that a later decision is made to dismiss a tenured faculty member if the problematic behavior persists. Although each faculty dismissal case is *sui generis*, and though faculty use a variety of legal theories to challenge discipline, it is difficult for an institution to defend against a claim of lack of notice to a faculty member regarding the infraction. Institutions that have tolerated the misconduct of a faculty member for years may find it difficult to persuade a court that the individual's due process rights were protected if misconduct that they had long tolerated suddenly becomes grounds for dismissal.¹⁷ The institutional shift often occurs with the arrival of new administrators. Prompt attention to misconduct that interferes with the institution's ability to carry out its mission, followed by progressive discipline, may have the happy outcome of "rehabilitating" a problematic faculty member, or it may lay the groundwork for eventual dismissal. In either case, intervention before the misconduct escalates

13. *Id.* at 53. See also ROBERT COULSON, THE TERMINATION HANDBOOK 122 (1981).

14. ELKOURI & ELKOURI, *supra* note 4, at 965–66.

15. *Id.* at 945.

16. *Id.* at 966.

17. See, e.g., *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (ruling that the college's sexual harassment policy was too vague to put the faculty member on notice that his classroom conduct in which he had engaged for many years violated that policy).

into a serious problem for the faculty member and the institution is a wise course of action.

While written progressive discipline policies are not commonplace in academe, examples exist. In *Trimble v. West Virginia Board of Directors*,¹⁸ the Supreme Court of Appeals of West Virginia ruled that the administration “should not have fired [a tenured professor for insubordination] before resorting to other progressive disciplinary measures” under West Virginia’s constitution because the tenured professor had a constitutionally protected property interest in his position.¹⁹ George Trimble, a professor of English who was a leader in the teachers’ labor union, was in conflict with the college president, who wanted to implement a computer-based program to write course syllabi.²⁰ The administration established mandatory meetings to discuss implementation of the new computer program which the professor refused to attend.²¹ Trimble, who had consistently received “favorable evaluations,” was ultimately dismissed because the college president considered the unexcused absences to be insubordination.²² The board of directors upheld the dismissal and Trimble appealed to a state appellate court, which upheld the board’s decision.²³ The Supreme Court of Appeals of West Virginia reversed, ruling that the West Virginia Constitution guarantees procedural safeguards against state action that affects a property interest.²⁴ The court found that Trimble had a protected property interest in his tenured faculty position.²⁵ While the court found Trimble to have been insubordinate on some occasions, the court reasoned that the gravity of the harm caused by the insubordination failed to justify the dismissal of a professor who had an “unblemished record.”²⁶ Under these circumstances, the court found that due process requires “the educational institution to impose progressive disciplinary sanctions in an attempt to correct the teacher’s insubordinate conduct before it may resort to termination.”²⁷

In an older case, *Garrett v. Mathews*,²⁸ Bert D. Garrett, a tenured professor of mathematics at the University of Alabama, challenged the ability of a faculty

18. 549 S.E.2d 294 (W. Va. 2001).

19. *Id.* at 301.

20. *Id.* at 297.

21. *Id.*

22. *Id.* at 297–98.

23. *Id.* at 298.

24. *Id.* at 302.

25. *Id.*

26. *Id.* at 304.

27. *Id.* In a sharply worded dissent, Justice Maynard opined that the majority was acting like a “super board of directors” and was “micro-manag[ing] higher education employment and disciplinary decisions.” *Id.* at 305. The dissent opined:

[T]he majority sends an unmistakable message to State college and university administrations that even the most recalcitrant, inflexible, and uncooperative tenured teachers cannot be fired absent a protracted, and most likely futile, effort to bring them into line. . . . It thus robs administrators of the ability to take quick and decisive action.

Id.

28. 474 F. Supp. 594 (N.D. Ala. 1979), *aff’d*, 625 F.2d 658 (5th Cir. 1980).

committee to impose a lesser sanction than dismissal when the faculty handbook provided for dismissal only.²⁹ The administration had accused Garrett of insubordination for eight infractions, which included his refusal to assign proper grades and his failure to cover required course material.³⁰ The administration sought the professor's dismissal, but a faculty hearing committee found sufficient evidence to support only three of the eight charges: Garrett's failure to comply with an administrative request to provide a list of publications, his failure to open mail from the department chair, and his failure to post and keep office hours.³¹ Accordingly, the faculty committee recommended that Garrett not be dismissed, but that his tenure be revoked and that his status be reconsidered at the end of one year.³² Eventually, the administration chose to dismiss Garrett because it viewed the lesser sanctions as outside the authority of the faculty committee.³³ Ironically *both* parties argued to the district court that the faculty committee did not have the power to revoke Garrett's tenure because the faculty handbook provided for dismissal only, not lesser sanctions.³⁴ The district court disagreed, reasoning: "The only discipline dealt with by the Faculty Handbook is termination. That document neither permits nor prohibits tenure revocation. The handbook is not on its face so complete in other respects as to create the presumption that the omission of tenure revocation was intentional."³⁵ The court observed that the power to revoke tenure need not be delineated in the faculty handbook, just like "not showing up for class naked is not a written job requirement Some things go without saying."³⁶

On appeal to the Fifth Circuit, the professor challenged "the university's power to impose any sanction other than dismissal."³⁷ The University of Alabama changed its argument on appeal, contending "that lesser sanctions such as loss of tenure, demotion, suspension, probation, or reprimand are necessarily included in the sanction of dismissal."³⁸ The appellate court ruled that not every departure from the university's rules rose to the level of a constitutional violation.³⁹ While the court did not hold that "failure to inform an individual of the sanctions he faces is never a violation of due process," in this case, the imposition of a sanction less severe than those listed in the handbook was not constitutionally impermissible.⁴⁰

29. *Id.* at 600.

30. *Id.* at 597.

31. *Id.*

32. *Id.*

33. *Id.* at 598.

34. *Id.* at 600.

35. *Id.*

36. *Id.* at 599.

37. *Garrett v. Mathews*, 625 F.2d 658, 660 (5th Cir. 1980).

38. *Id.*

39. *Id.*

40. *Id.*

II. STANDARDS FOR FACULTY CONDUCT

Under what circumstances might an institution choose to impose a lesser discipline than dismissal upon a faculty member? Although each case would be fact-specific and would thus afford no basis for generalizing, situations may exist where the institutional response should be a sanction short of dismissal. On the one hand, certain forms of academic misconduct may not be serious enough to warrant dismissal, or the facts may suggest that a sanction short of dismissal, such as suspension or a prohibition against working with student research assistants for a period of time, is more appropriate. On the other hand, sexual or racial harassment of students, faculty, or staff, or criminal misconduct, such as embezzlement or physical violence, might lead the institution to commence dismissal proceedings.

Although an institution cannot anticipate every form of faculty misconduct that may occur, developing a policy to deal with such issues before they arise will help to remind faculty of the general standards of professional behavior, allow the institution to respond promptly, provide guidelines for appropriate investigation and determination of whether misconduct occurred, and facilitate decisions as to what sanction, if any, is appropriate. The faculty should play a primary role in the development of policy, as well as in its implementation in particular cases.⁴¹

The American Association of University Professors' (AAUP) *Statement on Professional Ethics* provides a helpful starting place for a discussion of the grounds for disciplining a faculty member for misconduct.⁴² The statement says:

1. Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and to state the truth as they see it. To this end professors devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although professors may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.

41. See AAUP, *Statement on Government of Colleges and Universities*, in POLICY DOCUMENTS & REPORTS 217, 221 (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/Govern.htm> [hereinafter *Statement on Colleges and Universities*] ("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. . . . Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in the other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.")

42. AAUP, *Statement on Professional Ethics*, in POLICY DOCUMENTS & REPORTS 133, 133–34 (9th ed. 2001) [hereinafter *Statement on Professional Ethics*].

2. As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them. They protect their academic freedom.
3. 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.
4. As members of an academic institution, professors seek above all to be effective teachers and scholars. Although professors observe the stated regulations of the institution, provided the regulations do not contravene academic freedom, they maintain their right to criticize and seek revision. Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of work done outside it. When considering the interruption or termination of their service, professors recognize the effect of their decision upon the program of the institution and give due notice of their intentions.
5. As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Hundreds of colleges and universities have incorporated the *Statement on*

Professional Ethics in their faculty handbooks and collective bargaining agreements.⁴³ Courts have upheld sanctions imposed upon tenured faculty members, up to and including dismissal, based upon the statement.⁴⁴

In recent years, scholars have attempted to elaborate more fully articulated set of behavioral norms for college and university faculty. In some cases, these authors have relied on their own experience and their sense of what the academic community expects of learned professionals.⁴⁵ In others, scholars have surveyed their peers to develop a set of widely-recognized norms. For example, Braxton and Bayer surveyed faculty in four academic disciplines (biology, mathematics, psychology, and history) at research universities, liberal arts colleges, and community colleges throughout the United States.⁴⁶ The respondents identified what the authors call “inviolable norms” that required “strong sanctions” for faculty who ignore them.⁴⁷ The seven “inviolable norms” identified are: “condescending negativism, inattentive planning, moral turpitude, particularistic

43. See, e.g., *Barham v. Univ. of N. Colo.*, 964 P.2d 545, 549 (Colo. Ct. App. 1997); AAUP, *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 AAUP BULL. 382, 388, 391 (Autumn 1971) (noting the university’s incorporation of the AAUP’s *Statement on Professional Ethics* into the university’s code); AAUP, *Academic Freedom and Tenure: Camden County College*, 59 AAUP BULL. 356, 357 (Autumn 1973) (noting that collective-bargaining agreement incorporated the AAUP’s *Statement on Professional Ethics*).

44. See, e.g., *San Filippo v. Bongiovani*, 961 F.2d 1125, 1128–32 (3d Cir. 1992) (upholding dismissal by Rutgers University of a tenured chemistry professor, relying in part on the university’s adoption of the AAUP’s *Statement on Professional Ethics* to find the professor had “exploited, threatened and been abusive” to “visiting Chinese scholars brought to the University to work with him on research projects”); *Keen v. Penson*, 970 F.2d 252, 256 (7th Cir. 1992) (stating that the faculty hearing committee found that tenured professor violated standards for treatment of students established by the *Statement on Professional Ethics*, which was incorporated into the faculty handbook, when professor gave student an unjustified failing grade, demanded that she write letter of apology to him, and failed to treat her with respect); *Korf v. Ball State Univ.*, 726 F.2d 1222, 1227 (7th Cir. 1984) (endorsing the governing board’s interpretation of *Statement on Professional Ethics*—which was incorporated into Ball State University’s handbook and prohibits sexual exploitation—and which led to dismissal of a tenured faculty member who engaged in sexual relations with numerous students); *Earnhardt v. Univ. of New England*, No. 95-229-P-H, 1996 WL 400455, at *2 (D. Me. July 3, 1996) (ruling that tenured professor’s conduct violated University of New England’s sexual harassment policy as well the AAUP’s *Statement on Professional Ethics*); *Starsky v. Williams*, 353 F. Supp. 900, 912 (D. Ariz. 1972) (finding that tenured Arizona State University professor’s actions in supporting student take-over of administration building did not violate the AAUP’s *Statement on Professional Ethics*); see also AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 64 (Spring 1976) (finding that tenured professor did not do anything “contrary” to the professional ethics statement); AAUP, *Academic Freedom and Tenure: University of Judaism (California)*, 74 ACADEME 34, 39 (May–June 1988) (concluding that anonymous evaluating committee, “by its misleading treatment of presumably anonymous outside references” in its report on tenure-and-promotion candidate, “acted questionably” under the AAUP’s *Statement on Professional Ethics*).

45. See, e.g., STEVEN M. CAHN, *SAINTS AND SCAMPS: ETHICS IN ACADEMIA* (1986).

46. JOHN M. BRAXTON & ALAN E. BAYER, *FACULTY MISCONDUCT IN COLLEGIATE TEACHING* 7–20 (1999).

47. *Id.* at 21.

grading, personal disregard, uncommunicated course details, and uncooperative cynicism.⁴⁸ Although the research focused primarily on standards of conduct in teaching rather than in research,⁴⁹ many of the standards include conduct toward a faculty member's peers and administrators. The authors also identified nine additional "admonitory norms," which they defined as norms that "evoke less indignation [among the survey respondents] when violated," but which garnered sufficient support to justify their inclusion: "advisement negligence, authoritarian classroom, inadequate communication, inadequate course design, inconvenience avoidance, instructional narrowness, insufficient syllabus, teaching secrecy, and undermining colleagues."⁵⁰

Scholarly organizations also have developed codes of conduct for their members, many of which embody the principles of the AAUP's *Statement on Professional Ethics*. For example, *The Chemist's Code of Conduct* from the American Chemical Society states, among other requirements, that chemists "should remain current with developments in their field" and "should regard the tutelage of students as a trust conferred by society for the promotion of the student's learning and professional development. Each student should be treated respectfully and without exploitation."⁵¹ The code of conduct for the American Psychological Association states that psychologists who teach must ensure that course syllabi are accurate, present psychological information accurately, and refrain from engaging in sexual relationships with students whom they supervise in class or at internships.⁵² The *Code of Ethics* for the National Association of Social Workers instructs social workers to "treat colleagues with respect and [] represent accurately and fairly the qualifications, views, and obligations of colleagues."⁵³ Some colleges and universities have incorporated into their faculty codes of conduct explicit statements faculty are expected to comply with the standards of practice of their professional organization as well as with the institution's own code of conduct and that failure to remain in good standing with one's profession may be grounds for discipline by the institution.⁵⁴

Institutional practice varies with respect to codes of conduct for faculty, although codes of conduct for students appear to be ubiquitous.⁵⁵ Some

48. *Id.*

49. For a discussion of standards of conduct in research, see PERSPECTIVES ON SCHOLARLY MISCONDUCT IN THE SCIENCES (John M. Braxton ed., 1999).

50. BRAXTON & BAYER, *supra* note 48, at 42. The authors also provide examples of conduct that violates each norm.

51. THE CHEMIST'S CODE OF CONDUCT, available at <http://www.chemistry.org/portal/a/c/s/1/acdisplay.html?DOC=membership%5Cconduct.html> (last visited Jan. 23, 2006).

52. AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, available at <http://www.apa.org/ethics/code2002.html> (last visited Jan. 23, 2006).

53. NAT'L ASS'N OF SOCIAL WORKERS, CODE OF ETHICS, available at <http://www.socialworkers.org/pubs/code/code.asp> (last visited Jan. 23, 2006).

54. See, e.g., IOWA STATE UNIV., FACULTY CONDUCT POLICY, FACULTY HANDBOOK § 7.2.2.5.6, available at <http://www.provost.iastate.edu/faculty/handbook/section7.html> (last visited Jan. 23, 2006).

55. See, e.g., STUDENT DISCIPLINARY ISSUES (Janet Faulkner & Nancy Tribbensee eds., 3d

institutions do not attempt to define the types of misconduct for which sanctions may apply, choosing instead to rely on a more general statement that faculty are expected to behave in a professional manner; for example, Vanderbilt University's *Standards of Conduct* states:

Standards for faculty conduct are derived from tradition and evolve with contemporary practice. Accordingly, grounds for discipline for members of the faculty of a University are usually not made the subject of precise statement; when commonly held standards of conduct are broken, however, disciplinary action must be taken if the community is to be sustained.⁵⁶

Other institutions, such as Smith College and Middlebury College, have general codes of conduct for all employees, including faculty, that provide general guidance on conflicts of interest, the use of the institution's property and financial resources, and compliance with legal requirements.⁵⁷ Still other institutions, as noted earlier, have adopted the AAUP's *Statement on Professional Ethics*, in whole or in part, but do not elaborate on the kind of misconduct that will result in discipline.⁵⁸

The University of California system's *Faculty Code of Conduct* was first promulgated in 1971 and it has since been amended by the Assembly of the Academic Senate and the Regents several times.⁵⁹ The code first recognizes the university's commitment to academic freedom and the faculty's right to participate in university governance.⁶⁰ It also sets forth "ethical principles" drawn from the AAUP's *Statement on Professional Ethics*, and then lists types of unacceptable faculty conduct in the areas of teaching, scholarship, membership in the university community, and relationships with colleagues.⁶¹ The code also states that faculty may be disciplined for conduct that is not specifically mentioned in the document if such conduct contravenes the standards of unacceptable faculty behavior.⁶² Iowa State University's *Faculty Conduct Policy* also incorporates the AAUP's *Statement on Professional Ethics* and then specifies several types of misconduct that will be considered violations of the policy, such as conflicts of interest, harassment,

ed. 2005); *see also* THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATION, AND COMMUNITY ISSUES (Brent G. Paterson & William L. Kibler eds., 1998).

56. VANDERBILT UNIV., STANDARDS OF CONDUCT, *available at* <http://www.vanderbilt.edu/facman/actions.htm> (last visited Jan. 23, 2006).

57. MIDDLEBURY COLL., CODE OF CONDUCT FOR EMPLOYEES, *available at* <http://www.middlebury.edu/about/handbook/general/misc/Code+of+Conduct+for+Employees.hm> (last visited Jan. 23, 2006); SMITH COLL., CODE OF CONDUCT, *available at* <http://www.smith.edu/codeofconduct/> (last visited Jan. 23, 2006).

58. *See, e.g.*, S. ILL. UNIV. AT EDWARDSVILLE, FACULTY CODE OF ETHICS AND CONDUCT, *available at* <http://www.siue.edu/POLICIES/1q1.html> (last visited Jan. 23, 2006).

59. UNIV. OF CAL., GENERAL UNIVERSITY POLICY REGARDING ACADEMIC APPOINTEES: THE FACULTY CODE OF CONDUCT (APM-015), *available at* <http://www.ucop.edu/acadadv/acadpers/apm/apm-015.pdf> (last visited Jan. 23, 2006).

60. *Id.*

61. *Id.*

62. *Id.*

abandonment of the faculty member's position, and breaches of professional ethics.⁶³

Some institutions may include personal as well as professional misconduct as potential grounds for discipline. For example, Calvin College, a private, religiously-affiliated college in Michigan, lists spousal or alcohol abuse, "immoderate anger," and "persistently profane or obscene language" as possible grounds for discipline of faculty.⁶⁴ Other institutions, however, state that a faculty member may be charged with misconduct "only for actions taken in association with the faculty member's academic duties and responsibilities."⁶⁵ Another institution's policy states, "A faculty member's activities that fall outside the scope of employment shall constitute misconduct only if such activities adversely affect the legitimate interests of the University."⁶⁶

Drafters of faculty codes of conduct often walk a fine line between providing too little detail concerning the behavior expected of a faculty member (resulting in potential claims of lack of notice, a due process violation) and too much detail (potentially omitting serious forms of misconduct for which discipline should be meted out, but about which the code of conduct may be silent). The AAUP's *Statement on Professional Ethics*, having been vetted by federal courts as providing sufficient detail to establish a basis for providing notice of the type of conduct expected of a professor, appears to be a sound basis for a faculty code of conduct.⁶⁷ The statement may be incorporated into institutional policy as written, or modified to suit the institution's culture and mission.⁶⁸

III. SANCTIONS LESS THAN DISMISSAL IN THE ACADEMY

As noted, sanctions less severe than dismissal may be appropriate in dealing with particular faculty matters that do not rise to just cause. The Commission on Academic Tenure observed in 1973 that it was

63. IOWA STATE UNIV., *supra* note 54. For other institutional policies that specifically set out types of misconduct that will violate the institution's code of conduct, see ARIZ. STATE UNIV., FACULTY CODE OF ETHICS, *available at* <http://www.asu.edu/aad/manuals/acd/acd204-01.html> (last visited Jan. 23, 2006); STEPHEN F. AUSTIN STATE UNIV., FACULTY CODE OF CONDUCT, *available at* http://www.sfasu.edu/upp/pap/personnel_services/faculty_code_of_conduct.html (last visited Jan. 23, 2006); and UNIV. OF NEW ORLEANS, UNIV. POLICY ON FACULTY CONDUCT, *available at* <http://www.uno.edu/~acaf/forms/Policy%20on%20Faculty%20Conduct.pdf> (last visited July 22, 2005).

64. CALVIN COLL., HANDBOOK FOR TEACHING FACULTY, PROCEDURES FOR ADDRESSING ALLEGATIONS OF MISCONDUCT, *available at* http://www.calvin.edu/admin/provost/fac_hb/chap_6/6_1.htm (last visited Jan. 23, 2006).

65. *See, e.g.*, STANFORD UNIV., FACULTY HANDBOOK, *available at* <http://facultyhandbook.stanford.edu/ch4.html> (last visited Jan. 23, 2006).

66. UNIV. OF N. TEX., UNIT FACULTY DISCIPLINE POLICY, UNIVERSITY OF NORTH TEXAS POLICY MANUAL, *available at* http://www.unt.edu/policy/UNT_Policy/volume3/15_1_33.html (last visited Jan. 23, 2006).

67. *See* San Filippo v. Bongiovanni, 961 F.2d 1125 (3d Cir. 1992).

68. Statements that the code of conduct is illustrative but not comprehensive may provide notice to faculty that not all transgressions may be listed.

manifestly insufficient to have a disciplinary system which assumes that only those offenses which warrant dismissal should be considered seriously. Faculty members are from time to time guilty of offenses of lesser gravity. There should be a way of recognizing these and imposing appropriate sanctions. And it is equally insufficient to make do only with disciplinary procedures designed for capital offenses. Simpler procedures—though assuring due process in the particular context—are obviously required for offenses for which sanctions short of dismissal are contemplated.⁶⁹

Accordingly, the Commission recommended

that each institution develop and adopt an enumeration of sanctions short of dismissal that may be applied in cases of demonstrated irresponsibility or professional misconduct for which some penalty short of dismissal should be imposed. These sanctions and the due-process procedures for complaint, hearing, judgment, and appeal should be developed initially by joint faculty-administrative action.⁷⁰

In 1971, a special joint subcommittee of the AAUP considered the question of sanctions short of dismissal, and enumerated the following lesser sanctions:

(1) oral reprimand, (2) written reprimand, (3) a recorded reprimand, (4) restitution (for instance, payment for damage done to individuals or to the institution), (5) loss of prospective benefits for a stated period (for instance, suspension of “regular” or “merit” increase in salary or suspension of promotion eligibility), (6) a fine, (7) reduction in salary for a stated period, (8) suspension from service for a stated period, without other prejudice.⁷¹

Regulation 7 of the AAUP’s *Recommended Institutional Regulations on Academic Freedom and Tenure* (RIR), distinguishes between “major” and “minor”

69. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *FACULTY TENURE 75–76* (William R. Keast ed., 1973).

