Termination & Discipline (2004)

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Faculty Termination & Disciplinary Issues
Presentation to 14th Annual Legal Issues in Higher Education Conference, University of Vermont
By Donna R. Euben, AAUP Counsel
October 24, 2004

I. The Status Of Faculty

There are three professions which are entitled to wear the gown: the judge, the priest, and the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and his god. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and yield to pressure . . . [T]he judges are the court, the ministers together with the faithful are the church, and the professors together with students are the university . . . they are those institutions themselves, and therefore have prerogative rights to and within their institution which ushers, sextons and beadles, and janitors do not have.

--E.K. Kantorowicz (quoted in Henry Rosovsky, *The University: An Owner's Manual* 164-65 (1990)).

Because faculty are the institution themselves, they should have a significant role in the governance of their academic institution. The faculty have primary responsibility for aspects of the educational process, such as curriculum and methods of instruction. *See NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (finding that professors at that particular university were managerial and therefore not covered by the National Labor Relations Act, and explaining that "the business of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"); see also AAUP, *Statement on Government of Colleges and Universities*, AAUP *Policy Documents and Reports* 217 (9th ed. 2001) ("Redbook") ("The faculty has primary responsibility for such fundamental areas

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Because faculty are the institution themselves, they should have a significant role in the governance of their academic institution. The faculty have primary responsibility for aspects of the educational process, such as curriculum and methods of instruction. *See NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (finding that professors at that particular university were managerial and therefore not covered by the National Labor Relations Act, and explaining that "the business of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"); see also AAUP, *Statement on Government of Colleges and Universities*, AAUP *Policy Documents and Reports* 217 (9th ed. 2001) ("Redbook") ("The faculty has primary responsibility for such

fundamental areas as curriculum, subject matter and methods of instructions, research, faculty status, and those aspects of student life which relate to the educational process.").

In light of these and other responsibilities, professors are not treated like most other employees. Faculty tend not to be "employees at will," a term which denotes an employment relationship that lacks specific duration or protection from arbitrary dismissal. The appointment of an employee at will can be terminated for "bad reason, good reason, or no reason at all," so long as the reason is not illegal. Rather, two types of legal employment relationships tend to exist between faculty and their institutions: continuous tenure and term contracts.

A. Tenured Faculty

Tenured appointments are ongoing, extending beyond the period indicated in the annual salary letter. Tenure is a presumption of competence and continuing service that can be overcome only if specified conditions are met.

The 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 *Statement*") and other AAUP policy documents, notably the *Recommended Institutional Regulations* ("*RIR*"), speak to the termination of tenured appointments. The 1940 *Statement* was formulated in conjunction with the Association of American Colleges (now called the Association of American Colleges and Universities) and has been endorsed by over 240 professional and scholarly groups. "Probably because it was formulated by both administrators and professors, all of the secondary authorities seem to agree it [the 1940 *Statement*] is the most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). The 1940 *Statement* provides: "After the expiration of a probationary period, teachers . . . should have permanent or continuous tenure, and their service should be terminated only for adequate cause . . . or under extraordinary circumstances because of financial exigencies."

Professor William Van Alstyne explains:

> Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, *tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause*. . . . [T]enure is translatable as a statement of formal assurance that . . . the individual's professional security and academic freedom will not be placed in question without the observance of *full academic due process*.

W. Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense,'" *AAUP Bulletin* 57:329 (1971); *see also* Joseph C. Beckham, *Faculty/Staff Nonrenewal and Dismissal for Cause in Institutions of Higher Education* 5 (College Administration Publications, 1998) ("Dismissal for Cause") ("Tenure is a protection against arbitrary dismissal which requires an institution to justify 'adequate' cause for the adverse employment decision.").

B. Faculty With Term Contracts

A large number of faculty members have "term contracts," which are generally for one semester or one year. Faculty members who have term contracts can include individuals on probation for tenure; visiting faculty; and strictly temporary part-time instructors. Such faculty ordinarily have a protected property right to continued employment during the life of their contract, and a concurrent right to due process protections if they are subject to dismissal during the period of their employment contract.

II. The Legal Employment Relationship Between Faculty And Administrations

The sources of legal protections for faculty—tenured and non-tenured—may be grounded in the U.S. Constitution, contractual obligations, state law, and academic custom.

A. Constitutional Law

The federal constitution was largely designed to regulate the exercise of governmental power only. Therefore, as a matter of law, the constitutional restrictions pertaining to due process apply to public employers, such as state colleges and universities, and do not generally limit private employers, such as private colleges, from infringing on professors' due process rights. However, the due process rights of faculty members at private institutions are often protected by contracts. (*See* below).

B. Contractual Obligations

Internal sources of contractual obligations for public and private sector institutions may include institutional rules and regulations, letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements. Grounds for dismissal and discipline as well as due process rights are often explicitly incorporated into faculty handbooks, which are sometimes held to be legally binding contracts. *See, e.g., Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) (ruling faculty handbook to "govern the relationship between faculty members and the university"); *American Ass'n of University Professors, Bloomfield College Chapter v. Bloomfield College*, 129 N.J. Super. 249, 252 (N.J. Super. Ct. Ch. Div. 1974), *appeal after remand*, 346 A.2d 615 (N.J. Super. 1975) (finding faculty handbook "an essential part of the contractual terms governing the relationship between college and faculty"). *See generally Faculty Handbooks As Enforceable Contracts: A State Guide* (3rd ed.).