70. *Id.* at 76–77.

71. *Id.* at 76. This list is not exhaustive. For example, some administrations have sought to impose the “discipline” of tenure revocation. In one case, Herbert Benjamin, a tenured faculty member, was notified of the termination of his appointment after a complaint of sexual harassment had been filed against him by a female student. AAUP, *Academic Freedom and Tenure: Philander Smith College (Arkansas)*, 90 *ACADEME* 57, 64 (Jan.–Feb. 2004). According to the AAUP investigating committee, he was offered a number of “disciplinary choices” by the college president, “all but one of which, ‘tenure removal with mandatory counseling and two years of probation,’ would have resulted in his separation from the college.” *Id.* Benjamin accepted the tenure removal option. *Id.* The AAUP explained that the tenure revocation disciplinary option was inappropriate because “[t]enure, once bestowed, continues as long as the professor continues as a full-time member of the faculty. The only exception would be a demonstrated flaw in the initial granting of tenure.” *Id.* Other administrations have imposed as discipline the requirement of an apology. See, e.g., *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (stating that faculty hearing panel recommended that professor apologize in writing to female students who accused him of sexual harassment, but internal appeals committee declined to endorse this discipline).

sanctions, categorizing suspension as major and reprimand as minor.⁷² Regulations 5 and 7 provide that major sanctions should not be imposed until after a hearing in which the same procedures apply as in a dismissal case.⁷³ These procedures include written notice of the charges, a hearing before a faculty committee in which the administration bears the burden of proof, right to counsel, cross-examination of adverse witnesses, a record of the hearing, and a written decision.⁷⁴ Immediate suspension with pay, pending a hearing, is appropriate under AAUP policy if an individual poses a threat of immediate harm to himself or herself or others.⁷⁵ Moreover, regulation 5(c)(1) provides that the administration,

72. AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* (1999), in POLICY DOCUMENTS & REPORTS 23, 27–28 (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/Rbrir.htm> (last visited Jan. 23, 2006) [hereinafter *Regulations on Academic Freedom and Tenure*]. Regulation 7 provides:

(a) If the administration believes that the conduct of a faculty member, although not constituting adequate cause for dismissal, is sufficiently grave to justify imposition of a severe sanction, such as suspension from service for a stated period, the administration may institute a proceeding to impose such a severe sanction; the procedures outlined in regulation 5 will govern such a proceeding.

(b) If the administration believes that the conduct of a faculty member justifies imposition of a minor sanction, such as a reprimand, it will notify the faculty member of the basis of the proposed sanction and provide the faculty member with an opportunity to persuade the administration that the proposed sanction should not be imposed. A faculty member who believes that a major sanction has been incorrectly imposed under this paragraph, or that a minor sanction has been unjustly imposed, may, pursuant to Regulation 15, petition the faculty grievance committee for such action as may be appropriate.

Id. See, e.g., AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82, 86 (Spring 1977) (finding that suspension and salary reduction of tenured faculty member were “severe sanctions” requiring due process similar to that called for by dismissal); AAUP, *Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on Disciplinary Suspension*, 62 AAUP BULL. 369, 374–75 (Winter 1976) (concluding that while professor exercised “poor judgment in canceling his classes without the permission of his supervisor,” “some sanctions less severe than a long-term [unpaid] suspension might have been properly imposed” and that “the penalty assessed . . . [was] harsh even by industrial standards,” which in “monetary terms . . . cost [the professor] over \$10,000”); AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 65 (Spring 1976) (discussing discipline of antiwar professor who was active in Socialist Workers’ Party who canceled class to speak at rally and “the proposed letters of censure . . . as minor sanctions that are not altogether unjustified”).

73. *Regulations of Academic Freedom and Tenure*, *supra* note 72, at 27.

74. *Id.*

75. AAUP, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, in POLICY DOCUMENTS & REPORTS 1, 11–12 (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/Rbfacdis.htm> [hereinafter *Statement on Procedural Standards in Faculty Dismissal Proceedings*]. The 1958 statement provides:

Pending a final decision by the hearing committee, the faculty member will be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member’s status through the institution’s hearing procedures, the administration will consult with the Faculty Committee on

before suspending a faculty member, will consult with an appropriate faculty committee concerning the “propriety, the length, and other conditions of the suspension.”⁷⁶

The AAUP regulations further provide that an institution may impose a minor sanction after providing the individual notice, and that the individual professor has the right to seek review by a faculty committee if he or she believes that a sanction was unjustly imposed.⁷⁷ In the end, however, the governing board will make a final decision about the appropriateness of more serious sanctions.⁷⁸

IV. FACULTY LITIGATION CHALLENGING DISCIPLINE

Sanctions short of dismissal exist and should be considered for less significant transgressions with the potential for escalation as required. At most institutions, “there will be many checkpoints along the path of graduated employee discipline.”⁷⁹ That does not mean that such progressive discipline will escape faculty challenge. Litigation arising from the imposition of sanctions flows from a number of legal sources, including constitutional law for public institutions, contractual obligations at private and public institutions (faculty handbooks, letters

Academic Freedom and Tenure [or whatever other title it may have] concerning the propriety, the length, and the other conditions of the suspension. A suspension which is intended to be final is a dismissal, and will be treated as such. Salary will continue during the period of the suspension.

Id. at 11. The statement continues that “[u]nless legal considerations forbid, any such suspension should be with pay.” *Id.* at 12.

76. *Regulations on Academic Freedom and Tenure, supra* note 72, at 26.

77. *Id.* at 28.

78. Regulation 6 provides that the governing board will sustain or return a case to the appropriate faculty committee “with specific objections. The committee will then reconsider, taking into account the stated objections and reviewing new evidence if necessary. The governing board will make a final decision only after study of the committee’s reconsideration.” *Id.* at 27. Often internal review bodies disagree about the appropriateness of a disciplinary sanction. *See, e.g., Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993) (noting that the faculty committee recommended a one-year suspension for a professor accused of plagiarism and the council, to whom the professor appealed, remanded the matter to the faculty committee with the outcome being the more severe sanction of dismissal); *Samaan v. Trs. of the Cal. State Univ. & Colls.*, 197 Cal. Rptr. 856, 859 (Ct. App. 1983) (discussing a scenario where faculty committee recommended the imposition of a written reprimand for “casual bookkeeping” of tenured psychology professor who pled guilty to criminal charges for having submitted false bills to state insurance program and the president disagreed with that faculty committee’s recommendation).

79. STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 201 (2002) (noting that “faculty conduct that warrants institutional discipline may take an infinite variety of forms”). Poskanzer describes the “[t]ypical steps” with “increasing severity” in the academic workplace as follows:

- (1) an informal conversation between faculty member and the chair or dean; (2) a lower-than-normal (or even zero) salary increase; (3) loss of perquisites or privileges (i.e., premium office space, discretionary funds, research assistantships); (4) a formal warning or reprimand, which might be placed in the faculty member’s personnel file;
- (5) being put on probation; and (6) being put on involuntary leave.

Id. at 201–02.

of appointment, collective bargaining agreements), and regulations and statutes (internal and external).

A. Warning or Reprimand

Warnings or reprimands tend to be the most minor sanction imposed upon faculty.⁸⁰ Often such warnings or reprimands—sometimes oral, sometimes written—are issued in response to first time offenses that are not so serious as to trigger major sanctions.⁸¹ Generally courts uphold the imposition of warnings and reprimands as appropriate discipline so long as such minor sanctions are not imposed for discriminatory or unconstitutional reasons.

Courts generally rule that letters of reprimand do not constitute adverse employment actions under federal discrimination laws.⁸² In *Nelson v. University*

80. See, e.g., UNIV. OF GA., COOPERATIVE EXTENSION PROGRAM, available at <http://www.extension.caes.uga.edu/cec/forms/progdisc.pdf> (last visited Jan. 23, 2006) (“Oral reprimands and written warnings are warning procedures and are the least harsh of the several types of disciplinary actions. They are usually the first two steps in the progressive discipline sequence.”).

81. See AAUP, *Academic Freedom and Tenure: Tulane University*, 56 AAUP BULL. 424, 430 (Winter 1970) (acknowledging as proper faculty committee’s recommendation for reprimand as opposed to dismissal for professor’s interference with on-campus ROTC drill); AAUP, *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP BULL. 25, 41 (Spring 1963) (reviewing faculty senate’s reprimand of professor who wrote controversial letter-to-the-editor to campus newspaper that identified his faculty title, but deciding that the “crucial” issue was that unanimous agreement existed among internal review bodies that the professor should not have been discharged). But see AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 65 (Spring 1976) (discussing, in a case involving an antiwar professor who was active in the Socialist Workers’ Party and canceled class to speak at a rally, how two letters of reprimand “insofar as they referred or might have referred to the class dismissal, were out of line with a previous response to a similar class dismissal”).

82. Federal antidiscrimination statutes, such as Title VII of the Civil Rights Act, offer some protection to victims of “adverse employment actions.” See generally 42 U.S.C. § 1983 (2000). The Seventh Circuit described the term “adverse employment action” as “judicial shorthand . . . for the fact that these statutes require the plaintiff to prove that the employer’s action of which he is complaining altered the terms or conditions of his employment.” *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000). See, e.g., *Welsh v. Derwinski*, No. 90-10950-Z, 1993 WL 90168, at *4 (D. Mass. Mar. 12, 1993) (holding reprimand of employee not adverse employment action under the Age Discrimination in Employment Act); *Coney v. Dept. of Human Res. of State of Ga.*, 787 F. Supp. 1434, 1442 (M.D. Ga. 1992) (holding “that a nonthreatening written reprimand, which is later removed from an employee’s personnel file, is not an adverse employment action” under Title VII); *Rivers v. Balt. Dep’t of Recreation & Parks*, No. R-87-3315, 1990 WL 112429, at *10 (D. Md. Jan. 9, 1990) (noting that “[a] letter being placed in a personnel file does not, by itself, constitute an adverse employment action . . . because . . . [s]uch a claim is far too speculative to constitute an adverse employment action” under Title VII). Cf. *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (holding that written warnings constitute adverse employment action where evidence established that the more warnings received by employee, the more likely employee was to be terminated for future infraction). But see *Armstrong v. City of Dallas*, 829 F. Supp. 875, 880 (N.D. Tex. 1992) (holding a letter of reprimand constitutes an adverse employment action); *Columbus Educ. Ass’n v. Columbus City Sch. Dist.*, 623 F.2d 1155 (6th Cir. 1980) (concluding that a letter of reprimand in teacher’s personnel file constituted

of *Maine Systems*,⁸³ the federal district court granted the university's motion for summary judgment, thereby denying the claim of Edward Jessiman, a professor who alleged that letters of reprimand constituted retaliatory action against him based on allegations of sexual harassment.⁸⁴ Jessiman specifically claimed that the university engaged in an adverse employment action when the president placed a letter of reprimand in his personnel file based on the sexual harassment review.⁸⁵ The court observed that the professor "continues to teach all the classes he himself has chosen, and remains free to pursue outside activities as well. Furthermore [he] has not provided evidence to show that the University has threatened him with future adverse action."⁸⁶

Sometimes letters of reprimand trigger allegations of due process violations.⁸⁷ In *Hall v. Board of Trustees of State Institutions of Higher Learning*,⁸⁸ the University of Mississippi Medical Center (UMC) issued a written reprimand to Terrence J. Hall, a nontenured professor of medicine, after an investigation of an anonymous sexual harassment complaint.⁸⁹ The investigation concluded that while the university's sexual harassment policy had not been violated, the professor's

adverse employment action in retaliation for exercise of free speech).

83. 923 F. Supp. 275 (D. Me. 1996).

84. *Id.* at 281–84.

85. *Id.* at 281.

86. *Id.* at 282. *See also* *Cuenca v. Univ. of Kan.*, 265 F. Supp. 2d 1191, 1204, 1209 (D. Kan. 2003), *aff'd*, 101 F. App'x 782 (10th Cir. 2004) (ruling that "sanction of warning" to an assistant professor for his "egregious" failure to meet his academic responsibilities, related to his cancellation of certain classes" did not constitute an adverse action because the letter failed to have "any negative effect on his employment").

87. The Due Process Clause of the Fourteenth Amendment "provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). To succeed on a procedural due process claim, a public employee, including a professor at a public institution, must establish a property or liberty interest in employment as a professor and that the opposing party, acting under state law, deprived the faculty member of that interest without due process. *Id.* at 538. "[P]roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72 (1972)). A person's liberty interests are implicated when the individual's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Roth*, 408 U.S. at 573 (internal citations omitted). Such liberty interests may be violated when sanctions imposed "might seriously damage [a faculty member's] standing and associations in his community." *Id.* And so, when a state university "decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988). At the same time, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). One commentator has opined that "in an academic environment where both custom and comity frown on public disparagement of disciplined or departing colleagues, losses of property will be much more common than infringements of liberty." POSKANZER, *supra* note 79, at 243.

88. 712 So. 2d 312 (Miss. 1998).

89. *Id.* at 313.

touching a female student's breast in responding to her question about interpreting mammograms constituted "inappropriate behavior."⁹⁰ The letter of reprimand, which was placed in Hall's personnel file along with the "raw investigatory materials,"⁹¹ included a memorandum from the chair of the department of surgery, informing Hall "of the consequences of possible immediate termination if any further conduct or action that could be perceived as sexual harassment or improper conduct took place."⁹² The professor challenged the letter of reprimand before faculty bodies, which upheld the discipline.⁹³ Hall then appealed to UMC's board of trustees, which affirmed the findings of the faculty committees.⁹⁴

Hall then sought review in state court, arguing that the university had violated his substantive due process rights, which "bar[] outright 'certain government actions regardless of the fairness of the procedures used to implement them.'"⁹⁵ The Mississippi Supreme Court ruled that the written reprimand did not violate the professor's substantive due process rights, but required that the letter be maintained in a separate file.⁹⁶ The court reasoned that Hall had no property interest in the fourth year of his non-tenured position because he had no "legitimate expectation of, nor entitlement to, continued employment at UMC," and "thus, he is not entitled to substantive protection under the due process clause as the result of the arbitrary deprivation by government action of a protected property interest."⁹⁷

At the same time, the court found that Hall's liberty interest was implicated because his personnel file "contains statements made in connection with the investigation that amount to nothing more than free reign being given to students and co-workers to express their opinions about Dr. Hall's professional conduct which in no way were connected to the anonymous complaint of sexual harassment made against Dr. Hall."⁹⁸ Accordingly, the court found that the inclusion of the "raw investigatory materials" in Dr. Hall's personnel file created "a false and defamatory impression which stigmatizes and forecloses him from other employment opportunities," and constituted a "badge of infamy" that had the potential to "continuously har[m]" Dr. Hall's "future employment opportunities."⁹⁹

90. *Id.* at 313, 315.

91. *Id.* at 323.

92. *Id.* at 316.

93. *Id.* at 316-17.

94. *Id.* at 317.

95. *Id.* at 318 (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988)).

96. *Id.* at 326-27. *See also* *Meyer v. Univ. of Wash.*, 719 P.2d 98, 103 (Wash. 1986) (rejecting professor's due process claims because he did not have valid property interests, but instead had "expectations rather than entitlements").

97. *Hall*, 712 So. 2d at 320.

98. *Id.* at 323.

99. *Id.* (internal citations omitted). The court opined:

[F]or another institution to employ Dr. Hall they will run the risk of having a sexual harassment charge filed against the respective institution. In today's society with the already existing hysteria for employers to be subjected to liability for a charge of sexual harassment by one of its employees, UMC's actions and the Board's actions of allowing all materials of the investigation which resulted in no finding of sexual

However, because Hall could not establish that the confidential file would ever be made public, the court ultimately found no violation of his liberty interest in reputation.¹⁰⁰

In the end, the court found UMC's decision to include the investigatory materials in Hall's personnel file to be arbitrary and capricious under the state's administrative law, and ordered those materials to "be returned to and stored in the confidential investigation file maintained by the campus police who conducted the investigation."¹⁰¹ The court concluded that UMC was required "to place in the personnel file of Dr. Hall only a statement regarding the conduct, the findings of the investigation, and a statement regarding the disciplinary action taken against Dr. Hall."¹⁰²

From time to time, faculty members challenge reprimands as violating their free speech and academic freedom.¹⁰³ The competing First Amendment claims may compound when reprimands are imposed on individual faculty members by departmental colleagues. In *Meyer v. University of Washington*,¹⁰⁴ Carl Beat Meyer, a tenured professor of chemistry, challenged as improper his department's imposition on him of a reprimand.¹⁰⁵ In a closed executive session of the chemistry department faculty, his colleagues approved a motion (twenty-two in favor, two opposed, and one abstention) to reprimand Meyer "for inappropriate responses to interdepartmental activities."¹⁰⁶ After a grievance committee rejected Meyer's defamation claim, he sued his colleagues in state court asserting a number of claims, including violation of his First Amendment right to academic freedom.¹⁰⁷ The lower court granted summary judgment for the defendants, and the professor appealed.¹⁰⁸ The Supreme Court of Washington upheld the trial court's ruling, specifically rejecting Meyer's argument that the reprimand "chilled" his speech.¹⁰⁹ The court reasoned that the reprimand was very limited in its impact: "the intent of the reprimand was only as a warning to plaintiff and is not to

harassment to remain in Dr. Hall's personnel file wrongly attaches to Dr. Hall's reputation the stigma of being a potential sexual harasser.

Id.

100. *Id.* at 324.

101. *Id.* at 326.

102. *Id.* A dissent, which was joined by several judges, opined that that the majority "goes too far in ordering the investigatory materials to be removed from his personnel files and placed in a confidential UMC campus police file." *Id.* at 327.

103. See, e.g., AAUP, *Northwestern University: A Case of Denial of Tenure*, 74 *ACADEME* 55, 58, 69 (May-June 1988) (rejecting professor's claim that her academic freedom was violated by issuance of a "letter of severe reprimand and warning," included its placement in her tenure dossier, for "willfully" disrupting a speech by a Nicaraguan "contra").

104. 719 P.2d 98 (Wash. 1986).

105. *Id.* at 100.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 101.

be used to his detriment.”¹¹⁰ Moreover, the court noted, “Far from having his own right of free speech ‘chill[ed]’, plaintiff appears to be attempting to chill his colleagues [sic] right to express their views by claiming his First Amendment rights were violated.”¹¹¹

That is not to say that all letters of reprimand are ruled permissible. In *Butts v. Shepherd College*,¹¹² Joy Butts, an associate professor at Shepherd College, challenged her reprimand, which was issued for “insubordination” when she refused her supervisor’s order to release student grades to the supervisor.¹¹³ The state appellate court noted that the professor’s “refusal to obey a superior’s order, based on a good faith belief that the order violated a law, regulation, or policy, was not a willful refusal to obey and was not insubordination.”¹¹⁴ The court directed the administration to expunge the reprimand letter from Butts’ personnel file.¹¹⁵

B. Censure

The next step up the discipline ladder is censure.¹¹⁶ While letters of reprimand

110. *Id.*

111. *Id.* at 101–02. The Washington Supreme Court also rejected Meyer’s defamation claim because he failed to introduce admissible evidence. *Id.* at 103–04. The court relied on the faculty grievance committee’s findings that not only was there no direct evidence that Meyer was defamed, but Meyer “himself came very close to being guilty of defaming his colleagues.” *Id.* at 103.

112. 569 S.E.2d 456 (W. Va. 2002).

113. *Id.* at 456–57. Other faculty cases and controversies involving letters of reprimand exist. See, e.g., *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999) (involving placing a letter of reprimand in professor’s personnel file for engaging in a consensual relationship with a student). See also Elizabeth F. Farrell, *UNLV Backs Down in Dispute With Professor Accused of Making Homophobic Comments in Class*, CHRON. HIGHER EDUC. (Feb. 21, 2005), <http://chronicle.com/daily/2005/02/2005022103n.htm> (reporting that college president reversed faculty committee’s recommendation that an economics professor should serve one-week unpaid suspension and receive a letter of reprimand because student’s discrimination claim violated professor’s academic freedom).

114. *Butts*, 569 S.E.2d at 460.

115. *Id.* The dissenting judge in this case argued that the majority was inappropriately “insist[ing] . . . on managing higher education disciplinary decisions. Decisions such as this make it nearly impossible for the people who run our higher institutions of learning to do their jobs.” *Id.* at 461 (Maynard, J., dissenting).

116. See, e.g., AAUP, *Academic Freedom and Tenure: Arizona State University*, 62 AAUP BULL. 55, 65 (Spring 1976) (discussing proposed sanctions of antiwar professor who was active in Socialist Workers’ Party and who canceled class to speak at a rally, and opining that “the proposed letters of censure” for the professor’s missed class were “minor sanctions that are not altogether unjustified”). Apparently the line between “censor” and “censure” is not always clear. In *Speers v. Univ. of Akron*, 196 F. Supp. 2d 551 (N.D. Ohio 2002), in which the court declined to grant the University of Akron’s summary judgment motion because factual disputes existed regarding whether the administration reprimanded a female professor for speaking out on a campus matter, the university objected to the judge’s decision to exclude the professor’s reference “to ‘censure’ because of possible confusion with ‘censor.’” *Id.* at 557. The court opined:

With respect to the difference between ‘censure’ and ‘censor,’ the [university] states that it was prejudiced because the jury incorrectly associated the [university’s]

tend to be issued by administrators against faculty members in private, censure is frequently imposed by faculty colleagues against a professor in public. Cases involving challenges to such censures, which often arise in sexual harassment litigation, tend to trigger legal claims of due process, defamation, and First Amendment academic freedom. A heavily litigated procedural issue in such cases is the extent to which votes supporting the imposition of public censure by departments and faculty senates are official sanctions (or actions) of the institution.

In *Powell v. Ross*,¹¹⁷ William Powell, a tenured professor of social work at the University of Wisconsin-Whitewater, sued numerous faculty members and academic administrators alleging that they violated his due process rights by censuring him for having sexually harassed a female student.¹¹⁸ The censure Powell challenged included a “strong letter of reprimand” in his personnel file, a requirement that he and his department undergo sexual harassment training, an order that Powell keep his door open when meeting with students, and the warning that additional complaints would result “in ‘more serious measures.’”¹¹⁹

The Seventh Circuit found that “internal discipline without further adverse employment consequences does not implicate a protected property interest.”¹²⁰ Furthermore, the court rejected Powell’s assertion that the censure compromised his property interest in “his earnings and earning capacity as a professor.”¹²¹ The court ruled that “where a censured employee retains his job and does not suffer any loss of pay or rank, any alleged harm to his stature or earnings prospects is purely speculative.”¹²²

The appellate court also rejected Powell’s claim that his liberty interest had been harmed. Powell contended that if he “ever were to lose his current employment it is highly unlikely that he would be able to get a job anywhere else given these allegations.”¹²³ The court reasoned that no liberty interest exists “in reputation alone,” and because the censure had not “distinctly altered or

attempt to censure Speers for her actions as an attempt to censor her speech. The Court disagrees. The [university] has not produced a legitimate reason that the jury will not understand the difference between the two words. Furthermore, the [university] first used the word ‘censure’ in its own documents. The University of Akron cannot now claim that the use of a word it introduced is unfairly prejudicial.

Id.

117. No. 04-1819, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis. Feb. 27, 2004), *aff’d sub nom.* *Powell v. Fujimoto*, 119 F. App’x 803 (7th Cir. 2004).

118. *Id.* at *1.

119. *Powell*, 119 F. App’x at 804.

120. *Id.* at 805. The court also rejected Powell’s claim to a property interest in the expense of defending himself in the sexual harassment proceedings. *Id.* at 806.

121. *Id.* at 807. Powell asserted that it was “reasonable to infer” that the censure imposed upon him for sexual harassment might in the future cause him to lose “merit pay, extra class assignments normally to be expected such as summer school, promotion and increased pay, publishing opportunities, paid speaking opportunities, paid sabbaticals, research grants, and the like.” *Id.*

122. *Id.*

123. *Id.*

extinguished” Powell’s employment status so as to trigger due process protections, this claim also failed.¹²⁴ The court concluded that it could find no “authority stating that a formal reprimand alone infringes a liberty interest.”¹²⁵

Some courts, however, have found the imposition of a public censure by department colleagues as violating the free speech of the affected faculty member. In *Booher v. Northern Kentucky University Board of Regents*,¹²⁶ Kevin Booher, a tenured professor of art, sued the university’s board of trustees and his department colleagues for a number of claims, including the “faculty censure” his department colleagues imposed upon him for his published remarks about a controversial art exhibit, “Immaculate Misconceptions.”¹²⁷ One department colleague of Booher had proposed censure of Booher because of Booher’s comments about the art display.¹²⁸ At the next department meeting, the faculty discussed and voted for censure.¹²⁹ The department chair then notified Booher in writing of the sanction.¹³⁰ Booher sued his colleagues in federal district court, claiming that in censuring him, his colleagues violated his property interest in his tenured position and his liberty interest in his professional reputation.¹³¹ He also asserted a First Amendment retaliation claim.¹³²

First, the court found that the department faculty were acting “under color of state law,” because the actions were undertaken “by state employees acting

124. *Id.* at 808.

125. *Id.*

126. No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998), *aff’d*, 163 F.3d 395 (6th Cir. 1998).

127. *Id.* at *8. The Kentucky Post article, which was excerpted in the opinion, stated: “In fact, Booher said he is Catholic and found the title ‘Immaculate Misconceptions’ offensive, partly because he thought the title was selected to stir reaction. ‘It’s like yelling, ‘Fire!’ in a crowded theater,’ he said.” *Id.*

128. The memorandum proposing censure included the following passage:

This request for a vote of censure is instigated by the most recent activity of Mr. Booher, i.e., his interview with the Post which, in my opinion, exacerbated an already volatile state of affairs between this department, the university, and the community. . . . Faculty have the right to express any opinions, e.g., in ads, letters to the editor, etc., but Mr. Booher chose a manner which, in my opinion, was inflammatory and compromised this department and its faculty.

Id. at *10–11.

129. In explaining the potential affect of the censure during the department deliberations, the chair stated that the censure vote had

no legal ramifications . . . I do think that it will make a difference in committee appointments. . . . In the matter of our RPT (Reappointment, Promotion and Tenure), the people on the faculty who are not tenured have a right to request that somebody is not on the tenure committee, and I think that that is [a] wise thing for them to consider. So those kinds of things will make a difference.

Id. at *13.

130. *Id.*

131. *Id.* at *36.

132. *Id.* at *41.

collectively as a departmental faculty” at a “formal meeting” of the department.¹³³ While the department faculty argued that “they were merely exercising their own opinions regarding the plaintiff’s conduct,”¹³⁴ the court disagreed:

[W]hen, acting as a departmental faculty of a state university, they voted to censure the plaintiff, reduced their feelings of displeasure to writing, and circulated the written proof of their action, they stepped from the safe haven where individuals may exercise their own protected freedom of speech and into the hazardous area where consequences may result from ill-advised action.¹³⁵

Accordingly, the court ruled that the department faculty were not entitled to qualified immunity.¹³⁶

Next, the court found that Booher suffered harm from the imposition of the censure by his department colleagues.¹³⁷ The defendants had argued that Booher suffered no harm because “the censure was not a disciplinary action, did not affect the plaintiff’s status as a tenured professor, did not reduce the plaintiff’s compensation, and was not recorded in the plaintiff’s university personnel file.”¹³⁸ The court framed the inquiry as “whether the censure, or threat of censure, would tend to encourage employees to conform their speech to the departmental orthodoxy.”¹³⁹ It ruled that the department’s censure provided a basis for the professor’s First Amendment retaliation claim, because the censure could affect the professor’s “ability to engage in the department’s system of governance; . . . [to] participat[e] in departmental decision-making; and [to select] . . . his teaching assignments.”¹⁴⁰

The court next found Booher’s comments to the newspaper about the controversial art exhibit to be a matter of public concern, because the exhibit was an event that “had stirred widespread public concern; the debate was not just within the university or within the art department. His comments were directed at the issues of the debate: whether the title of the exhibit was offensive and whether artistic freedom was allowed at the university.”¹⁴¹ Furthermore, the court found that Booher’s remarks failed to “disrupt[] the university’s teaching in classroom or studio,” and any other disruptions caused by him were “relatively minor.”¹⁴² Accordingly, Booher’s First Amendment right to express himself outweighed Northern Kentucky University’s interest in an efficient workplace.¹⁴³ The court

133. *Id.* at *36–38.

134. *Id.* at *41 n.22.

135. *Id.* at *46–47.

136. *Id.* at *47.

137. *Id.* at *40.

138. *Id.* at *38.

139. *Id.* at *40.

140. *Id.* at *40 n.21.

141. *Id.* at *42–43.

142. *Id.* at *43–44.

143. *Id.* at *44.

thus denied the university's motion for summary judgment, because a "question of fact [existed] regarding the factors that motivated the censure vote."¹⁴⁴

A different conclusion based on the censure imposed by a department upon a faculty member was reached in connection with a similar First Amendment claim in an earlier case, *Wineman v. Wayne State University*.¹⁴⁵ A tenured professor of social work sued the university and others for having violated his free speech rights when it "censured" him for co-authoring an article in the school's newspaper in which he "strongly criticized" the department's new graduate student dismissal procedures, the educational model used by one of the schools, and the competence of one of his colleagues.¹⁴⁶ The Sixth Circuit affirmed the district court's ruling against Wineman, because the censure was undertaken by the faculty members in exercising their free speech rights.¹⁴⁷ The court concluded that the faculty's action was not that of the university itself.¹⁴⁸

Not only faculty departments, but also faculty senates censure actions of individual faculty members.¹⁴⁹ In *Aldridge v. De Los Santos*,¹⁵⁰ professors in the School of Business Administration at the University of Texas-Pan American who had been censured by the faculty sued thirty-seven colleagues, many of whom were members of the faculty senate, claiming defamation, tortious interference with their contracts, and negligent infliction of emotional distress.¹⁵¹

The suing professors served on a committee to review the business school's merit pay system and, in that service, recommended that two tenured professors, who allegedly exaggerated their publication records, be dismissed for "moral turpitude."¹⁵² Eventually the matter was brought to the faculty senate for consideration and, after investigation, the senate voted to censure the faculty members serving on the committee for having failed to act in a "fair and collegial manner."¹⁵³ The local newspaper reported the censure action.¹⁵⁴

144. *Id.* at *45. The court, however, rejected Booher's procedural due process claim arising from the censure action, because Booher "lost neither his tenured position nor pay as a result of the censure." *Id.* at *47-48.

145. 667 F.2d 1029, No. 79-1659, 1981 U.S. App. LEXIS 16514 (6th Cir. Oct. 29, 1981) (unpublished table decision).

146. *Wineman*, 1981 U.S. App. LEXIS 16514, at *1.

147. *Id.* at *2.

148. *Id.* The court wrote: "The professors who censured Wineman also had first amendment rights, which they exercised when they censured Wineman." *Id.*

149. *Cf.* *Stern v. Shouldice*, 706 F.2d 742, 745 (6th Cir. 1983) (stating that complying with an administrator's request, the faculty senate replaced a professor serving as the senate's faculty representative following the publication in the school newspaper of what was considered a controversial statement).

150. 878 S.W.2d 288 (Tex. App. 1994).

151. *Id.* at 291.

152. *Id.*

153. *Id.* at 292. The Faculty Senate censured its colleagues for

[f]ailing to treat their colleagues in a fair and collegial manner during the [committee's] investigation. [Additionally, the Faculty Senate concluded that the committee] exceeded the limits of its legitimate functions, failed to allow a tenured full professor

The faculty members argued that their service on the faculty senate was part of their official responsibilities as faculty members and, therefore, within the scope of their authority.¹⁵⁵ They further asserted that they took the censure vote in good faith.¹⁵⁶ The suing professors argued otherwise, based in part on a memorandum to the faculty senate from the college president in which he had written that while “[t]he Faculty Senate has censured and reprimanded several individuals on this campus. . . . [T]he Faculty Senate is not authorized to take such disciplinary action.”¹⁵⁷ In the end, the appellate court upheld the lower court’s denial of the faculty senate members’ motion for summary judgment, finding that questions of fact existed regarding the authority of faculty senate members to vote for censure, which was key in determining whether the sued faculty senate members were entitled to qualified immunity.¹⁵⁸

C. Departmental Reassignment

On occasion an institution decides to transfer a faculty member from one academic department to another as a form of discipline, especially where significant problems exist in the former department. In challenging such transfers, some faculty members have claimed that the reassignment violated their due process and First Amendment rights. Generally, courts have ruled that the transfer of tenured faculty from one department to another, without loss of compensation or rank, is not illegal, unless such reassignment is in retaliation for the exercise of free speech, is discriminatory, or violates a contractual obligation.

In *Huang v. The Board of Governors of the University of North Carolina*,¹⁵⁹ the Fourth Circuit ruled that when North Carolina State University transferred Dr. Barney Huang, a tenured professor, from the Department of Biological and Agricultural Engineering (BAE) to the Division of University Studies due to

sufficient time to prepare his defense against a recommendation for termination, and imposed its interpretation of unwritten academic standards on the proceedings. In so doing, the [committee] displayed a lack of collegiality and fundamental fairness.

Id.

154. *Id.*

155. *Id.*

156. *Id.* at 295.

157. *Id.* at 295 n.5.

158. *Id.* at 297. For other cases involving censures of faculty members, see *Newman v. Burgin*, 930 F.2d 955, 962 (1st Cir. 1991), where the court upheld the public censure of a faculty member for plagiarism by the University of Massachusetts at Boston administration after an investigation and hearing by a faculty committee, despite the professor’s contention that to make her censure public was a “substantial departure from academic norms”; *Meister v. Regents of University of California*, 78 Cal. Rptr. 2d 913 (Ct. App. 1998), where the arbitrator found that the professor’s reputation had been injured by the circulation of a letter of censure, which was recommended by a campus committee, for the professor’s unauthorized circulation of a confidential planning document; *Fong v. Purdue University*, 692 F. Supp. 930 (N.D. Ind. 1988), where the court reviewed the university committee’s action subjecting a disruptive colleague to censure and dismissal.

159. 902 F.2d 1134 (4th Cir. 1990).

“performance and productivity” concerns, Huang was not denied due process, nor were his First Amendment rights violated.¹⁶⁰ Although Huang had originally suggested the possibility of a transfer after relations with his departmental colleagues soured, when the chancellor followed up on the transfer option, Huang decided to grieve the matter before his faculty peers.¹⁶¹ The faculty committee ruled that “Dr. Huang’s transfer from BAE was in the interests of Dr. Huang and the department.”¹⁶²

Dr. Huang took his challenge to district court, which granted summary judgment for the university.¹⁶³ On appeal, the Fourth Circuit ruled that Huang’s First Amendment rights had not been violated by his transfer.¹⁶⁴ The court found that Huang’s claim failed on the “but for” requirement, since “some six years prior to his transfer, he ‘blew the whistle’ about an improper business arrangement between two [department] members involving state funds.”¹⁶⁵ The appellate court also rejected Huang’s procedural due process claim, finding that he remained “a tenured full professor . . . at the same or effectively greater salary,” and that he “received all the process he was due and more,” including meetings with the chancellor and a nine-day hearing before a faculty body.¹⁶⁶ In so reasoning, the court rejected Huang’s argument that he had a property interest in his particular position within the BAE department, finding “[n]o authority . . . that a property interest in the continued expectation of public employment includes the right to physically possess a job, in defiance of the stated desire of the employer.”¹⁶⁷ The court also noted that the transfer failed to constitute a “serious sanction” under the University of North Carolina’s handbook.¹⁶⁸

Similarly, in *Maples v. Martin*,¹⁶⁹ the Eleventh Circuit ruled that professors’ due process and First Amendment rights were not violated when they were transferred from the Agricultural Engineering Department to the Department of Agriculture at Auburn University.¹⁷⁰ In reviewing the case law on due process, the court concluded that “[t]ransfers and reassignments have generally not been held to implicate a property interest.”¹⁷¹ Neither the faculty handbook nor the state law protected professors from involuntary transfers and, therefore, the court found that

160. *Id.* at 1136.

161. *Id.* at 1137.

162. *Id.* at 1138.

163. *Id.* at 1137.

164. *Id.*

165. *Id.* at 1140.

166. *Id.* at 1141.

167. *Id.* (quoting *Royster v. Bd. of Trs.*, 774 F.2d 618, 621 (4th Cir. 1985)).

168. *Id.* See also *Farkas v. Ross-Lee*, 727 F. Supp. 1098, 1104 (W.D. Mich. 1989), *aff’d without opinion*, 891 F.2d 290 (6th Cir. 1989) (finding that a professor had no property interest to remain in a given department, and recognizing that “transfers may be especially appropriate as a matter of practical internal college administration”).

169. 858 F.2d 1546 (11th Cir. 1988).

170. *Id.* at 1548–49.

171. *Id.* at 1550.

transfer decisions appeared to be at the administration's discretion.¹⁷² The court also rejected the professors' liberty interest claim, finding that they had not suffered loss of rank or salary, still had the opportunity to teach in their specialized areas, and could not establish that a stigma resulted from the transfers that damaged their reputations or foreclosed other employment opportunities.¹⁷³

The court further found no First Amendment violation.¹⁷⁴ One of the professors, Dr. John Turner, alleged that his transfer was in retaliation for his participation in the preparation of a report reviewing the seemingly dysfunctional academic department.¹⁷⁵ While the court recognized that some aspects of the departmental review, such as the status of the department's accreditation, were matters of public concern,¹⁷⁶ the court concluded that the report's "interference with the efficient operation of the [department] was sufficient to justify the transfer" of Turner.¹⁷⁷ The court opined that "[b]y subjecting internal administrative policies to public scrutiny, it distracted both students and faculty from the primary academic tasks of education and research."¹⁷⁸

But some contracts specifically protect faculty against such reassignments. In *Hulen v. Yates*,¹⁷⁹ the Tenth Circuit ruled that Myron Hulen, a tenured professor in the accounting and taxation department at Colorado State University, "had a property interest in his departmental assignment based upon the terms and conditions of his appointment," and therefore basic due process attached to his involuntary transfer from one academic department to another.¹⁸⁰ The dean imposed Hulen's transfer "after learning of the more than six years of divisiveness and dysfunction" within the original department.¹⁸¹ Hulen alleged that he was involuntarily transferred from his home department to the management department after he and others had spoken out in support of the revocation of a department colleague's tenure because of alleged plagiarism and copyright violations, emotional abuse of students, and misuse of state funds.¹⁸² The faculty handbook at issue provided that alterations to a tenured position required "mutual agreement between a faculty member and the appropriate administrative officers."¹⁸³ The college president acknowledged in his testimony that during his twenty-seven

172. *Id.* at 1550–51.

173. *Id.* at 1550–51 & n.5. For another case involving a departmental transfer, see *Johnson v. Savannah College of Art and Design, Inc.*, 460 S.E.2d 308 (Ga. Ct. App. 1995), where the court upheld the transfer of a video professor by the administration upon the request of the professor's original department members.

174. *Maples*, 858 F.2d at 1552–55.

175. *Id.* at 1552.

176. *Id.* at 1553.

177. *Id.* at 1554.

178. *Id.*

179. 322 F.3d 1229 (10th Cir. 2003).

180. *Id.* at 1243.

181. *Id.* at 1233.

182. *Id.*

183. *Id.* at 1241.

years on the faculty, he was unaware of any involuntary transfers.¹⁸⁴ In the end, however, the court found that Hulen had received more than adequate pre-transfer due process protections.¹⁸⁵

D. Modified Teaching Assignments and Removal from the Classroom

Some institutions have sought to modify teaching assignments as a form of discipline. A few others have attempted to remove professors from the classroom entirely. Many, but not all, of the cases arise in the sexual harassment context, where modified teaching assignments or removal from the classroom are employed as ways to discipline the faculty member and to avoid future potential problems with students. Generally, courts have ruled that professors have no property interest in the teaching of particular courses and so have found reassignment and removal permissible, absent evidence that the discipline is based on impermissible motives or contrary to contractual terms of the professor's employment.¹⁸⁶

In *McClennan v. Board of Regents of the State University*,¹⁸⁷ Powell McClennan, a twenty-two year tenured faculty member in the Department of Health, Physical Education, and Recreation at Middle Tennessee State University, challenged, under the state's administrative procedures law, a sexual harassment investigation in which he was found to have violated the university's sexual harassment policy when he touched a female student's breasts while teaching how to use electrocardiograms.¹⁸⁸ A hearing committee found against McClennan, ruling in part that "Dr. McClennan not be allowed to teach the only section of a required course offered for three years and that course substitutions be allowed for students."¹⁸⁹ McClennan challenged the committee's findings, including the

184. *Id.* at 1243.

185. *Id.* at 1244. The court opined: "Dr. Hulen received as much process as would have been due had he been fired, and the transfer of an employee certainly requires no more procedural safeguards than a termination." *Id.* In so concluding, the court rejected Hulen's contention that he was "entitled to a formal hearing—an evidentiary hearing—before being laterally transferred. It would be remarkable if such a hearing were constitutionally required, since the Constitution does not even require such a hearing before an employee is *fired*." *Id.* at 1247 (emphasis in original). In this case, Hulen "was able to meet with the decisionmaker twice, lodged repeated written complaints, and engaged the services of an attorney in an attempt to avoid the transfer. . . . [I]t is apparent that Dr. Hulen received all the pre-transfer process he was due." *Id.* at 1248.

186. See, e.g., *Wagner v. Tex. A&M Univ.*, 939 F. Supp. 1297, 1312 (S.D. Tex. 1996) (finding that where there was no "contractual provision limiting the University's right to reassign Wagner," no property interest existed in teaching a particular course or, in fact, teaching at all); *Davis v. Mann*, 882 F.2d 967, 973 (5th Cir. 1989) (establishing that a dentist participating in a residency program lacked a property interest in the non-economic benefits of his position when, in the contract, they were inextricably linked to his academic performance); *Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985) (concluding that a change in duties that prevented professor from teaching specific courses did not constitute constructive discharge); *Johnson v. S. Univ.*, 803 So. 2d 1140 (La. Ct. App. 2001) (upholding administrative directive limiting professor to multi-section classes only, after four students challenged his teaching, testing, and grading methods).

187. 921 S.W.2d 684 (Tenn. 1996).

188. *Id.* at 684.

189. *Id.* at 686-87.

“severity of the sanctions,” but the college’s president upheld the committee’s findings.¹⁹⁰ McClennan then sought judicial redress, but two lower courts specifically rejected McClennan’s assertion that “the sanctions imposed were unconstitutional in that they unlawfully restrict the terms and conditions of employment.”¹⁹¹ The appellate court concluded that the faculty committee’s findings were supported by “substantial and material evidence,” thereby upholding the three-year course moratorium.¹⁹²

From time to time administrators have removed faculty members from classrooms and assigned them non-class work or no work as a form of discipline.¹⁹³ One court referred to such “make work” as “the academic equivalent of the rubber gun squad.”¹⁹⁴ In *Wozniak v. Conry*,¹⁹⁵ Louis Wozniak, a tenured engineering professor who had taught at the University of Illinois at Urbana-Champaign for twenty-eight years, became a “rebel” by repeatedly refusing to turn over his grading materials as required under a new policy to ensure uniformity among sections on a prescribed curve.¹⁹⁶ In response, Wozniak claimed that the dean of the engineering school barred him from teaching, cancelled his research funds, and reassigned him as webmaster of the engineering faculty’s official web page.¹⁹⁷ Wozniak’s title and salary remained the same.¹⁹⁸ Wozniak claimed that this modification of his duties violated his right to free speech and due process.¹⁹⁹

The district court granted the University of Illinois’ motion for summary

190. *Id.* at 687.

191. *Id.*

192. *Id.* at 693.

193. *See, e.g.,* *Edwards v. Cal. State Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (noting that while the professor’s “temporary removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment,” and therefore did not implicate his liberty interest). The AAUP has found in some cases that summary removal from teaching responsibilities violates faculty rights. In a 1966 report involving St. John’s University in New York, the AAUP investigating committee opined:

The administration’s view that it had discharged its obligation with the payment of salary also excluded from consideration a principle crucial to the profession. . . . To deny a faculty member this opportunity [to teach] without adequate cause, regardless of monetary compensation, is to deny him his basic professional rights. . . . One has only to think of the famous teachers of the past, beginning with Socrates, to realize what a serious injury it would have been to these men to have been denied the right to teach.

AAUP, *Academic Freedom and Tenure: St. John’s University (N.Y.)*, 52 AAUP BULL. 12, 18–19 (1966).

194. *Shub v. Hankin*, 869 F. Supp. 213, 215 (S.D.N.Y. 1994) (observing that removal of tenured professor from teaching to “several curriculum/syllabus projects” as “the academic equivalent of the rubber gun squad,” which is “[p]olice jargon for officers deprived of gun and badge and assigned to limited duty”).

195. 236 F.3d 888 (7th Cir. 2001).

196. *Id.* at 889.

197. *Id.*

198. *Id.*

199. *Id.*

judgment, and the Seventh Circuit upheld the lower court's ruling.²⁰⁰ The appellate court recognized that

[i]f Wozniak is describing events correctly, he lost more than his dignity and the opportunity to influence students. He lost all prospects of promotion to full professor . . . and, because he lost research support, future scholarly publications, recognition within the profession, and the chance of obtaining private consulting work, all bit the dust.²⁰¹

Wozniak had "tenure *as a faculty member* and not just an all-purpose employee equally suited to the classroom and the janitorial staff."²⁰² Nevertheless, because Wozniak was given at least three opportunities to explain himself but refused to do so, the Seventh Circuit found no due process violation.²⁰³ The court further found that Wozniak's reassignment was not in retaliation for opposing the grading policy: "[a] violation of an employer's lawful rules does not become an improper basis for decision just because the employee makes his position known to the public."²⁰⁴ Accordingly, the university's reassignment of Wozniak "must be understood as a reaction to Wozniak's behavior, not as a penalty for his speech about that behavior."²⁰⁵

However, not all such removals are proper. In *McCartney v. May*,²⁰⁶ a state appellate court ruled that the dean of the medical school was not immune from suit by Donald R. May, a tenured professor who was removed as chair of the Department of Ophthalmology at Texas Tech Health Sciences Center.²⁰⁷ The dean had instructed May to refrain from speaking to the faculty or staff of the department, which in practical terms suspended the faculty member from his clinical privileges.²⁰⁸ The court examined May's claim "concerning his faculty status and clinical privileges on the basis that he was precluded from interacting with department faculty or staff."²⁰⁹ The court concluded that the lower court had properly denied the university's claim for immunity regarding the denial of May's

200. *Id.* at 889, 891.

201. *Id.* at 890.

202. *Id.*

203. *Id.*

204. *Id.* at 891.

205. *Id.* From time to time, faculty members have successfully argued in court that their reassignments are so dramatic that they have been constructively discharged from their positions. *See, e.g.,* *Patterson v. Portch*, 853 F.2d 1399, 1407 (7th Cir. 1988) (ruling that state college's reassignment of tenured geography professor to non-teaching duties was constructive discharge and, therefore, the college had violated professor's due process by not providing pre-termination hearing, but refusing to order reinstatement because of professor's admitted mental state as "emotional basket case"); *Levenstein v. Salafsky*, 164 F.3d 345, 351 (7th Cir. 1998) (ruling that professor adequately alleged constructive discharge when the University of Illinois reassigned him, "a physician whose reputation spanned several continents," to "reviewing old medical training videos" after sexual harassment complaint was filed against professor by student).

206. 50 S.W.3d 599 (Tex. App. 2001).

207. *Id.* at 603, 609.

208. *Id.* at 608.

209. *Id.*

clinical privileges, because the court found those privileges to be a protectable property interest and so May was entitled to a hearing.²¹⁰

E. Removal from Particular Committees and Programs

Sometimes faculty are removed from particular committees and programs as a form of discipline. In *Ganesan v. Northern Illinois University Board of Trustees*,²¹¹ Sengoda Ganesan, a tenured professor of mechanical engineering, was disciplined for “confrontations with other faculty members.”²¹² As part of the discipline, the professor was directed to attend human resource workshops and, after a “no confidence” vote by department faculty, he was removed from his positions as a member and chair of the university’s personnel committee.²¹³ The professor challenged the discipline on various grounds, including that the committee removals violated his due process and First Amendment rights.²¹⁴ The federal district court rejected Ganesan’s claims: “While plaintiff may have a property interest in his employment as a tenured faculty member, his property interest does not extend to participation in personnel decisions, membership on committees, or avoiding workshop attendance.”²¹⁵

Suspension of other perquisites might be appropriate as well, so long as they are imposed for permissible reasons and do not violate a contractual provision providing otherwise. During the pendency of a sexual harassment investigation, for example, a faculty member might be denied permission to attend an out-of-state conference especially when the complainant is scheduled to attend the gathering.²¹⁶ Depending on the facts and circumstances, other potential actions might include

210. *Id.* at 607–08. *See also Levenstein*, 164 F.3d at 351 (ruling tenured professor at the University of Illinois was “effectively deprived of a property interest in a job” by administration’s decision to forbid him from seeing patients and assigning him to review of old medical files); *Woodbury v. McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971) (recognizing that Woodbury had property rights in his former position, and noting that until there was a hearing satisfying the “minimum” procedural due process requirements, he was entitled to reappointment); *Greenwood v. N.Y. Office of Mental Health*, 163 F.3d 119, 122 (2d Cir. 1998) (acknowledging that Greenwood’s clinical privileges were an entitlement under state law, subject to certain procedural safeguards, and finding that the privileges were property rights for due process purposes).

211. No. 02-C-50498, 2003 U.S. Dist. LEXIS 21721 (N.D. Ill. Dec. 2, 2003).

212. *Id.* at *2.

213. *Id.*

214. *Id.* at *1.

215. *Id.* at *3. The court also rejected the professor’s First Amendment claim, finding that his speech was “not as an interested citizen or an academic communicator of protected ideas.” *Id.* at *6 (internal citations omitted). *See also Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 219–22 (D. Conn. 2005) (concluding that Radolf’s participation in a grant proposal was not a “protectable property right,” and thus did not warrant procedural due process protection); *Hollister v. Tuttle*, 210 F.3d 1033, 1036 (9th Cir. 2000) (“[A] place on a college search committee is not property, nor is denial of it generally a demotion.”); *Mahaffey v. Kan. Bd. of Regents*, 562 F. Supp. 887 (D. Kan. 1983) (finding no property interest implicated where professor was denied merit increases, stripped of specific committee assignments, moved to smaller office, reduced from a twelve-month contract to a nine-month contract, and ceased to direct equipment).

216. *See, e.g., Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 559 (Iowa 1999).

suspending a professor from working with graduate students, or declaring a professor ineligible for a period of time to receive internal research funds or sabbaticals.

F. Salary Actions for Disciplinary Reasons

1. Denial of Salary Increases

The denial of salary increases—short term and long term—are sometimes considered as disciplinary sanctions against faculty.²¹⁷

In *Harrington v. Harris*,²¹⁸ the Fifth Circuit considered whether the application of a merit pay plan in the law school of Texas Southern University, a public historically black institution, violated the legal rights of three tenured white professors.²¹⁹ The professors claimed that they received lower-than-expected merit increases in retaliation for exercising their free speech rights, which included writing to various Texas Southern University officials seeking the dismissal of a law school dean, participating in a “no confidence” vote to remove the dean, and complaining to the American Bar Association about the university’s refusal to dismiss the dean.²²⁰

The court rejected the professors’ First Amendment retaliation claim, finding the case merely a “dispute over the quantum of pay increases.”²²¹ The court noted

217. In *Academic Freedom and Tenure: Arizona State University*, 61 AAUP BULL. 65 (Spring 1976), the AAUP investigating committee examined a matter involving an antiwar professor who was active in the Socialist Workers’ Party who canceled class to speak at a rally. The committee found as not supported by the evidence the imposition by the administration of “sanctions . . . [that] involve financial penalties, which the investigating committee considers severe individually, and which become very severe when lumped together and recommended ‘for an indefinite period’ in the President’s report.” *Id.* at 65. The financial sanctions included the denial of a salary increase for one year and “any raise” for the following year, and the recommendation of the issuance of a letter of censure for “five other penalties [to] be imposed ‘for an indefinite period . . . (1) No merit salary increases (2) No summer teaching . . . (3) No promotions . . . (4) No leaves . . . with pay (5) No travel at University expense.’” *Id.* See also AAUP, *Academic Freedom and Tenure: University of Missouri, Columbia*, 59 AAUP BULL. 34, 41–42, 45 & n.2 (Spring 1973) (finding that while sanction of a salary reduction of “one or two days of pay, running from \$40 to \$110” for six faculty members who cancelled classes for two days in support of protests “fueled by the tragedies at Kent State University and Jackson State College” was “relatively light,” more severe sanctions, including the denial of “salary increments,” were more “severe”); AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82, 86 (April 1977) (finding as “major sanctions” the imposition of suspension and salary reduction).

218. 118 F.3d 359 (5th Cir.).

219. *Id.* at 359. See also *Ghirardo v. Univ. of S. Cal.*, No. 94-55430, 2005 U.S. App. LEXIS 26573 (9th Cir. Dec. 2, 2005) (involving the University of Southern California which rebutted female professor’s sex discrimination claim by demonstrating that refusal to give her a salary increase was in response to a grievance panel’s finding that she had engaged in misconduct).

220. *Harrington*, 118 F.3d at 364.

221. *Id.* at 366. As the court opined:

“Adverse employment actions are discharges, demotions, refusals to hire, refusals

that the professors had not “suffered a reduction in pay” and “are among the law school’s top earners.”²²² However, the court observed that “[i]f Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion.”²²³

Other courts, however, have found as impermissible discipline the denial of a one-time salary increase. In *Power v. Summers*,²²⁴ the Seventh Circuit ruled that the plaintiffs had an actionable claim against the administration of Vincennes University—a two-year public institution in Indiana which allegedly retaliated against three professors by awarding them low merit increases because they had spoken out on issues of faculty salaries, thereby implicating the First Amendment.²²⁵ The faculty members asserted that they were awarded merit increases of only \$400, compared with an average increase of \$1,000, despite strong performance evaluations, because they were outspoken.²²⁶ The professors sought a judicial injunction commanding Vincennes University to raise their base salaries to reflect the merit increases they would otherwise have been awarded.²²⁷ In this unusual case, the university “concede[d] that these so-called ‘merit’ raises were actually used to reward faculty who were combating ‘dissension’ and ‘divisiveness.’”²²⁸ The court calculated that the lower merit increase

not only reduced the fringe benefits [the professors] would have received had they gotten a higher raise, but will reduce their future salaries; for by being added to the base salary the amount of the merit raise will be paid in all future years to those faculty who were granted

to promote, and reprimands.” Actions such as “decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,” while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation.

Id. at 365 (quoting *Doresett v. Bd. of Trs. For State Colls. & Univs.*, 940 F.2d 121, 123 (5th Cir. 1991)). See also *Dorsett*, 940 F.3d at 121 (finding no constitutional violation in limiting salary increase for professor who did not speak out on a matter of public concern).

222. *Harrington*, 118 F.3d at 366. The court framed the professors’ claim as “we were not awarded merit pay increases in the same amount as others or in the amount to which we think we were entitled.” *Id.*

223. *Id.* At the same time, the court accepted the law professors’ argument that the jury could have reasonably concluded that the professors’ low merit increases constituted race discrimination, because the faculty members presented evidence that the administration “failed to give white professors equal credit and consideration” for their work, which caused “black professors to receive higher merit pay increases than those received by their white counterparts.” *Id.* at 368. Similarly, the court found that a jury could have concluded that the administration violated the professors’ substantive due process rights by acting in an arbitrary and capricious manner in conducting the merit pay evaluations. *Id.*

224. 226 F.3d 815 (7th Cir. 2000).

225. *Id.* at 821. The court described the university as follows: “Vincennes University, which despite its grand name is only a two-year college, pays low salaries to its faculty . . .” *Id.*

226. *Id.* at 819.

227. *Id.* at 817–18.

228. *Id.* at 819.

it.²²⁹

In allowing the case to proceed to trial, the court concluded that it could not say “that denying a raise of several hundred dollars as punishment for speaking out is unlikely to deter the exercise of free speech; a tenure system does not select for boldness.”²³⁰

Other courts have upheld as permissible discipline the denial of a merit increase. In *Wirsing v. Board of Regents of University of Colorado*,²³¹ the Tenth Circuit upheld the district court’s summary judgment ruling in favor of the University of Colorado, finding no illegality when it denied Marie Wirsing, a tenured professor of education, a merit increase when she refused to distribute “standardized” teacher evaluation forms to her class.²³² She argued that the requirement violated her academic freedom as protected by the First and Fourteenth Amendments.²³³ The system-wide teacher evaluation policy was the basis upon which annual merit salary increases were awarded.²³⁴ Wirsing’s position was “that teaching and learning cannot be evaluated by any standardized approach,”²³⁵ and the evaluations were “contrary to her theory of education.”²³⁶ The administration argued that Wirsing’s refusal to comply with the teacher evaluation requirement was not protected from sanction.²³⁷ While a faculty committee and division director gave Wirsing high teaching ratings in two consecutive years, the dean denied her merit increases for her refusal to administer the evaluation form.²³⁸ The court reasoned that the evaluation form did not interfere with Wirsing’s academic freedom, because the forms were “unrelated to course content.”²³⁹ Accordingly, the court ruled that the university could require the professor to use its evaluation forms and that “it may withhold merit pay increases for her refusal to do so.”²⁴⁰

A longer-term denial of a salary increase may raise greater judicial concerns. In

229. *Id.* at 820. In so reasoning, the court opined on the difference between a bonus and a raise: “Bonuses generally are sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer, while raises are normal and expected, if only to offset inflation, which while mild in the United States today is not negligible.” *Id.* at 821.

230. *Id.*

231. 739 F. Supp. 551 (D. Colo. 1990), *aff’d*, 945 F.2d 412 (10th Cir. 1991) (unpublished table decision).

232. *Id.* at 554.

233. *Id.* at 552.

234. *Id.*

235. *Id.*

236. *Id.* at 553.

237. *Id.* at 552.

238. *Id.*

239. *Id.* at 554.

240. *Id.* See also *Shaw v. Bd. of Trs.*, 396 F. Supp. 872, 886–87 (D. Md. 1975), *aff’d*, 549 F.2d 929 (4th Cir. 1976) (concluding that faculty member’s refusal to participate in commencement exercises as a means of protesting administrative policies was a violation of their conditions of employment and unprotected by the First Amendment).

Vaughn v. Sibley,²⁴¹ an Alabama appellate court ruled that the University of Alabama at Birmingham violated the rights of Leo Vaughn, a tenured professor of mathematics, by denying him any salary increase from 1982 through at least 1994.²⁴² Vaughn sued the administration, seeking the enforcement of its salary policy that each faculty member was to be paid within an approved salary range unless the college president filed an annual exception to the range with required documentation.²⁴³ The administration admitted to the facts alleged by Vaughn, but argued it was immune from such suit under the state constitution.²⁴⁴ The state appellate court reversed part of the lower court's summary judgment for the university, reasoning that the administration either had to follow its salary policy and pay the professor the minimum salary, or had to file an exception to exclude him from the established salary range.²⁴⁵

In the end, then, a denial of a salary increase generally will be upheld unless it is imposed for impermissible reasons, such as retaliation for the exercise of First Amendment rights or race discrimination, or it violates a contractual obligation.

2. Salary Reduction

Salary reductions, as opposed to denials of salary increases, tend to be imposed infrequently and significantly ratchet up the severity of the discipline.²⁴⁶ In *Williams v. Texas Tech University Health Sciences Center*,²⁴⁷ Charles Williams, a tenured professor of anesthesiology research, sued the university's medical school

241. 709 So. 2d 482 (Ala. Civ. App. 1997).

242. *Id.* at 484, 487. It is unclear whether the denial of salary increases continued up until 1997, the date of the court decision. Vaughn asserted that from 1982 through 1994, his salary varied from the minimum approved salary range anywhere from \$587 to \$12,787. *Id.* at 484.

243. *Id.*

244. *Id.*

245. *Id.* at 485.

246. From time to time controversies erupt when outspoken faculty members trigger the outrage of particular state legislators who then seek to reduce individual professors' salaries through college or university appropriations. *See, e.g.*, Olivier Uyttebrouck, *UNM Prof's Wages Stay in Budget*, ALBUQUERQUE J., Jan. 29, 2002 (reporting that legislator sought to delete professor's salary from university appropriation because of his controversial statement about the September 11 terrorist attacks); Elizabeth F. Farrell, *Book on Childhood Sexuality Arouses Controversy*, CHRON. HIGHER EDUC., Apr. 19, 2002, at A21 (reviewing involvement of majority leader of state house of representatives who threatened to remove financial support for the university press); *Missouri Lawmakers Get Mad and Get Even*, CHRON. HIGHER EDUC., May 31, 2002, at A19 (reporting that state legislators "cut \$100,000 more from the university's budget after Harris G. Mirkin, a professor on the Kansas City campus, continued doing research on pedophilia despite their objections"). *See also* Starsky v. Williams, 353 F. Supp. 900, 915 (D. Ariz. 1972) (expressing concern of Arizona State University that state legislature might penalize the university in state appropriations because of the outspoken views of a Marxist professor). *See generally* Mark F. Smith, *Improper Activities*, 88 ACADEME 85 (Nov.-Dec. 2002) (reviewing appropriations rider in the North Carolina legislature targeting controversial university summer reading programs and the University of Missouri controversy).

247. 6 F.3d 290 (5th Cir. 1993).

claiming that the administration violated his due process rights by failing to provide him with a hearing before the medical school reduced his compensation from \$68,000 to \$46,500.²⁴⁸ The administration allegedly reduced the professor's salary because he had not generated enough grant income.²⁴⁹ The Fifth Circuit disagreed with the professor, granting Texas Tech University's summary judgment motion.²⁵⁰ It ruled that the professor received sufficient due process—six months notice and the opportunity to seek additional funding—and that his interest in a specific salary did not outweigh the state's interest in administering its budget.²⁵¹ In so reasoning, the court found that Williams did not have a property interest in his particular salary because the tenure regulations in place allowed for annual adjustments to the professor's salary and that augmentations were not guaranteed.²⁵²

State laws may restrict salary reduction for public employees, including faculty at state institutions. For example, a New Jersey statute provides that no tenured professor in a public college or university may be “subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause.”²⁵³ By requiring a showing of just cause, the law appears to preclude salary

248. *Id.* at 292.

249. *Id.*

250. *Id.* at 294.

251. *Id.*

252. *Id.* at 292, 294. Courts generally rule that faculty members do not have a property interest in a specific salary. *See, e.g.,* Swartz v. Scruton, 964 F.2d 607, 610 (7th Cir. 1992). *See also* Tavolini v. Mount Sinai Med. Ctr., 26 F. Supp. 2d 678, 682 (S.D.N.Y. 1998) (dismissing breach-of-contract action by tenured professor whose salary was reduced to under the minimum for his rank, but above the minimum salary set forth in the faculty handbook, which the parties agreed constituted a contract between them); Meens v. State Bd. of Educ., 267 P.2d 981 (Mont. 1954) (ruling that reduction of tenured professor's salary is breach of tenure agreement). *See generally* Donna R. Euben, *Doctors in Court: Salary Reduction Litigation*, 85 ACADEME 87 (Nov.–Dec. 1999), available at <http://www.aaup.org/publications/Academe/1999/99nd/ND99LgWa.htm> (last visited Jan. 23, 2006). An AAUP investigating committee commented on the notice issued by a college administration proposing a substantial reduction of salary to a tenured faculty member. AAUP, *Academic Freedom and Tenure: The College of Osteopathic Medicine and Surgery (Iowa)*, 63 AAUP BULL. 82 (Apr. 1977). Dr. David Robert Celander was offered a contract reducing his salary by 30%, and later was suspended and then dismissed for incompetence by the college president. *Id.* at 83–84. The AAUP committee found that the suspension and salary reduction were imposed unilaterally with no academic due process. *Id.* at 86. The committee further found the salary reduction and suspension to be “major sanctions” requiring due process similar to that called for by dismissal. *Id.*

253. N.J. STAT. ANN. § 18A:6-18 (West 1999). *See, e.g.,* Williams v. Red Bank Bd. of Educ., 662 F.2d 1008, 1017 (3d Cir. 1981) (citing the New Jersey law as one of several statutes supporting the general proposition that “a teacher who fails to live up to the required standards may be disciplined or even removed from tenure”). For examples of other states' statutes, see KY. REV. STAT. ANN. §§ 164.360, 164.365 (West, Westlaw through end of 2005 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 73, § 4B (West, Westlaw through 2005 1st Annual Sess. and through Ch. 10 of the 2006 2d Annual Sess.); N.M. STAT. ANN. § 21-1-7.1 (West, Westlaw through Ch. 3 of the First Special Session of the 47th Legislature (2005) (including Constitutional Amendments 1 and 2)); TENN. CODE ANN. §§ 49-8-302 to 49-8-304 (West, Westlaw through end of 2005 First Reg. Sess.).

reduction as a sanction except where dismissal would be permissible.

G. Fines or Restitution

An exceedingly rare action is for an administration, as a form of discipline, to seek reimbursement, restitution, or a fine from a faculty member.²⁵⁴ The Fair Labor Standards Act regulations provide that:

Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment.²⁵⁵

H. Suspension

There are a variety of suspensions, including paid suspensions, unpaid suspensions, and immediate (paid and unpaid) suspensions.²⁵⁶ AAUP policy provides that a suspension pending a faculty hearing should be with pay.²⁵⁷ If an administration, instead of moving to dismiss a faculty member, intends to impose a suspension as a form of sanction, AAUP policy recommends that such action should be preceded by a hearing with the same procedural protections as afforded in a dismissal case.²⁵⁸

I. Paid Suspensions

Faculty members who have been suspended with pay occasionally seek legal redress. Courts generally rule that suspensions with pay do not trigger constitutional due process concerns at public institutions.²⁵⁹

254. See, e.g., *Hughes v. Univ. of Me.*, 652 A.2d 97 (Me. 1995) (suspending a tenured professor without pay for six and one-half days after advancing him \$10,000 and disallowing him a portion of his claimed expenses to make up the equivalent of the amount in dispute).

255. 29 C.F.R. § 541.602(b)(5) (2005). The Secretary of Labor has posited that employees whose pay is docked in small amounts for disciplinary reasons “do not deserve exempt status because as a general matter true ‘executive, administrative, or professional’ employees are not ‘disciplined’ by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments.” *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

256. See generally Ann H. Franke, *Suspending a Faculty Member*, 83 *ACADEME* 52 (July–Aug. 1997).

257. See *Statement on Procedural Standards in Faculty Dismissal Proceedings*, *supra* note 75.

258. See *Regulations on Academic Freedom and Tenure*, *supra* note 72.

259. *Goss v. Lopez*, 419 U.S. 565 (1975) (noting that *de minimis* property interests do not trigger procedural due process protections). See, e.g., *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (holding that while tenured professor was being investigated for the use of inappropriate language in the classroom, his suspension with pay did not violate his constitutional

In *Simonson v. Iowa State University*,²⁶⁰ the Iowa Supreme Court ruled that placing Michael Simonson, a tenured professor, on “paid administrative leave” during a sexual harassment investigation did not trigger due process protections under the state and federal constitutions because he was “not deprived of any economic benefits.”²⁶¹ After receiving a student complaint alleging sexual harassment, the dean placed Simonson on paid administrative leave pending the outcome of the investigation.²⁶² Simonson appealed the dean’s decision, but the provost denied the appeal.²⁶³ Simonson then sought review of the provost’s decision by a faculty senate committee, which recommended reinstatement of Simonson, and its recommendation was forwarded to the president.²⁶⁴ The president rejected the faculty senate’s recommendation that Simonson “be taken off administrative leave pending the completion of the investigation.”²⁶⁵

Simonson sued in state court, seeking reinstatement to his teaching duties, arguing that his placement on administrative leave violated his due process rights under the state and federal constitutions.²⁶⁶ The court ruled in the professor’s favor, and Iowa State University appealed the court’s requirement that it provide Simonson “a full, evidentiary-type hearing prior to placing him on paid administrative leave.”²⁶⁷

The central issue before the state supreme court was whether Simonson was entitled to a hearing before being placed on paid administrative leave.²⁶⁸ The court thought it helpful to “clarify that Simonson was not suspended, but rather was placed on paid administrative leave pending the investigation of the sexual

rights even though his “temporary removal from class duties may have further stigmatized him”); *Roberts v. Bd. of Trs. of the Minn. State Colls. & Univs.*, Nos. A03-528, A03-1053, 2004 Minn. App. LEXIS 306, *23 (Minn. Ct. App. Apr. 6, 2004) (rejecting aviation professor’s claim that his due process rights were violated by a sixty-day paid suspension, which was imposed pending an auditor’s report examining an allegation that he misappropriated funds, because “a suspension with pay does not invoke the protection of the Due Process Clause”) (internal citations omitted); *Victor v. Brickley*, 476 F. Supp. 888, 895–96 (E.D. Mich. 1979) (finding that suspension of nontenured faculty member during sexual harassment investigation did not trigger “pre-deprivation” due process protections). See also *Pitts v. Bd. of Educ.* of U.S.D. 305, 869 F.2d 555, 556 (10th Cir. 1989) (ruling that two-day suspension with pay failed to involve a “measurable property interest”); *Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 9 (1st Cir. 2003) (declining to extend due process protection to suspensions with pay and noting that the Supreme Court reached a unanimous decision declining to extend due process to situations where suspension was *unpaid* (citing *Gilbert v. Homar*, 520 U.S. 924, 929–30 (1997))). For a more in-depth discussion of *Gilbert*, see *infra* text accompanying notes 300–309.

260. 603 N.W.2d 557 (Iowa 1999).

261. *Id.* at 562.

262. *Id.* at 559.

263. *Id.* at 560.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

harassment complaint filed against him.”²⁶⁹ The court reasoned that “to determine whether a public employee has a property interest in continued employment, we look to state law and any contractual rights Simonson may have.”²⁷⁰ Accordingly, the court looked to the university’s faculty handbook provisions on the imposition of sanctions.²⁷¹ The lower court had found his contract with Iowa State University and the university’s administrative code that guaranteed Simonson’s property interest in continued employment as a tenured professor.²⁷² The state supreme court disagreed. It noted that the administrative code defined suspension as when one “shall receive no salary,” and that the sanctions requiring “appropriate hearings” were only for “suspension, expulsion, or dismissal.”²⁷³ Because the code referred to suspension without pay as a sanction, but not paid suspension, the court concluded that “a faculty member who is placed on administrative leave *with pay* is not suspended as that term is defined in the University’s personnel policies.”²⁷⁴ Thus Simonson did not have a property interest entitling him to a hearing before the imposition of the paid suspension.²⁷⁵ In reversing the lower court, the state supreme court opined that “[p]lacing Simonson on paid administrative leave was a way the University could protect students, while at the same time ensuring that Simonson continued to receive the economic benefits of his position.”²⁷⁶

Professors at private institutions have challenged paid suspensions as breach-of-contract actions. In *Earnhardt v. University of New England*,²⁷⁷ John Earnhardt, an untenured professor who was dismissed for alleged sexual misconduct and harassment, sued the private university for breach of contract and negligence.²⁷⁸ Earnhardt admitted that he had had relationships with the complaining students, but he contended that they were consensual.²⁷⁹ During the University of New England’s investigation into the complaints, the university suspended him with pay.²⁸⁰ In the end, the investigation found that he had violated the university’s sexual harassment and conflict-of-interest policies, as well as the AAUP *Statement on Professional Ethics*, which was incorporated into the university’s policies.²⁸¹ The president concluded that Earnhardt should be dismissed and notified him

269. *Id.* at 561.

270. *Id.* at 562.

271. *Id.* at 563.

272. *Id.*

273. *Id.* at 563 (emphasis omitted).

274. *Id.* (emphasis in original).

275. *Id.* The court assumed “without deciding that the University’s procedural rules concerning suspension [without pay] create a property interest in employment which entitles a professor to an ‘appropriate hearing’ prior to suspension.” *Id.*

276. *Id.* at 565.

277. No. 95-219-P-H, 1996 U.S. Dist. LEXIS 10030 (D. Me. July 3, 1996).

278. *Id.* at *5.

279. *Id.* at *9.

280. *Id.* at *10.

281. *Id.* For a discussion of the AAUP’s *Statement on Professional Ethics*, see *supra* notes 42–44 and accompanying text.

accordingly.²⁸² Earnhardt sought review by the faculty grievance committee of his suspension and dismissal, and the committee concluded that Earnhart's suspension and dismissal were justified.²⁸³

In court, Earnhardt argued specifically that the University of New England "breached his contract by suspending him without reason to believe his continued presence on campus would threaten harm to himself or others."²⁸⁴ The court rejected the professor's contention and granted the university's motion for summary judgment.²⁸⁵ The court found no language in his appointment letter or the university's faculty handbook that required that "a faculty member's . . . presence on campus threaten harm to himself or to others before he could be suspended."²⁸⁶

J. Unpaid Suspensions

Depending on the severity of the deprivation, some courts have found unpaid suspensions to violate faculty members' due process rights.²⁸⁷

282. *Earnhardt*, 1996 U.S. Dist. LEXIS 10030, at *10.

283. *Id.* at *11.

284. *Id.* at *16.

285. *Id.* at *1.

286. *Id.* at *19.

287. *See, e.g.,* *Bonnell v. Lorenzo*, 241 F.3d 800, 806–08 (6th Cir. 2000) (noting that Macomb Community College professor who was initially put on "Disciplinary Suspension" (leave without pay) for four months while sexual harassment investigation was pending, was later put on indefinite leave with pay); *Peacock v. Bd. of Regents*, 510 F.2d 1324, 1327 (9th Cir. 1975) (concluding that no pre-suspension hearing was required when professor was suspended and then immediately given post-suspension hearing); *Shub v. Hankin*, 869 F. Supp. 213 (S.D.N.Y. 1994) (removing professor from teaching pending resolution of internal sexual harassment investigation); *Frye v. La. State Univ. Med. Ctr. in New Orleans*, 584 So. 2d 259, 261–62 (La. Ct. App. 1991) (ruling that one-day suspension without pay did not require pre-suspension hearing); *Hughes v. Univ. of Me.*, 652 A.2d 97 (Me. 1994) (ruling that six and one-half day unpaid suspension of tenured professor, which the administration imposed for his refusal to return a portion of his claimed conference expenses and that was "equivalent to the amount Hughes allegedly owed to the University," was properly dismissed because the professor failed to exhaust his administrative remedies); *Stephens v. Roane State Cmty. Coll.*, No. M1998-00125-COA-R3-CV, 2000 WL 192577 (Tenn. Ct. App. Feb. 18, 2000) (remanding case for procedural and substantive review under state statute providing for "suspension for cause" that involved tenured professor's six month unpaid suspension for violating institutional sexual harassment policies). *See also* AAUP, *Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on a Disciplinary Suspension*, 62 AAUP BULL. 369, 373 (Winter 1976) (finding that denial of one week's salary to professor for missing six days of class to attend a professional conference (and two days "for other reasons not specified in the record") and later suspension of one-semester without pay was "far too severe" because "[i]n monetary terms the suspension cost [the professor] over \$10,000"); AAUP, *Academic Freedom and Tenure: University of Missouri, Columbia*, 59 AAUP BULL. 34, 43 (Spring 1973) (finding that "[t]he tangible effect upon [a professor] of the official suspension from June 2 to 12 was that he received no salary for that span of time" and finding that penalty to be significant). Fair Labor Standards Act (FLSA) concerns may be triggered by the unpaid suspension of a faculty member. *See supra* text accompanying note 255.

In *Silva v. The University of New Hampshire*,²⁸⁸ the district court ruled that the unpaid suspension of Donald Silva, a tenured professor of English, violated his due process rights.²⁸⁹ The court reviewed the disciplinary sanctions imposed upon Silva, which included the creation of shadow sections of his course, a letter of reprimand, a “suspension” or removal from teaching classes with pay, and a suspension without pay for a year.²⁹⁰ The district court found the disciplinary sanctions “in the aggregate” to have created more than a “de minimis” deprivation of Silva’s due process rights and that he was entitled to due process protections before the university “significantly altered his employment status.”²⁹¹ In so reasoning, the court ruled that the unpaid suspension formed an “independent basis” for issuing a preliminary injunction on the grounds that Silva had been and continued to be irreparably harmed.²⁹²

Sometimes contracts, such as collective bargaining agreements, modify the constitutional due process protections triggered by suspensions without pay. In *Victor v. Brickley*,²⁹³ an untenured professor at Eastern Michigan University was suspended without pay pending an investigation into an allegation that he had had sex with some of his female students and had attempted to do so with others.²⁹⁴ After the investigation was complete and the professor had filed grievances protesting the suspension, he was reinstated with back pay.²⁹⁵ The professor filed suit against the administrators, claiming that he had been deprived of due process when he was suspended without pay before a hearing.²⁹⁶ The court disagreed, ruling that the procedures followed were sufficient because he was untenured so he had no “expectation of continued employment,” he was only temporarily suspended until the university proved the charges, and the collective bargaining agreement he had signed explicitly provided for suspension without pay and without a pre-suspension hearing.²⁹⁷ The court cited the university’s strong “obligation to avoid even the appearance of what might be characterized as sexual blackmail of students, at worst, and unprofessional conduct, at best,” in suspending him without pay before a hearing.²⁹⁸

288. 888 F. Supp. 293 (D.N.H. 1994)

289. *Id.* at 317.

290. *Id.*

291. *Id.* at 317–18.

292. *Id.* at 326. See also AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70, 76 (Nov.–Dec. 1994) (noting that suspension without pay for an initial time period that was ultimately withdrawn still constituted a “severe sanction” that was “imposed without having afforded Professor Silva requisite protections of academic due process”).

293. 476 F. Supp. 888 (E.D. Mich. 1979).

294. *Id.* at 890.

295. *Id.*

296. *Id.* at 894.

297. *Id.* at 895.

298. *Id.* See also *Narumanchi v. Bd. of Trs.*, 850 F.2d 70, 71 (2d Cir. 1988) (ruling that no due process violation existed when accounting professor at Southern Connecticut State University was suspended without pay for two weeks because of his “refusal to permit a formal classroom

The U.S. Supreme Court directly addressed the due process rights of a tenured non-faculty public employee who is suspended without pay.²⁹⁹ In *Gilbert v. Homar*, the Court ruled that the due process rights of Richard Homar, a tenured police officer at East Stroudsburg University, had not been violated when the administration suspended him without pay for sixteen days without a pre-suspension hearing after his arrest in a drug raid.³⁰⁰ Homar challenged the unpaid suspension before his meeting with university officials as violative of his due process rights.³⁰¹ The Third Circuit had agreed with Homar, ruling that the administration's failure to provide him with a pre-suspension hearing violated his due process rights.³⁰²

The Supreme Court reversed, ruling that no absolute constitutional rule required a hearing before the unpaid suspension of a tenured employee.³⁰³ It explained that the concept of due process is flexible, providing "such procedural protections as the particular situation demands," especially in this situation where the university believed that it needed to move quickly to protect public confidence in campus law enforcement.³⁰⁴ The Court further observed that "the length [and] finality of the deprivation [should be considered] in determining what process is due."³⁰⁵ The Court differentiated between Homar's interest in remaining employed and his interest in the temporary loss of pay, which the court found to be "insubstantial."³⁰⁶ The Court further noted the administration's strong interest in moving quickly given the pending felony charges against Homar.³⁰⁷

The *Gilbert* decision should not be generally applicable to the due process

evaluation following complaints from students that his classes were conducted in an unprofessional manner"; the administration had strictly followed collective bargaining agreement by scheduling a grievance hearing to contest the suspension and professor had skipped the hearing).

299. *Gilbert v. Homar*, 520 U.S. 924 (1997).

300. *Id.* at 924.

301. *Id.* at 928.

302. *Homar v. Gilbert*, 89 F.3d 1009 (3d Cir. 1996), *rev'd*, 520 U.S. 924 (1997).

303. *Gilbert*, 520 U.S. at 929–31.

304. *Id.* at 930 (quoting *Morrissey v. Brewer*, 409 U.S. 471, 481 (1972)). In determining what constitutes due process in a particular case, "three distinct factors" must be balanced. *Id.* at 931. The Court lists these factors as "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Id.* at 931–32 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

305. *Id.* at 932. *See, e.g.*, *McLaurin v. Clarke*, 133 F.3d 928, No. 96-16823, 1997 WL 800243, at *3 (9th Cir. Dec. 17, 1997) (unpublished table decision) (ruling in post-*Gilbert* case that Los Rios Community College District administration did not violate the due process of tenured faculty member who was removed as administrator due to violation of sexual harassment policy because his removal "did not include termination or pay demotion"; rather, the discipline included his transfer to a teaching position and a letter of reprimand being placed in his file).

306. *Gilbert*, 520 U.S. at 932.

307. *Id.* *Homar's* suspension was upheld on remand. *Homar v. Gilbert*, 63 F. Supp. 2d 559 (M.D. Pa. 1999).

protections afforded suspended faculty members

[u]nless a college could demonstrate that it needed to remove a tenured faculty member quickly because he or she was a potential threat to the health or safety of others, or because the faculty member had committed some act that rendered him or her unfit to continue teaching pending a disciplinary hearing.³⁰⁸

Nevertheless, at least some courts appear to be reading *Gilbert* as allowing for no pre-suspension hearings of faculty in a wide variety of situations.³⁰⁹

K. Immediate Suspensions

Regulation 5 of the AAUP's RIR provides that an institution may suspend a professor when immediate harm to the individual or others is threatened pending a hearing on charges and the ultimate determination of the individual's status.³¹⁰ Regulation 5 further provides that, before suspending a faculty member, the administration should consult with a faculty committee concerning the propriety, length, and other conditions of the suspension.³¹¹ The threat of physical harm can certainly warrant suspension, but so can harm to the educational process (e.g., a faculty member who refuses to evaluate the work of most of her students). AAUP policy provides that such suspensions should be with pay and such suspensions can remain in effect during investigation and disciplinary proceedings.³¹²

In *Delahoussaye v. Board of Supervisors of Community and Technical Colleges*,³¹³ the Louisiana appellate court ruled that the administration violated the due process rights of Ted Delahoussaye, a tenured instructor at Louisiana

308. WILLIAM A. KAPLIN & BARBARA A. LEE, YEAR 2000 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION, 280–96 (3d ed. 2000). See, e.g., *Malla v. Univ. of Conn.*, 312 F. Supp. 2d 305, 308 (D. Conn. 2004) (ruling that a genuine issue of material fact existed because the professor's removal from the center director position was so significant in the academic community that his removal required greater procedural protections, and noting in a footnote that in *Gilbert* the "Supreme Court has left open the question of whether discipline of tenured public employees short of termination is afforded protection under the Due Process Clause"); *Delahoussaye v. Bd. of Supervisors of Cmty. & Tech. Colls.*, 906 So. 2d 646, 655 (La. Ct. App. 2005) (finding that the "factual circumstances thus fail to bring this case within the *Gilbert* exception to the general rule of *Loudermill*").

309. See, e.g., *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998) (noting that professor was "wise" not to argue under *Gilbert* "that the initial act of suspending him with pay violated any constitutional right"); *Levenstein v. Salafsky*, 414 F.3d 767, 775 (7th Cir. 2005) (citing *Gilbert* for the proposition that "suspensions without pay are also possible under some circumstances"); *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999) (citing *Gilbert* for the proposition that tenured public employees cannot be fired without due process). See generally Daniel T. Gallagher, *Summary Suspension of Public Employee Without Pay Does Not Violate Due Process*, 39 B.C. L. REV. 464 (1998) (discussing the history of the law before *Gilbert* and possible future implications of the then-new law).

310. *Regulations of Academic Freedom and Tenure*, supra note 72, at 26.

311. *Id.*

312. *Id.*

313. 906 So. 2d 646 (La. Ct. App. 2005).

Technical College-Lafayette campus, by placing him on administrative leave without pay for one day during an investigation after students sent letters to administrators complaining about sexual harassment.³¹⁴ The day after he was suspended, the college held a “post-suspension hearing” to inform the instructor of the reasons for his suspension, and to provide him with a chance to respond to the allegations.³¹⁵ The investigation found that the professor’s “offensive statements” in class “created a detrimental learning environment,” and the college scheduled a hearing to remove the instructor.³¹⁶ However, before the hearing took place, Delahoussaye sought a “judicial declaration of the unconstitutionality of the [college]’s imposition of leave without pay under its policy, as well as a writ of mandamus restoring his salary and benefits.”³¹⁷

The court ruled that the instructor’s right to due process had been violated when he was suspended without pay before the hearing because the allegations lacked “indicia of independent, substantial trustworthiness provided by an indictment or arrest,” were not “of such egregious character as to warrant immediate, ‘emergency’ action” by the board, and “the factual circumstances did not warrant the immediate, indefinite deprivation of [the instructor’s] interest in receiving his salary.”³¹⁸ The court further explained that the “mere fact that he was afforded a postsuspension hearing the day after the suspension’s effective date does not serve to change the indefinite suspension without pay into a one-day loss of pay.”³¹⁹

L. Removal from Administrative Position

Some faculty members hold administrative positions, such as department chair, program director, or dean. These individuals often receive one or more course releases, an additional payment, or a calendar year contract (compared to the academic year contracts issued to many faculty). Although institutional policies and individual arrangements vary, in many cases individuals appointed to administrative positions serve at will,³²⁰ and thus, may be removed from their administrative appointment (but not from their tenured faculty position) without cause and without due process protections.³²¹

314. *Id.* at 656.

315. *Id.* at 647.

316. *Id.* at 648.

317. *Id.* at 648–49.

318. *Id.* at 654.

319. *Id.* at 655.

320. *See, e.g.*, *Franken v. Ariz. Bd. of Regents*, 714 P.2d 1308 (Ariz. Ct. App. 1985) (noting that the letter of appointment to administrative position specified that assignment was at-will).

321. *See, e.g.*, *Mahaffey v. Kan. Bd. of Regents*, 562 F. Supp. 887 (D. Kan. 1983) (finding no constitutionally-protected property interest in administrative salary or its perquisites). *But see* *Roberts v. Coll. of the Desert*, 870 F.2d 1411 (9th Cir. 1988) (holding department chair had a protectable property interest in retaining position as chair because the college president had testified that he and the chair had “mutually explicit understandings” that the president could not reassign her without good cause). *See also* *Spiegel v. Univ. of S. Fla.*, 555 So. 2d 428 (Fla. Dist. Ct. App. 1989) (stating that department chair’s contract was basis for property rights requiring

Courts have made it clear that, although an individual may hold tenure as a faculty member, there is no tenure in administrative positions (unless, of course, state law, institutional policy, or an individual contract explicitly provides for tenure in administrative roles).³²² In *Kirsner v. University of Miami*,³²³ a state court ruled that the University of Miami could lawfully reduce a former department chair's salary by the amount attributable to his service as chair because, although he was a tenured faculty member, he was not tenured in the chair position.³²⁴ Similarly, the Florida Supreme Court ruled that a department chair did not have tenure in that position, but only as a faculty member, and thus, the university's rules for nonreappointment of faculty did not apply to the decision not to reappoint a department chair.³²⁵ Because no tenure in an administrative position exists, faculty members who are demoted from administrative positions do not have a constitutionally-protected property interest in that administrative position, and are not entitled to a notice or a hearing before being relieved of the position.³²⁶

If, however, institutional policy or an individual contract provides that removal from the administrative position may only be for cause, or the contract specifies a term for the appointment, then the administrator may not be removed without due process protections. In *Mangaroo v. Nelson*,³²⁷ the university's faculty handbook

notice and opportunity to be heard). In *Speigel*, the department chair was removed only two months into his one-year contract without explanation or any opportunity to challenge the reasons for his removal. *Id.* at 428–29. The court reacted harshly to what it apparently considered unfair treatment:

We hold that Dr. Spiegel's contractual status and the potential right to compensation over and above that of a professor are protected property rights that cannot be withdrawn without notice and the opportunity to be heard. This is not, however, the sole concern we have with the manner in which Dr. Spiegel was removed. Removing him without charging misconduct or providing any other explanation for such action may well damage his standing with his associates and in the community generally. It may place upon him a stigma giving rise to suspicions as to the reason for his removal, damaging his reputation and impairing his ability to obtain employment elsewhere, factors which implicate his liberty interest protected by the Fourteenth Amendment. These reasons, standing alone, suggest the propriety of a hearing prior to the termination of his contract. Thus, we find that Dr. Spiegel possesses a constitutionally protected property interest in the benefits flowing from his chairmanship as well as his tenured position of professor entitling him to the procedural protections of Chapter 6C4-10, Florida Administrative Code.

Id. at 429.

322. The AAUP's *Statement on Government of Colleges and Universities* provides: "The chair or department head should not have tenure in office; tenure as a faculty member is a matter of separate right. The chair or head should serve for a stated term but without prejudice to reelection or to reappointment by procedures which involve appropriate faculty consultation." *Statement on Colleges and Universities*, *supra* note 41, at 222.

323. 362 So. 2d 449 (Fla. Dist. Ct. App. 1978).

324. *Id.* at 451.

325. *Mohammed v. Dep't of Educ.*, 444 So. 2d 1007 (Fla. Dist. Ct. App. 1984).

326. *See, e.g., Barde v. Trs. of Reg'l Cmty Colls.*, 539 A.2d 1000 (Conn. 1988); *see also Jimenez-Torres de Panepinto v. Saldana*, 834 F.2d 25 (1st Cir. 1985).

327. 864 F.2d 1202 (5th Cir. 1989).

stated that administrators could be removed only “for cause,” and that removal before the end of the administrator’s one-year contract required that due process protections be provided.³²⁸ But in *Tuckman v. Florida State University*,³²⁹ a dean who was removed prior to the end of his contractual term sued for breach of contract.³³⁰ The court ruled that, because Florida State University continued to employ the former dean as a tenured professor and continued to pay him the enhanced salary and benefits until the expiration of the contract for his services as dean, there was no breach of contract.³³¹

M. Demotion in Rank

Institutions on rare occasions demote faculty members from certain ranks or status as a form of discipline. The AAUP generally views reductions in faculty rank, such as from associate to assistant professor, as an inappropriate sanction, except in situations where the promotion had obtained through fraud or dishonesty.³³² Demotion claims tend to arise from academic misconduct allegations and have resulted in mixed judicial outcomes.³³³

328. *Id.* at 1203.

329. 530 So. 2d 1041 (Fla. Dist. Ct. App. 1988).

330. *Id.* at 1042. *See also Drucker v. Hofstra Univ.*, 719 N.Y.S.2d 263 (App. Div. 2001) (stating that the university complied with all provisions in faculty manual during removal of department chair for failure to maintain “an effective communications climate,” and gave the plaintiff sufficient opportunity to respond to the administration’s concerns before her removal).

331. *Tuckman*, 530 So. 2d at 1042.

332. AAUP, *Committee A Action Minutes* (June 10–11, 1992) (finding that “the penalty of demotion in rank, while not categorically inappropriate, should generally be resisted”) (on file with authors). *See, e.g., AAUP, Academic Freedom and Tenure: Simpson College (Iowa)*, 26 AAUP BULL. 607, 612 (Dec. 1940) (finding as violative of AAUP policies demotion of tenured associate to rank of assistant professor that would have “deprived” the professor under the tenure rules in force of “permanent tenure and of all rights to a hearing in the future” because of criticism of his administrative ability as department chair). The mechanics of a demotion would seem to raise a number of issues, including what are the conditions to be met to restore the previously held rank—simply the absence of further misconduct or additional academic achievement? If absence of misconduct, for how long?

333. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 459–62 (6th Cir. 2000) (ruling that full-time instructor of health and physical education was not unlawfully retaliated against by the dean after he rebuffed her sexual advances because even though she stripped him of his title, “Coordinator of Sports Studies,” he was reinstated to the coordinator position after a week and there was no diminution in salary or prestige); *Kirschenbaum v. Northwestern Univ.*, 728 N.E.2d 752, 762 (Ill. App. Ct. 1999) (finding that administration did not breach medical professor’s tenure contract when it changed his status from “full-time” to “contributed service” because the “reclassification did not affect plaintiff’s status as a tenured faculty member”); *Hollister v. Tuttle*, 210 F.3d 1033, 1036 (9th Cir. 2000) (finding that reduction in the number of academic credits offered for a course taught by professor and his removal from appointment on a college search committee was not “generally a demotion”). *But see Klinge v. Ithaca Coll.*, 634 N.Y.S.2d 1000 (Sup. Ct. 1995) (ruling that a factual issue for jury existed regarding whether tenure was breached for professor, who was found guilty of plagiarizing, when he was demoted from full to associate professor, his salary was reduced, and his academic duties restricted); *Moosa v. State Personnel Bd.*, 126 Cal. Rptr. 2d 321, 326 (Ct. App. 2002) (finding that administration violated collective

In *Radolf v. University of Connecticut*,³³⁴ Justin Radolf, a tenured medical school professor, was eventually placed on academic probation by the university and the federal government for five years with respect to his federally funded research after it was discovered that he had falsified data in grant proposals.³³⁵ Soon thereafter, the professor resigned from his position as director of the medical school's Center for Microbial Pathogenesis, where he was responsible for finding a cure for Lyme disease, but retained his title of full professor.³³⁶ After he was not reinstated to the director position, he sued the medical school and the center's faculty members, arguing that his due process rights had been violated when he was not granted a pre-decision hearing before being denied reappointment as director.³³⁷ The federal district court described the litigation as arising from the university administration's "attempt to navigate the difficult terrain of continuing to employ a tenured professor who was on academic probation imposed by the [university] and under investigation by the federal government for scientific misconduct."³³⁸

The court ultimately rejected Radolf's federal claims, granting summary judgment to the university, and declining to exercise jurisdiction over the remaining state claims.³³⁹ The court reasoned that Radolf had no property interest in regaining the position of director, which was a discretionary appointment that he had "voluntarily relinquished" and, therefore, he was entitled to no procedural due process.³⁴⁰ The court noted that Radolf had not suffered a reduction in salary or laboratory support, so the court was "skeptical that such intangible benefits [as prestige and honor] are sufficiently compelling to require a hearing before a decision is made on appointing a professor."³⁴¹ The court also found that Radolf had no particular property interest in participating in a Department of Defense (DOD) research grant: no evidence existed that "his income, tenure or research was intimately connected [to] and dependent on the DOD Grant so as to create a property interest in participation in this grant, or that he had any other right to participation in the DOD research which would create such a property interest."³⁴²

The court also rejected Radolf's claim that his First Amendment right to academic freedom was violated. While recognizing the First Amendment right of

bargaining agreement by demoting tenured faculty member from full to associate professor because of the professor's failure to comply with an administrative directive to develop and submit an improvement plan; the contract only authorized a discussion "along with suggestions").

334. 364 F. Supp. 2d 204 (D. Conn. 2005).

335. *Id.* at 208. A letter of reprimand was also placed in his personnel file. *Id.*

336. *Id.*

337. *Id.* at 206. This litigation appears to have been particularly acrimonious. The court noted that this "bitter dispute" appeared to have redirected "much of the time, energy and passion of the parties . . . towards this destructive, accusation-laden battle." *Id.*

338. *Id.* at 209.

339. *Id.* at 207.

340. *Id.* at 212-13.

341. *Id.* at 213.

342. *Id.* at 221.

academic freedom, the court found that Radolf had no such constitutionally protected “right to participate in writing a particular grant proposal or performing research under a particular grant.”³⁴³ Even if this “particular alleged variant of the First Amendment right to academic freedom” existed, the court wrote, it was not clearly established at the time of the administration’s actions, and therefore the university administrators were entitled to qualified immunity.³⁴⁴ The court “hasten[ed]” to note, however, that:

[I]t is certainly possible that an academic institution could make a tenured professor’s life so onerous and so difficult through denial of normal privileges and benefits of tenure that the University’s actions could rise to the level of a constructive demotion. For example, a university might make it impossible for a professor to perform his duties by denying the tenured professor access to the library, laboratory spaces, classrooms, offices and other University resources that are usually accorded tenured professors.³⁴⁵

Radolf’s situation, however, did not establish such a case of “constructive demotion.”³⁴⁶

In an earlier case the Seventh Circuit upheld a university’s demotion of a professor for professional misconduct.³⁴⁷ In *Keen v. Penson*, Carl Keen, a tenured English professor at the University of Wisconsin-Oshkosh, failed a student and berated her in correspondence after he found as insufficient her apology for publicly complaining about his class assignments and grading policy in modern American literature.³⁴⁸ Several internal faculty reviews of the matter resulted in a finding that Keen’s letters were “unwarranted, personally demeaning to the intended reader, overbearing, unforgiving, and relentless” and “unprofessional,” and that Keen violated the AAUP’s *Statement of Professional Ethics* by failing the student when she merited a higher grade.³⁴⁹ Based on the recommended sanctions

343. *Id.* at 215.

344. *Id.* at 218.

345. *Id.* at 228.

346. *Id.* The court in *Radolf* observed:

Dr. Radolf continues to perform research in his chosen field; he is still a tenured faculty member; his salary and fringe benefits have not been reduced; he has not suffered any reduction in lab space or institutional support; he has received pay increases; he continues to apply for and receive grant funding; he continues to publish academic articles; he is still a member of academic societies, reviews manuscripts for academic journals and sits on editorial boards; he attends and speaks at scientific conferences; and he still sits on certain academic committees at [the university], just not the ones he wants to sit on.

Id. at 228. *But see* Gertler v. Goodgold, 487 N.Y.S.2d 565, 567–69 (App. Div. 1985), *aff’d*, 489 N.E.2d 748 (N.Y. 1985) (ruling that tenured medical school professor was not entitled contractually to adequate research space, fair teaching assignments, and participation in research grants because such “benefits” are “perquisites of faculty life,” not “contract entitlements”).

347. *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

348. *Id.* at 253.

349. *Id.* at 254.

by the faculty committee, the university's president ordered Keen to apologize to the student and give her a grade of "C."³⁵⁰ When Keen refused, the president demoted him from associate to assistant professor and reduced his salary by \$700.³⁵¹ Keen then appealed to the faculty senate executive committee, which upheld as "appropriate" the demotion in Keen's rank and salary.³⁵² Keen then sought review by the board of trustees, which declined to consider the matter.³⁵³

Keen sued, alleging that the university president's demoting him in rank violated his academic freedom and due process.³⁵⁴ The lower court granted the university's motion for summary judgment, and the Seventh Circuit affirmed.³⁵⁵ The court observed that the "various reviewing committees . . . [support]" the conclusion that "Keen abused his power as a professor in his dealing with his former student and deserves sanctions."³⁵⁶ The court rejected Keen's First Amendment academic freedom argument, struggling to understand how the professor's interest in a First Amendment right to give the student an "F" and write demeaning letters to the student involved a matter of public concern.³⁵⁷ In any case, the court reasoned that the University of Wisconsin had a stronger "interest in ensuring that its students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments," than in the faculty member's concerns.³⁵⁸ The court opined:

It is true that if Keen had written the apology and changed Johnson's grade, he could have avoided the loss of rank and salary. In a 'but-for' sense, then, Keen was demoted because he failed to write the apology. But in a 'proximate-cause' sense, he was demoted not because of his failure to apologize and change Johnson's grade but because of his sanctionable misconduct.³⁵⁹

The court further rejected the professor's contention that the punishment was unfair because no policy existed on grading or correspondence with students, declaring that a "university need not adopt a quasi-criminal code before it can discipline its professors . . . and should not be expected to foresee every particular type of unprofessional behavior on the part of its professors."³⁶⁰ Lastly, the court rejected Keen's argument that he was denied procedural due process, citing to the

350. *Id.* at 254–56.

351. *Id.* at 255.

352. *Id.*

353. *Id.* at 256.

354. *Id.* at 256–57.

355. *Id.* at 257–59.

356. *Id.* at 257.

357. *Id.* at 257–58.

358. *Id.* at 258.

359. *Id.* The court cited to the board of regents' committee finding, which stated: "The circumstances reflect the institution's belief that Professor Keen's unprofessional behavior towards the student should be penalized, not that his opinions and views of the situation should be silenced." *Id.* at 259.

360. *Id.*

district court's finding that Keen had received "much more due process than even the most violent recidivist sitting on death row has been afforded in terms of the criminal justice system."³⁶¹

N. Shadow Sections

"Shadow sections"—courses taught by other instructors to compensate for perceived problems in the teaching of the original professor—may violate a public college or university professor's constitutionally protected interests depending on why and how these parallel sections are created. Significant legal and policy risks are involved in the creation of shadow sections, and such an action should not be taken without thorough consideration of these risks. In the infamous case, *Levin v. Harleston*,³⁶² the administration of the City College of the City University of New York (CUNY) created shadow sections of a course, Philosophy 101, taught by Michael Levin, a white tenured professor who spoke in public about affirmative action quotas and the lack of intelligence of blacks as compared to whites, to "protect" and "insulate" his present and future students from the professor's "odious" remarks.³⁶³ However, no students had ever complained about Levin's course.³⁶⁴ The dean had asked the chair to assign someone else to teach Levin's section, which the chair refused to do because he found the action to be "immoral and illegal, and an unwarranted interference in the discretionary powers of a department chairman."³⁶⁵ The dean then moved forward on his own, writing a letter to students enrolled in Levin's course and offering them a new section if they wished to transfer out of the course because of Levin's "controversial views."³⁶⁶

The district court enjoined permanently the continuance of the alternative sections of the introductory philosophy course, because the shadow sections "were established with the intent and consequence of stigmatizing Professor Levin solely because of his expression of ideas."³⁶⁷ Instead, the effect of the dean's letter was to "officially [condemn] his views as controversial and dangerous to the welfare of his students and the educational process in the College at large."³⁶⁸ The district court found no evidence to support the administration's contention that it created the "parallel" sections because Levin's theories outside the classroom harmed the students and the educational process in the classroom.³⁶⁹ The court concluded: "University and College administrators may under certain circumstances penalize a faculty member for deficient scholarship or teaching, *if* they follow proper procedures, apply clear and announced criteria, and invoke, without distortion,

361. *Id.* at 257.

362. 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in relevant part*, 966 F.2d 85 (2d Cir. 1992).

363. *Id.* at 898.

364. *Id.*

365. *Id.* at 907–08.

366. *Id.* at 908.

367. *Id.* at 915, 927.

368. *Id.* at 918.

369. *Id.* at 922.

peer judgment. This was manifestly not done here.”³⁷⁰

The Second Circuit affirmed, rejecting the administration’s argument that the alternative sections “presuppose that Professor Levin will continue to teach a class section,”³⁷¹ and therefore, his First Amendment rights were not violated. The court opined, “Appellants’ encouragement of the continued erosion in the size of Professor Levin’s class if he does not mend his extracurricular ways is the antithesis of freedom of expression.”³⁷²

In *Silva v. University of New Hampshire*,³⁷³ the district court granted J. Donald Silva’s preliminary injunction, finding that the university employed a subjective standard that violated the tenured professor’s First Amendment academic freedom.³⁷⁴ In so doing, it noted that the administration created “[t]wo shadow classes” when Silva was accused of sexual harassment.³⁷⁵ Twenty-six students changed to the two alternate sections of the technical writing class.³⁷⁶ One administrator noted that “scheduling a separate class is an extreme measure and an option he has never exercised in his six years.”³⁷⁷

The AAUP’s investigating committee report on Professor Silva at the University of New Hampshire discussed the creation of the shadow sections in more detail.³⁷⁸ It reported that Silva “was required to announce at the beginning of each of his three sections of the technical writing course on March 18 that students could transfer to an alternate section” in light of the sexual harassment allegations

370. *Id.* at 927.

371. *Levin v. Harleston*, 966 F.2d 85, 88 (2d Cir. 1992).

372. *Id.* In an amicus brief filed in support of Levin in the Second Circuit, the AAUP and the other amici wrote: “[V]iable alternatives pre-dated establishment of the shadow sections. The district court noted the multiple sections of Philosophy 101 and the ready availability of transfer, were any student to so request.” Brief for the AAUP, the New York Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellee, 29–30, *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (No. 91-7953). As Professor Robert O’Neil has commented:

Concern about [Levin’s] published writings and their startlingly insensitive views on race and intelligence needed urgent attention. The City College administration did almost everything right but in the end made two big mistakes. One concerns the “shadow sections,” born of a commendable desire to protect students. If the dean had simply been prepared to offer alternative sections to any students who came and expressed discomfort about the racial views of their instructor rather than jumping the gun and stigmatizing a teacher about whom none had complained, the policy would have been not only acceptable but in fact laudable.

ROBERT M. O’NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 50–51 (1997). *See also* *McClennan v. Bd. of Regents of the State Univ.*, 921 S.W.2d 684, 687 (Tenn. 1996) (upholding “course substitutions” for students not wishing to enroll in a course with a professor found to have sexually harassed a student in teaching how to administer electrocardiograms).

373. 888 F. Supp. 293 (D.N.H. 1994).

374. *Id.* at 314, 332.

375. *Id.* at 320.

376. *Id.* at 310.

377. *Id.*

378. AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 *ACADEME* 70 (Nov.–Dec. 1994).

against him.³⁷⁹ According to the report, twenty-six of Silva's seventy-two students, including those who had filed sexual harassment complaints against him, transferred.³⁸⁰ The reprimand imposed upon Silva required that he "reimburse the university for the cost of the alternate sections."³⁸¹ A faculty hearing panel recommended the imposition of "severe sanctions," including that "he not be allowed to return to the classroom until he had reimbursed the university for the alternate sections of his three classes the previous spring."³⁸²

O. Class Monitoring

Faculty members have been subjected in rare circumstances to college or university classroom monitoring as a form of discipline.

In *Parate v. Isibor*,³⁸³ Natthu Parate, an Indian non-tenured civil engineering professor at East Tennessee State University, was ordered by his dean to alter the grading scale of one of his courses so that a student could receive a higher grade.³⁸⁴ After other students complained about the grade they received on Parate's exam, the dean came to class, interrupted the professor and told the class that Parate was a poor teacher.³⁸⁵ During the remainder of the year, administrators "continually sent faculty observers to his classroom."³⁸⁶ Parate sued the dean and the head of his department, claiming he had been discriminated against and that his First Amendment rights had been violated.³⁸⁷ Parate specifically argued that the type of classroom monitoring engaged in by the university administrators violated his academic freedom, because the university had already decided not to retain him, so

379. *Id.* at 72.

380. *Id.*

381. *Id.*

382. *Id.* at 74.

383. 868 F.2d 821 (6th Cir. 1989).

384. *Id.* at 824.

385. *Id.* at 825.

386. *Id.* In the report and recommendation to the district court in the Parate matter, the magistrate concluded, "School administrators have the right and duty to monitor classroom performance in an effort to determine if instructors are carrying out their teaching responsibilities in a professional and capable manner." *Parate v. Isibor*, No. 3-86-0311 at 17-18 (M.D. Tenn. Jan. 23, 1987) (Magistrate Judge's Report and Recommendation) (on file with author). The magistrate conceded, however, that "[i]n hindsight, it would have been more professional for defendants to have observed plaintiff's teaching performance, and then discussed any perceived deficiencies with him in private, rather than to humiliate him in front of his class. However, boorish behavior does not translate into a constitutional violation." *Id.* at 18. The magistrate concluded, "Plaintiff was not protected by the First Amendment from monitoring and inquiry into his competence as a teacher." *Id.* at 19. Parate took exception to this recommendation. While he recognized the right of the university to observe, review, and evaluate his competence as a teacher, in this case, Parate argued, "no legitimate reason" existed to investigate his teaching competence since his contract was not being renewed. Plaintiff's Objections to Magistrate's Report and Recommendation, *Parate*, No. 3-86-0311, at 11 (M.D. Tenn. Feb. 2, 1987) (on file with author). Instead, Parate argued that the supervisor's attendance was in retaliation for the professor's refusal to change the grades of the students. *Id.* at 12.

387. *Parate*, 868 F.2d at 825.

the monitoring served no evaluative function.³⁸⁸ The federal appellate court disagreed. While it conceded that the administrator's behavior in Parate's classroom was "unprofessional," the court concluded that because "the defendants interfered with [Parate's] classroom teaching on only one occasion," the administrators' conduct "could not have resulted in a 'pall of orthodoxy' being cast' over his class."³⁸⁹ The court ruled that such classroom monitoring, however "boorish," did not infringe upon Parate's academic freedom.³⁹⁰

As a policy matter, if periodic monitoring is deemed a necessary discipline, the primary responsibility should be in the hands of faculty familiar with the subject matter.³⁹¹

P. Mandatory Counseling

Some administrations have required that faculty undergo counseling. The imposition of such a disciplinary sanction often arises in sexual harassment cases.³⁹² Such disciplinary "sensitivity training" triggers significant legal and

388. *Id.* at 830.

389. *Id.* at 831. The court further found that no academic freedom violation existed because Parate failed to contend that the administrators "consistently denied him a free and open exchange with his students." *Id.* It also stated that Parate, as a nontenured professor, had no "First Amendment right to teach a particular class or to be free from the supervision of university officials." *Id.*

390. *Id.* *But see* Kalia v. St. Cloud State Univ., 539 N.W.2d 828, 835 (Minn. App. 1995) (examining professor's race and national origin discrimination claim and noting that the university's request to have him submit to classroom monitoring "appear[ed] . . . to represent the peak in a series of prior related incidents" that constituted "evidence that the discrimination . . . occurred . . . with the purpose of denying tenure and promotion"). *Cf.* Rheams v. Marquette Univ., 989 F. Supp. 991, 997 (1997) (noting the grievance committee's discovery of several deficiencies in the professor's teaching style and a failure to adhere to university policy regarding exam administration during a classroom monitoring session undertaken at professor's request).

391. *See, e.g.,* Robert C. Post, *Academic Freedom and the "Intifada Curriculum,"* 89 ACADEME 16, 20 (May-June 2003), available at <http://www.aaup.org/publications/Academe/2003/03mj/03mjpost.htm> (last visited Jan. 23, 2006) (observing that English department took the "extraordinary step of requiring that a full tenured member of the faculty observe [a class on "The Politics and Poetics of Palestinian Resistance" taught by a graduate assistant which had originally been described as excluding those hostile to the Palestinian cause] to ensure that it would be taught in a way that was entirely consistent with applicable academic standards").

392. In addition to the cases discussed in this section, see also, *Powell v. Ross*, No. 03-C-0610-C, 2004 U.S. Dist. LEXIS 3601, at *3 (W.D. Wis. Feb. 27, 2004), where the court rejected a professor's defamation claim arising in part from a recommendation that he "attend sexual harassment training to identify his 'problem areas'"; Katherine S. Mangan, *Thorny Legal Issues Face Colleges Hit by Sexual-Harassment Cases*, CHRON. HIGHER EDUC., Aug. 4, 1993, at A13, which discusses a case where a University of Houston educational leadership professor was suspended and forced to undergo counseling after making a sexual advance toward a graduate student and the professor later sued after the university did not agree that he was fit to return, saying that his counseling did not "adequately deal with the harassment issue"; Robin Wilson, *Students Sue Professor and U. of Texas in Harassment Case*, CHRON. HIGHER EDUC., July 2, 2004, at A12, which reports on a professor at the University of Texas-Pan American who was found to have created a hostile learning environment for some of his students and was required to undergo counseling. Some sexual harassment policies explicitly delineate such mandatory

policy concerns including those relating to free expression, academic freedom, and privacy: “Colleges and universities need to distinguish between behavior—which they have a right to punish—and the attitudes or ideas that drive that behavior—which they do not.”³⁹³

Requiring a faculty member to undergo mandatory counseling may also trigger protections under the Americans with Disabilities Act (ADA).³⁹⁴ Some courts have ruled that an employer’s directive that an employee undergo mandatory psychiatric counseling or “anger management” counseling is evidence that the employer “regarded” the employee as disabled, and thus the employee is entitled to the protections of the ADA.³⁹⁵

In *Bauer v. Sampson*,³⁹⁶ the Ninth Circuit ruled that the chancellor of South Orange Community College District violated the First Amendment rights of Roy Bauer, a tenured professor of ethics and political philosophy at Irvine Valley College, by requiring the professor to meet with an anger management counselor.³⁹⁷ Bauer “voiced his disapproval” of the acting college president through four writings and two illustrations—which the court described as “adolescent, insulting, crude and uncivil”—in the campus newspaper.³⁹⁸ The

counseling as a proper sanction. For example, the University of Nebraska Employee Policies and Practices manual requires sexual harassment education to address particular faculty members’ deficiencies. UNIV. OF NEB., EMPLOYEE POLICIES AND PRACTICES, available at <http://www.nebraska.edu/hr/EmployeePolicyManual.pdf> (last visited Jan. 23, 2006).

393. Jonathan Knight, Op-Ed., *The Misuse of Mandatory Counseling*, CHRON. HIGHER EDUC., Nov. 17, 1995, at B1 (“No single punishment is appropriate for all sexual-harassment cases, but it is the faculty member’s misconduct, not his ideas, that should be punished.”). There is more literature and case law raising significant concerns about mandatory counseling for students than for faculty. See, e.g., *Gorman v. Univ. of R.I.*, 646 F. Supp. 799, 814 (D.R.I. 1986), *rev’d on other grounds*, 837 F.2d 7 (1st Cir. 1988) (finding that the university’s discipline of student that included “compulsory psychiatric treatment [was] a ‘shocking extreme’” and an “invasion of protected privacy rights [that] can survive constitutional scrutiny only if it furthers a compelling state interest”). See generally Steven P. Gilbert & Judith A. Sheiman, *Mandatory Counseling of University Students: An Oxymoron?*, J. C. STUDENT PSYCHOTHERAPY, 1995, at 3 (summarizing the clinical, ethical, legal and political problems with mandatory outpatient counseling of university students and concluding that the use of mandatory counseling as discipline fails to help either the institution or the student).

394. 42 U.S.C. §§12101–12300 (2000).

395. See, e.g., *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 365–66 (9th Cir. 1996) (concluding that genuine issues of material fact existed as to whether employee was “disabled” as defined under the ADA, when employee’s stress and depression were possibly the result of an ADA-recognized disorder known as “organic mental syndrome”); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999) (holding that school district’s request that teacher submit to mental and physical exams “to determine his fitness as a teacher” was insufficient evidence to prove that school district regarded him as disabled under the ADA); *Miners v. Cargill Commc’ns, Inc.*, 113 F.3d 820, 823–24 (8th Cir. 1997) (reversing the district court and concluding that employee presented sufficient evidence that her employer regarded her as being an alcoholic—and thus, disabled within the meaning of the ADA—when it presented her with the choice of either attending an alcohol treatment program or being terminated).

396. 261 F.3d 775 (9th Cir. 2001).

397. *Id.* at 780.

398. *Id.* at 780, 783.

chancellor of the community college district responded to the submissions by alleging that Bauer had violated district policies on workplace violence and racial harassment, and “strongly urged” the professor to “[deal] with [his] feelings of anger” by participating in the district’s employee assistance program.³⁹⁹ Later the chancellor, wrote to Bauer and directed him to

[s]chedule a minimum of two meetings with the employee assistance counselor provided by the District, or make similar arrangements with another counselor approved by the Vice Chancellor [of] Human Resources, and report, in writing, that you have met the counselor. The confirming letter will become part of the District’s record and your personnel file.⁴⁰⁰

Failure to comply with this and other terms of the letter “would be grounds for more severe discipline.”⁴⁰¹

Bauer sued in district court, seeking declaratory and injunctive relief on a number of claims, including violation of his First Amendment rights under the federal and state constitutions.⁴⁰² The district court granted Bauer preliminary injunctive relief, directing the district “to withdraw the directive for Bauer to undergo counseling.”⁴⁰³

Other faculty legal challenges to mandatory counseling in the sexual harassment context have been similarly successful. In *Cohen v. San Bernardino Valley College*,⁴⁰⁴ Dean Cohen, a tenured professor of English and film studies at the community college, challenged the institution’s sexual harassment policy on a number of grounds, including that it violated his free speech and academic freedom.⁴⁰⁵ A student was offended by Cohen’s use of vivid sexual imagery in his remedial English class, and filed a sexual harassment complaint against him.⁴⁰⁶ The grievance committee found for the student, ruling that Cohen had violated the institution’s sexual harassment policy by creating a hostile learning environment, a finding accepted by the college president.⁴⁰⁷ Neither party was satisfied, and both appealed to the board.⁴⁰⁸ The board ruled against Cohen, ordering a variety of

399. *Id.* at 780 (alteration in original) (citation omitted).

400. *Id.* (alteration in original) (citation omitted).

401. *Id.* at 780–81.

402. *Id.* at 781.

403. *Id.* The district court later granted Bauer summary judgment on his First Amendment claims, which included the challenge to the counseling directive. *Id.* The school district appealed the district court’s ruling to the Ninth Circuit, and the court struck down the workplace violence policy as vague. *Id.* at 785.

404. 92 F.3d 968 (9th Cir. 1996).

405. *Id.* at 970.

406. *Id.* The court described these episodes as including that Cohen “typically assigned provocative essays such as Jonathan Swift’s ‘A Modest Proposal’ and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a ‘devil’s advocate’ style.” *Id.* at 970.

407. *Id.* at 971.

408. *Id.*

disciplinary actions, including that he “[a]ttend a sexual harassment seminar within ninety days” and that he “[b]ecome sensitive to the particular needs and background of his students.”⁴⁰⁹ The Ninth Circuit found the sexual harassment policy vague, and described the administration’s actions against Cohen as a “legalistic ambush.”⁴¹⁰ The federal appellate court partially reversed the lower court’s ruling, striking down the imposition of the discipline, including the mandatory attendance at the sexual harassment seminar and the “sensitivity” requirement.⁴¹¹

Similarly, in *Silva v. University of New Hampshire*,⁴¹² a court struck down as violative of the First Amendment the University of New Hampshire’s sexual harassment policy that was challenged by J. Donald Silva, a tenured professor of English.⁴¹³ After receiving complaints from nine students who alleged that Silva had sexually harassed them, the dean initially required Silva to attend weekly sessions for one year with a “professional psychotherapist approved by the University.”⁴¹⁴ A faculty hearing committee found that Silva had been guilty of harassing the students, and recommended that he be suspended without pay and be required to continue counseling at his own expense.⁴¹⁵ The president generally concurred with the recommendations.⁴¹⁶ Silva appealed the president’s ruling to another faculty committee, and, like the faculty hearing panel, the appeals panel found that Silva had violated the school’s sexual harassment policy, and reiterated the discipline to be imposed, which included counseling at his own expense.⁴¹⁷ The suspension was to end upon the therapist’s notifying the administration that Silva was “ready to return to the classroom.”⁴¹⁸ In the end, the parties reached a

409. *Id.*

410. *Id.* at 972.

411. *Id.* at 970. At the same time, the court affirmed the lower court’s ruling that the individual officers sued by Cohen were entitled to qualified immunity. *Id.* at 970. The amicus brief before the Ninth Circuit in this case, filed by the AAUP, the Thomas Jefferson Center for Free Expression, and the Freedom to Read Foundation, contended that the sanctions imposed on Cohen were “substantial” and infringed upon his academic freedom. Brief for the AAUP et al. as Amici Curiae Supporting Appellant at 21, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (No. 94-1083). The brief contended that “while a professor who has engaged in certain unlawful conduct (including sexual harassment) might be expected to take ameliorative steps—requiring a DUI convict to attend driver-training classes is fairly routine—any such sanction must be invoked with greater care and precision than the open-ended mandate here reflects.” *Id.* The brief continued: “It is . . . the fourth sanction [—to ‘become sensitive’ to the needs and background of his students—] that arouses deepest concern. . . . How a professor is to ‘become sensitive’ to the needs of his students—especially when he believes he has been sensitive all along—remains a mystery.” *Id.* at 21–22.

412. 888 F. Supp. 293 (D.N.H. 1994). See also AAUP, *Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME 70 (Nov.–Dec. 1994).

413. *Silva*, 888 F. Supp. at 314, 316.

414. *Academic Freedom and Tenure: University of New Hampshire*, *supra* note 412, at 72.

415. *Id.* at 74.

416. *Id.*

417. *Id.* at 75.

418. *Id.*

settlement agreement and the sanctions, including mandatory counseling, were withdrawn.⁴¹⁹ The AAUP found in its investigation of the matter that the psychotherapy sanction was a “severe penalty,” given its “stigma of guilt,” and “as such should not have been imposed without complaints about Professor Silva’s alleged misconduct having first been considered by a faculty body.”⁴²⁰

V. DRAFTING POLICIES TO ADDRESS FACULTY MISCONDUCT

Faculty disciplinary policies at U.S. colleges and universities are generally divided between two approaches. At some institutions, an administrator makes a preliminary determination as to whether misconduct has occurred and what discipline, if any, should be imposed; the faculty member then has the right to

419. “The professor initiated litigation in federal court. Following publication of the investigating committee’s report and an opinion by the district judge strongly supportive of the professor, he and the administration reached a settlement of his case. He has returned, with tenure, to his teaching duties.” AAUP, *Report of Committee A, 1994–95*, 81 ACADEME 47 (Sept.–Oct. 1995).

420. *Id.* at 76. According to the AAUP investigating committee report:

No university official has explained to Professor Silva why his entering counseling is a condition for his return to teaching, but the available evidence suggests to the investigating committee that the requirement is perhaps meant to induce Professor Silva to concede that he sexually harassed students. Dr. Giles told Professor Silva that the “goal” of requiring him to participate in weekly sessions with a psychotherapist was to make him “better aware of the nature of [his] behavior towards students and to ensure that there will be no further incidents of sexual harassment on [his] part”. . . . The similarity to mandatory counseling for drug or alcohol abuse seems obvious, although it should be noted that the university apparently pays the cost for counseling of faculty members who have alcohol-related problems. The investigating committee will refrain from pursuing all the implications of a university’s using mandatory counseling as a possible device to elicit a confession from a faculty member. Suffice it to observe that if the purpose of counseling is rehabilitation, the objective is unlikely to be achieved unless all the parties concerned subscribe to that goal. The university’s emphasis in Professor Silva’s case on meting out punishment seems directly at odds with this purpose.

Id. at 79–80. The report continued:

The investigating committee finds potentially even more troubling another aspect of the mandatory counseling There may be circumstances in which a faculty member’s return to classroom duties is properly conditioned on entering counseling, as with a professor who has a drug or alcohol-related problem that has adversely affected professional performance. Very different is mandatory counseling that focuses on a faculty member’s utterances which some consider deeply offensive. . . . If, in fact, the counseling was intended to compel Professor Silva to agree to certain ideas about sexual harassment, the investigating committee can state that such a purpose would be repugnant to the principles of academic freedom.

Id. at 80. See also AAUP, *Academic Freedom and Tenure: Philander Smith College (Arkansas)*, 90 ACADEME 57, 64 (Jan.–Feb. 2004) (noting sanction of “tenure removal with mandatory counseling”). Like mandatory counseling, the imposition of a required apology would appear to raise similar policy and legal concerns. See, e.g., *Silva*, 888 F. Supp. at 308 (noting that faculty hearing panel recommended that professor apologize in writing to female students who accused him of sexual harassment, but internal appeals committee declined to endorse this discipline).

appeal that determination to a faculty grievance committee.⁴²¹ At other institutions, a member of the administration charges the faculty member with specific instances of misconduct, and a faculty hearing board or committee makes a determination as to whether misconduct has occurred and recommends a sanction to a higher level administrator.⁴²² Some institutions have separate investigative and factfinding processes for charges of scientific misconduct or sexual harassment as opposed to other types of faculty misconduct.⁴²³ In some cases, institutional policies provide for redundant or overlapping jurisdiction of administrators and faculty committees; such redundancy can often cause confusion, lengthen the decision-making process, and encourage litigation.⁴²⁴

A. Preliminary Issues

Before developing or revising campus policies addressing faculty misconduct, institutional counsel, faculty, and administrators need to determine whether state law limits either the type of policy or the institution's autonomy to deal with faculty misconduct internally. If the faculty are represented by a union, state law (for public institutions) or the National Labor Relations Act (for private institutions) will very likely view the disciplinary process as a term and condition of employment that must be negotiated with representatives of the union.⁴²⁵ State law may also dictate how discipline may be used at public institutions, and also any grievance mechanisms that faculty may use to challenge such discipline.⁴²⁶

421. See, e.g., UNIV. OF WIS.-MADISON, DISCIPLINE AND DISMISSAL OF FACULTY FOR CAUSE, available at http://www.secfac.wisc.edu/governance/FPP/Chapter_9.htm (last visited Jan. 23, 2006).

422. See, e.g., STANFORD UNIV., *supra* note 65 (noting that faculty advisory board makes findings of fact and recommends sanction, if any, to president).

423. See, e.g., UNIV. OF WIS.-MADISON, *supra* note 421 (noting separate policy for charges of scientific misconduct). See also MICH. STATE UNIV., POLICY AND PROCEDURE FOR IMPLEMENTING DISCIPLINARY ACTION WHERE DISMISSAL IS NOT SOUGHT, available at <http://www.hr.msu.edu/HRsite/Documents/Faculty/Handbooks/Faculty/AcademicPersonnelPolicies/iv-disciplinary.htm> (last visited Jan. 23, 2006). For an example of the use of a separate procedure for adjudicating complaints of sexual harassment, see UNIV. OF S. CAL., FACULTY HANDBOOK OF THE UNIVERSITY OF SOUTHERN CALIFORNIA § 7-A, available at <http://policies.usc.edu/facultyhandbook/facultyhandbook2005.pdf> (last visited Jan. 23, 2006).

424. See, e.g., UNIV. OF CAL. AT IRVINE TASK FORCE ON FACULTY DISCIPLINE, RECOMMENDATIONS OF THE TASK FORCE ON FACULTY DISCIPLINE (Sept. 17, 1999), available at http://www.senate.uci.edu/3_DivSenateAssembly/3_DSAAgendas/03-04Agendas/6_3_04Agenda/PT_Rep_files/Att_3.htm (last visited Jan. 23, 2006) (recommending a streamlined system of investigation and adjudication of faculty discipline issues).

425. The National Labor Relations Act, which regulates collective bargaining in the private sector, requires employers to negotiate with representatives of duly recognized unions over "wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d) (2000).

426. For a discussion of negotiable subjects under state collective bargaining laws, see Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242 (1978). For an example of a faculty disciplinary policy that is part of a collective bargaining agreement between the Minnesota State Colleges and Universities and the faculty union, see MNSCU-UTCE MASTER AGREEMENT 1997-1999, ARTICLE 23,

Another preliminary issue for public institutions is the degree to which public meetings laws and open records laws may affect the public's access to disciplinary hearings or to the documents produced by hearing panels or by individual administrators.⁴²⁷ Although many open meetings and open records laws contain exceptions for personnel decisions,⁴²⁸ not all do; some laws give the subject of the hearing or document the right to request a public hearing or the release of the otherwise exempt document.⁴²⁹

A third issue that policy developers may wish to consider is whether the disciplinary process is mandatory. If, for example, the accused faculty member agrees to the discipline, must a hearing still be held? Does the institution's policy allow for, or require, attempts to resolve the charges against the faculty member informally? In certain circumstances, if serious discipline is contemplated, the accused faculty member may wish to resign and negotiate a severance package. Although "buyouts" and other informal methods of resolving disputes about faculty behavior circumvent the public notice aspect of progressive discipline,⁴³⁰ the institution may choose this approach for a variety of strategic reasons, such as concern for the institution's public image, the desire to protect the privacy of students or other faculty members who would need to testify regarding the misconduct, a concern that a formal hearing or other factfinding process might damage relationships within a department or among departments,⁴³¹ or a desire to resolve the situation quickly. In those states in which faculty hearing boards or their reports are subject to public meetings and open records statutes, informal resolution may be an attractive option for the accused faculty member and the

FACULTY DISCIPLINE, available at <http://www.hr.mnscu.edu/LR/Contracts/archive/UTCE/art23.htm> (last visited Jan. 23, 2006).

427. See, e.g., *Marder v. Bd. of Regents*, 226 Wis. 2d 563 (Ct. App. 1999) (ruling that University of Wisconsin had to disclose to the media copies of the personnel records and investigation files compiled by administration in response to a sexual misconduct claim filed against tenured professor of mass communications, and opining that the professor's privacy interests were outweighed by the public's "substantial legitimate interest in student-faculty relations at our state universities, the manner in which school administrations handle student complaints against faculty, and the enforcement of university rules"). See generally Donna R. Euben, *Let the Sunshine In? State Open-Records Laws*, 88 ACADEME 102 (Mar.-Apr. 2002).

428. For example, CAL GOV'T CODE § 6254(c) (West 2000) exempts personnel files from disclosure because disclosure would be "an unwarranted invasion of personal privacy." See also *Donahue v. State*, 474 N.W.2d 537 (Iowa 1991) (stating that tenure appeals committee hearing not subject to Iowa open public meetings law).

429. Similarly, Alaska's open public meetings statute permits a public body to meet in executive session if the meeting involves "subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion." ALASKA STAT. § 44.62.310(c)(2) (LEXIS through 2005 legislation). For a case applying this law to the deliberations of a tenure committee at the University of Alaska, see *Univ. of Ala. v. Geistauts*, 666 P.2d 424 (Alaska 1983), which states that because a candidate for tenure was not given the opportunity to request a public hearing, the tenure decision was void and had to be redone.

430. See *supra* text accompanying note 9.

431. For a discussion of the negative effect of disputes over faculty conduct and the impact of litigation on collegiality, see GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT* (1987).

college or university's leaders.

Several institutions' faculty disciplinary policies address the issue of informal resolution before initiation of formal discipline. For example, Stanford University's *Statement on Faculty Discipline* states that a misconduct charge against a faculty member may be "settled by agreement" before such initiation as long as the university president approves.⁴³² The Stanford handbook also provides that the matter may be "settled by agreement" at any point in the formal discipline process.⁴³³ The faculty disciplinary policies at Johns Hopkins University's School of Public Health, Indiana University, the University of Pennsylvania, the University of Wisconsin, and Ohio State University, among others, also suggest or require that administrators attempt to resolve charges against faculty members informally before the initiation of formal disciplinary proceedings.⁴³⁴ Even if an informal resolution is attempted and effected, however, the agreement should be reviewed by key administrators and college or university counsel to ensure consistent treatment across the institution, as well as an institutional record of the outcome of the informal resolution.

B. Process for Policy Development

Whether the institution is developing a faculty disciplinary policy for the first time or is revising existing policy, representatives of the faculty should be involved in the process. Faculty members are the individuals potentially affected by such policies, and they are often most expert in the kinds of faculty misconduct at issue and possible responses to such misconduct. Moreover, it is likely that the faculty will view the policy that is eventually developed as more legitimate if they have had a role in shaping it. And if, as the authors believe they should be, faculty members are involved in making recommendations about faculty discipline, their involvement in the policy development process will enhance their understanding of

432. STANFORD UNIV., *supra* note 65, at 1.

433. *Id.* at 2.

434. IND. UNIV. AT BLOOMINGTON, FACULTY MISCONDUCT POLICY, *available at* <http://www.indiana.edu/~bfc/docs/policies/facultymisconduct.htm> (last visited Jan. 23, 2006) (requiring the misconduct policies of academic units to provide for informal resolution of misconduct charges); JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, PROCEDURE FOR HANDLING ALLEGATIONS OF UNSATISFACTORY PERFORMANCE OR UNACCEPTABLE BEHAVIORS, *available at* http://www.jhsph.edu/schoolpolicies/ppm_faculty_8_handling_allegations.shtml (last visited Jan. 23, 2006) (requiring an initial attempt at informal resolution); THE OHIO STATE UNIV. BD. OF TRS., RULES OF THE UNIVERSITY FACULTY, HEARING PROCEDURES FOR COMPLAINTS AGAINST REGULAR, REGULAR CLINICAL, AND AUXILIARY FACULTY MEMBERS, *available at* <http://trustees.osu.edu/rules5/ru5-04.html> (last visited Jan. 23, 2006) (requiring administrators, at all stages of the disciplinary process, to attempt to resolve complaints informally); UNIV. OF PA., PROCEDURE GOVERNING SANCTIONS TAKEN AGAINST MEMBERS OF THE FACULTY, FACULTY HANDBOOK, *available at* http://www.upenn.edu/assoc-provost/handbook/ii_e_16.html (last visited Jan. 23, 2006) (requiring dean to attempt informal resolution of misconduct charge); UNIV. OF WIS.-MADISON, *supra* note 421 (requiring provost to invite faculty member to participate in voluntary and confidential settlement negotiations, or if both agree, formal mediation).

the process and its requirements.

Policies may be drafted by a faculty governance committee or by the administration, which then shares the draft with the faculty senate or a similar faculty governance group. Given the potential for litigation concerning discipline meted out under an institution's misconduct policy, it is advisable to have experienced counsel involved in the drafting process before implementation of the policy.

C. Due Process Considerations

If the faculty disciplinary policy has the potential to affect an accused faculty member's reputation, salary, or other job benefits, then due process protections must be given to faculty members at public institutions.⁴³⁵ The elements of due process for faculty hearings were developed by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill*.⁴³⁶ The Court ruled that a tenured teacher who was being terminated was entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."⁴³⁷ Institutions may differ as to whether a formal hearing should be available to faculty who are charged with offenses that would not lead to dismissal; it would appear that the relatively informal type of due process outlined in *Loudermill* would be sufficient to satisfy due process requirements for a non-dismissable offense. However, the AAUP distinguishes between a "major" sanction and a "minor" sanction, stating that major sanctions, such as suspensions, should only be imposed after a faculty member receives the same type of hearing that he or she would receive if he or she were to be dismissed.⁴³⁸ Therefore, an important decision that will need to be made is whether the institution will adopt the AAUP recommended regulation ("academic due process") or whether a less formal process that complies with the parameters of *Loudermill* will be used for non-dismissable offenses ("legal due process"). This decision is a matter of institutional policy rather than a matter of law.

Developers of faculty disciplinary policy at private colleges and universities have more legal latitude in that these institutions are not subject to federal constitutional due process requirements. However, state constitutions may have

435. The parameters of due process protections for faculty at public institutions were developed by the U.S. Supreme Court in two cases: *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Although both cases involve the nonrenewal of faculty members' contracts, the principles articulated in the cases are relevant to discipline short of dismissal in situations where the faculty member has a liberty or property interest in the position. Tenured faculty have a property interest in continued employment as do faculty members during the term of their contracts; a professor accused of violating a faculty code of conduct would very likely have a liberty interest in clearing his or her name.

436. 470 U.S. 532 (1985). For a discussion of due process issues in faculty employment, see *supra* note 87.

437. *Id.* at 546.

438. *Regulations on Academic Freedom and Tenure*, *supra* note 72, at 28.

explicit protections for privacy or property rights, or state courts may have interpreted their state's constitution to provide such rights for private sector employees.⁴³⁹ For example, in *Hennessey v. Coastal Eagle Point Oil Co.*,⁴⁴⁰ while the New Jersey Supreme Court refused to apply the state constitution's privacy protections directly to a private sector employer, it ruled that the constitution's privacy protections created a basis for a public policy exception to at-will employment, thus allowing the plaintiff to make a wrongful discharge claim.⁴⁴¹ The New Jersey Supreme Court also held that the state constitution provides free speech protections for an individual seeking to engage in speech or expressive conduct on the campus of Princeton University, a private institution.⁴⁴² The Pennsylvania Supreme Court subsequently followed the New Jersey court's reasoning to hold that its state constitution protected an individual's free speech rights at Muhlenberg College.⁴⁴³ In both cases, the plaintiffs were members of the public (not faculty members, employees, or students) who sought to distribute leaflets on campus and were arrested for trespass.⁴⁴⁴ These cases suggest that faculty members at a private institution in those states would have rights similar to those of the alleged trespassers, and that discipline for conduct that involved speech or expressive conduct may require due process protections.

Contract law is also an important consideration at both public and private institutions; the faculty disciplinary policy, if contained in a faculty handbook or an institutional policy manual (or their electronic equivalents), would be construed as contractually binding in many states.⁴⁴⁵ Discrimination claims under federal or state law may ensue when institutions attempt to discipline faculty. Therefore, the advice of counsel is very important to ensure that the policy complies with all federal and state laws, and that the application of the policy is fair and consistent.

Another consideration facing developers of faculty disciplinary policies is whether there should be a standard approach for determining whether, and what, discipline should be meted out, or whether the institution wants to retain some flexibility, particularly for first offenses or for misconduct that is relatively minor.

439. For a review of state constitutions providing a basis for causes of action by private sector employees against their employers, see generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998). See also Alexander Wohl, *New Life for Old Liberties: The Massachusetts Declaration of Rights: A State Constitutional Law Study*, 25 NEW ENG. L. REV. 177 (1998).

440. 609 A.2d 11 (N.J. 1992).

441. *Id.* at 29. See also *Semore v. Pool*, 266 Cal. Rptr. 280, 282 (Ct. App. 1990) (finding that the "right of privacy in the California Constitution protects Californians from actions of private employers as well as government agencies. Accordingly, when a private employee is terminated for refusing to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right of privacy").

442. *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

443. *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981).

444. *Schmid*, 423 A.2d at 616; *Tate*, 432 A.2d at 1384.

445. For a discussion of the contractual status of faculty handbooks, see KAPLIN & LEE, *supra* note 1, at 151-52, 297. See also AAUP, FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE (5th ed. 2005).

For example, should a faculty hearing board be convened to deal with a first offense when the administration is considering only a warning or a reprimand? On the other hand, will a reprimand that is a result of faculty deliberations carry more weight than one that is issued by a dean or provost? Such low level discipline may provide the foundation for more serious sanctions and, therefore, can have significant implications. Institutional culture will play a role in reaching these decisions; as long as the minimal *Loudermill* requirements⁴⁴⁶ are met in the public sector, the institution has some flexibility in deciding which types of misconduct will be dealt with through a formal process involving a faculty body as the initial factfinder and recommender of sanctions.

At Cornell University, only faculty members who face “severe sanctions” (suspension or dismissal) are entitled to a hearing prior to a faculty panel before the imposition of the sanction.⁴⁴⁷ Those faculty facing a “minor sanction” (defined as “any sanction other than dismissal or suspension”) may grieve the imposition of a sanction after it has been imposed.⁴⁴⁸ The faculty disciplinary policy of Rice University uses a similar approach.⁴⁴⁹

D. Use of Alternative Dispute Resolution

As noted above, the policies of several public and private institutions require an initial attempt to resolve the faculty disciplinary matter through mediation before the use of formal hearing bodies. Although mediation is mentioned in the policy of the University of Wisconsin-Madison, it is not a required step, and both parties must agree to use it.⁴⁵⁰ At the University of California at San Francisco, the individual investigating the claim of faculty misconduct is required to attempt to resolve the matter informally through mediation, which can occur even after the matter has been referred to a faculty hearing committee.⁴⁵¹ At Iowa State University, complaints of faculty misconduct may be resolved through mediation or through a formal process that involves peer review.⁴⁵² If the faculty member were to select the mediation option, then a subsequent breach of the mediation agreement entered into by the faculty member could be considered a form of misconduct for which discipline may be imposed.⁴⁵³ Some institutions exclude

446. *See supra* note 87.

447. CORNELL UNIV., POLICY ON SANCTIONS FOR JOB-RELATED FACULTY MISCONDUCT, available at <http://web.cornell.edu/UniversityFaculty/FacSen/050511SenateMtg/SanctionsPolicy.pdf> (last visited Jan. 23, 2006).

448. *Id.*

449. RICE UNIV., RICE UNIVERSITY ORGANIZATION POLICY NO. 201-01, available at http://www.ruf.rice.edu/~facsec/facmin/Rice_Univ_Organization_Po2.pdf (last visited Jan. 23, 2006).

450. UNIV. OF WIS.-MADISON, *supra* note 421.

451. UNIV. OF CAL. SAN FRANCISCO, INTERIM PROCEDURE FOR INVESTIGATION OF FACULTY MISCONDUCT AND THE ADMINISTRATION OF DISCIPLINE, available at <http://acpers.ucsf.edu/policies/facinvestinterimproc.pdf> (last visited Jan. 23, 2006).

452. IOWA STATE UNIV., *supra* note 54.

453. *Id.* at § 7.2.2.5.5.

certain forms of misconduct, such as dishonesty in research, from mediation.⁴⁵⁴

A few institutions allow for binding arbitration of disputes over alleged faculty misconduct even in the absence of a faculty union. For example, the faculty handbook of the University of Southern California provides for binding arbitration, but only if both the faculty member and the president agree that they will be bound by the decision of the arbitrator.⁴⁵⁵ Use of the binding arbitration option, according to the faculty handbook, requires the faculty member to agree to forego the right to sue in court concerning the subject of the arbitration.⁴⁵⁶ The arbitration provision excludes disputes over promotion or tenure, dismissal for cause, or nonreappointment.⁴⁵⁷

E. Allocation of Responsibility for Factfinding

Whether or not an institution will provide the opportunity for informal resolution of misconduct charges against a faculty member, it will need a more established process for determining whether charges of misconduct are supported by sufficient evidence. This requires the faculty and administration to determine who will conduct the factfinding process and how the information obtained thereby will be used.

At some institutions, there is a two-step process of factfinding. At the initial step, an individual, usually an administrator,⁴⁵⁸ conducts an "informal" inquiry to determine whether there is "probable cause" to refer the alleged misconduct charge to a factfinding body.⁴⁵⁹ Should that individual find probable cause to believe that misconduct has occurred that warrants discipline, then the matter is referred to a faculty body, either appointed or elected institution-wide by the faculty with representation from each component of the institution.⁴⁶⁰ The conclusions of the faculty body are typically treated as a recommendation to the president/chancellor or to the institution's board of trustees.⁴⁶¹ Should the president/chancellor disagree

454. See, e.g., UNIV. OF CAL. SAN FRANCISCO, *supra* note 451; see also MICH. STATE UNIV., MEDIATION SERVICE available at <http://www.msu.edu/~mediate/> (last visited Jan. 23, 2006) (excluding "serious workplace misconduct," sexual harassment, and scientific misconduct from mediation).

455. UNIV. OF S. CAL., *supra* note 423, at § 7.

456. *Id.*

457. *Id.*

458. See MICH. STATE UNIV., *supra* note 423 (noting that at Michigan State University, the "faculty grievance official," who is a member of the faculty appointed for a five-year term by the board of trustees upon the recommendation of the University Committee on Faculty Affairs, conducts the preliminary investigation of the misconduct charge).

459. See, e.g., THE OHIO STATE UNIV., *supra* note 434.

460. See, e.g., STANFORD UNIV., *supra* note 65; see also THE OHIO STATE UNIV., *supra* note 434; UNIV. OF CAL. SAN FRANCISCO, *supra* note 451.

461. See, e.g., UNIV. OF CAL. SAN FRANCISCO, *supra* note 451. But see THE OHIO STATE UNIV., *supra* note 434. The policy provides for a college-level "investigation committee" that makes recommendations to the dean concerning the merits of the complaint and any recommended sanction. According to the policy, "[i]f the college investigation committee has recommended a sanction other than termination of employment, the dean may not increase the

with the faculty body's conclusions and/or recommended sanctions, many institutional policies require the president/chancellor to inform the committee in writing, meet with the committee, or remand the matter to the committee for further deliberation.⁴⁶²

Although institutional histories, missions, and cultures differ (and a faculty disciplinary policy should, where possible, reflect institutional culture), it appears that the combination of initial administrative review (to determine "probable cause") and a faculty factfinding process, culminating in a final decision by the president/chancellor or board of trustees, provides sufficient due process to satisfy both constitutional requirements and the dictates of academic custom and usage with respect to the faculty role in evaluating the conduct (or misconduct) of their peers and applying professional norms to that conduct.⁴⁶³ Neither the AAUP statements and recommended policies, nor most of the institutional policies reviewed for this article, require the president/chancellor or trustees to accept the faculty hearing committee's recommendation, although they do place responsibility on the president to explain why he or she may disagree with the recommendation. There seems to be no obvious advantage to a system that uses two faculty committees—one to draw up the list of charges and a second to act as the factfinding body. Although this two-committee approach is routinely used to investigate scientific misconduct,⁴⁶⁴ most charges of faculty misconduct unrelated

sanction to termination of employment." *Id.*

462. See UNIV. OF CAL. SAN FRANCISCO, *supra* note 451, at 6; THE OHIO STATE UNIV., *supra* note 434. Regulation 7 of the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure* provides that, should the president disagree with the recommendations of the faculty hearing committee, the president should explain his or her reasons for rejecting the recommendations and should remand them to the faculty hearing committee for its response before transmitting the president's recommendation to the institution's governing board. *Regulations on Academic Freedom and Tenure*, *supra* note 72, at 27. Regulation 7 also provides that, should an administrator decide to impose a "minor" sanction on a faculty member, that faculty member should be given "an opportunity to persuade the administration that the proposed sanction should not be imposed." *Id.* at 28. See also STANFORD UNIV., *supra* note 65. The Stanford policy provides that, should the president disagree with the recommendation of the advisory board, he/she must resubmit the case to the advisory board "for reconsideration with a statement of questions or objections." *Id.* The board will either revise its recommendation or resubmit the original recommendation.

After study of the Board's reconsidered decision, the President may make a final decision different from that of the Board only if the President determines: that the faculty member or the University was denied a fair hearing; or that the Board's decision (as to whether there has been professional misconduct and/or as to the sanction) was not one which a decision-making body in the position of the Board might reasonably have made.

Id.

463. For a discussion of academic custom and usage, see KAPLIN & LEE, *supra* note 1, at 153–54. See also AAUP, *Academic Freedom and Tenure: University of Virginia*, 87 *ACADEME* 49, 59 (Nov.–Dec. 2001) (finding a violation of AAUP policy when a tenured professor was "afforded no opportunity to respond" to actions by the administration "imposed on him, and the administration did not consult with any faculty body before it acted as it did").

464. For a discussion of federal regulations concerning the investigation of scientific

to research fraud or plagiarism do not necessarily require the type of specialized expertise that an investigation into scientific misconduct may require.

Some institutions have decentralized faculty disciplinary policies, requiring each academic unit to develop its own complaint process according to general guidelines developed by a faculty body or by the institution itself.⁴⁶⁵ This approach has the advantage of involving faculty at the unit level in the development of the policy and the adjudication of faculty misconduct cases; it has the potential disadvantage that any decentralized process has in that similar types of misconduct may be treated differently by academic units.

F. Who Decides the Sanction?

The policies reviewed for this article take one of two basic approaches to the determination of the sanction. In most policies, the faculty factfinding panel also recommends a sanction (or no sanction if the body concludes that no policies or rules have been violated) to the president or chancellor.⁴⁶⁶ The president or his/her designee may accept the faculty hearing panel's recommendation, reject it, or return the matter to the hearing body for further deliberation. Most policies do not limit the president's ability to determine the sanction, even if the faculty hearing panel has recommended some other sanction.⁴⁶⁷ In some policies, the faculty body reports to the president on whether the alleged misconduct occurred and whether it violates institutional policies or academic norms, but the policy does not specify whether the faculty body recommends a particular sanction to the president.⁴⁶⁸

G. Drafting Policies to Encourage Judicial Deference

Faculty misconduct policies and disciplinary procedures that keep the factfinding and sanction-setting decisions inside the institution, determined by academics rather than by juries, should be the goal of the developers of these policies. As with any other institutional policy that may be challenged, either internally or in court, faculty misconduct policies need to be drafted carefully and reviewed by legal counsel who are experienced in academic employment matters. In some cases, faculty members who have challenged the outcome of a disciplinary process have found that courts will not review the merits of the decision, unless discrimination or constitutional violations are alleged.⁴⁶⁹ As the AAUP recognizes

misconduct, see Debra M. Parrish, *The Federal Government and Scientific Misconduct Proceedings Past, Present, and Future as Seen Through the Thereza Imanishi-Kari Case*, 24 J.C. & U.L. 581 (1998).

465. See, e.g., IND. UNIV. AT BLOOMINGTON, *supra* note 434.

466. *Id.* See also MICH. STATE UNIV., *supra* note 423; THE OHIO STATE UNIV., *supra* note 434.

467. *But see* STANFORD UNIV., *supra* note 65 (imposing a number of limits on the president's freedom to reject or modify the recommendations of the faculty hearing panel).

468. See, e.g., RICE UNIV., *supra* note 449.

469. See e.g., *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418 (Pa. 2001); *see also Ferrer v. Trs. of the Univ. of Pa.*, 825 A.2d 591 (Pa. 2002). The same court reinstated a jury

in its *Statement on Government of Colleges and Universities*, the governing board and president have final authority “on questions of faculty status,” although the AAUP’s statement provides that those bodies should concur with the faculty’s judgment “except in rare instances and for compelling reasons which should be stated in detail.”⁴⁷⁰

In *Murphy v. Duquesne University of the Holy Ghost*, the Pennsylvania Supreme Court affirmed an appellate court’s determination that the university had not breached the faculty handbook’s provisions regarding the dismissal of tenured faculty, and held the parties to the language of the handbook, using traditional contract law doctrine.⁴⁷¹

[P]rivate parties, including religious or educational institutions, may draft employment contracts which restrict review of professional employees’ qualifications to an internal process that, if conducted in good faith, is final within the institution and precludes or prohibits review in a court of law. . . . When a contract so specifies, generally applicable principles of contract law will suffice to insulate the institution’s internal, private decisions from judicial review.⁴⁷²

The court examined the language of the faculty handbook, and noted that it reserved to the faculty and the university the determination of whether a faculty member’s conduct met the definition of “serious misconduct” such that it justified a decision to dismiss a tenured faculty member.⁴⁷³ The handbook required the faculty hearing body to determine that the university had proven, by clear and convincing evidence, that the individual had engaged in serious misconduct under the handbook’s definition.⁴⁷⁴ It provided that the president could disagree with the faculty body, and that if that occurred, the individual charged with misconduct could appeal that decision to the board of trustees.⁴⁷⁵ Given the specificity of the process and the clear allocation of the decision-making authority to the president and the trustees, the court ruled that Murphy was not entitled to have a jury “reconsider the merits of his termination.”⁴⁷⁶ Careful drafting of the disciplinary and

verdict for the faculty plaintiff because, despite the fact that a faculty body had found in his favor and recommended that he not be sanctioned, the provost imposed sanctions because he disagreed with the findings of the faculty hearing panel. *Id.* at 594. The faculty handbook provided that the panel’s determination of guilt or innocence was binding on the administration. The court justified its decision on the basis that it was reviewing alleged procedural violations by the administration, not the merits of the decision. *Id.* at 609.

470. See *Statement on Colleges and Universities*, *supra* note 41 and accompanying text.

471. *Murphy*, 777 A.2d at 434.

472. *Id.* at 428.

473. *Id.* at 421.

474. *Id.* at 432.

475. *Id.*

476. *Id.* at 433. See *Pomona Coll. v. Superior Court ex. rel. Corin*, 53 Cal. Rptr. 2d 662 (Ct. App. 1996). A California appellate court reached a similar conclusion in this case involving the denial of tenure. *Id.* at 664. A professor denied tenure had filed breach-of-contract and wrongful termination claims against the college. *Id.* The college, noting that the faculty member’s grievance challenging the tenure denial had been heard by a grievance committee, as provided for

grievance policies with attention to procedural due process protections might encourage other courts to follow the *Murphy* Court's deference to academic judgment.

CONCLUSION

The review of case law, AAUP statements and other policy documents, institutional policies, and the literature on discipline suggests that stating the expected standards of conduct clearly, following the procedures for making decisions concerning faculty misconduct carefully, imposing a degree of discipline that is appropriate to the severity of the misconduct, and giving written justifications for recommendations or decisions made under the faculty handbook or other policies, are critical. Because these documents are the source of employment rights at private institutions and at many public institutions as well, they should reflect the consensus of the academic community with respect to both the criteria and the procedures that will be used to make these disciplinary decisions. Perhaps in doing so, institutions can avoid having to proceed with the penalty of dismissal—the “capital punishment” of the academy—for those forms of faculty misconduct that do not merit the imposition of so serious a sanction.

in the faculty handbook, argued that California law limits review of a college's internal hearings to evaluating the fairness of the hearing by filing a claim of administrative mandamus. *Id.* at 664–65. The court dismissed the faculty member's contract and wrongful termination claims. *Id.* at 671.