C. State Law

Some states have specific statutes applicable to public colleges and universities that address grounds for dismissal as well as due process protections. For example, a New Jersey statute provides: "No professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher or other persons employed in a teaching capacity in any State college, county college or industrial school who is under tenure during good behavior and efficiency shall be dismissed or subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause." The statute provides for written charges, a hearing, the right to counsel, and the right to subpoena witnesses. N.J.S.A. 18A:6-18; *see also Cohen v. Board of Trustees of University of Medicine & Dentistry of New Jersey*, 867 F.2d 1455, 1460-61 (3rd Cir. 1989) (tenure contractual terms delineated in New Jersey statutes).

D. Academic Custom and Usage

Where documents are ambiguous, courts sometimes look to "academic custom," "academic usage" or "academic common law." The 1940 *Statement* constitutes a "professional 'common' or customary law of academic freedom and tenure." Matthew W. Finkin, "Towards a Law of Academic Status," 22 *Buffalo L. Rev.* 575, 577 (1972).

The U.S. Court of Appeals for the District of Columbia Circuit in *Greene v. Howard University* observed:

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is.

> The readings of the market place are not invariably apt in this non-commercial context.

412 F.2d at 1135. *See also Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (just as there may be a "common law of a particular industry or of a particular plan," so there may be an "unwritten 'common law' in a particular university" so that even though no explicit tenure system exists, the college may "nonetheless . . . have created such a system in practice"); *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975) (finding that jointly issued statements of AAUP and other higher education organizations, such as the 1940 *Statement,* "represent widely shared norms within the academic community" and, therefore, may be relied upon to interpret academic contracts); *Krotkoff v. Goucher College*, 585 F.2d 675, 678-79 (4th Cir. 1978) (academic custom and usage as demonstrated by AAUP's 1940 *Statement* added an implied "financial exigency" limitation to the tenure contract).

III. Dismissal For Cause Of Faculty

One of the most contentious issues in higher education involves efforts to terminate the tenured appointments of faculty members and term appointments of faculty members before their expiration. In such situations, significant academic due process protections attach. Generally accepted dismissal procedures are delineated in the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, which is discussed below.

Dismissal is different from nonreappointment and nonrenewal. Nonreappointment and nonrenewal involve not retaining a nontenured faculty member beyond the expiration of the current term of appointment. Dismissal involves breaking an appointment. Generally accepted procedural protections for nontenured faculty are set forth in AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, which is discussed further below.

Distinguishing between dismissal and nonrenewal of faculty is critical in determining what, if any, due process protections attach. A Virginia Supreme Court case, *Fun v. Virginia Military Institute*, 427 S.E.2d 181 (Va. 1993), highlights the importance of using these terms correctly. In *Fun*, the administration's letter to a faculty member notified him that his appointment would not be renewed but, in so doing, made "no reference to nonrenewal, but 'refer[red] instead to 'regulations for dismissal'." The court found a question of fact existed about whether the nonrenewed professor was legally entitled to the due process procedures for dismissed faculty. As a legal matter, absent evidence of illegal discrimination or violation of protected constitutional rights or failure to follow contractual obligations, the nonrenewal of a faculty member's appointment does not usually trigger legal due process protections.

A. What is "Just Cause"?

Adequate cause has been defined as:

> a basis on which a faculty member, either with *academic tenure* or during a *term appointment*, may be dismissed. The term refers especially to demonstrated incompetence or dishonesty in teaching or research, to substantial and manifest neglect of duty, and to personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities.

Faculty Tenure: Commission on Academic Tenure 256 (Keast, ed., 1973) ("Faculty Tenure").

While AAUP provides extensive advice on the procedural protections to be afforded faculty who face dismissal for cause, the identification of the substantive grounds for the dismissal of faculty is left primarily to individual campuses. The 1958 *Statement* observes:

> One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure*, and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 *Statement* and standards which have developed in the experience of academic institutions.

As one scholar explains AAUP policy:

> [T]he particular standards of "adequate cause" to which the tenured faculty is accountable are themselves wholly within the prerogative of each university to determine through its own published rules, save only that those rules not be applied in a manner which violates the academic freedom or the ordinary personal civil liberties of the individual. An institution may provide for dismissal for "adequate cause" arising from failure to meet a specified norm of performance or productivity, as well as from specified acts of affirmative misconduct. In short, there is not now and never had been a claim that tenure insulates any faculty member from a fair accounting of his professional responsibilities within the institution, which counts upon his service.

William Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense'," *AAUP Bulletin* 57:328 (1971).

RIR 5(a) acknowledges that "adequate cause" is an appropriate standard under which to dismiss faculty so long as it is "related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers." *See* AAUP, "Academic Freedom and Tenure: University of Virginia," *Academe: Bulletin of the American Association of University Professors* 60 (Nov.-Dec. (2001) (finding that complaints against professor, which involved mishandling of research funds, were "related, directly and substantially" to his fitness in his professional capacity as a researcher) ("*Academe*"). The 1940 *Statement* provides that tenured faculty members whose appointments are terminated for cause will receive at least one year of notice or severance salary unless the grounds for dismissal involve moral turpitude:

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

What conduct constitutes just cause should be sensitive to the nature of higher education. Professors Barbara Lee and William Kaplin suggest that "[i]nstitutions should not comfortably settle for the bald adequate-cause standard. Good policy and (especially for public institutions) good law should demand more." Accordingly, such definitions "should be sufficiently clear to guide the decision-makers who will apply them and to forewarn the faculty members who will be subject to them." Kaplin & Lee, *The Law of Higher Education* 277-78 (3rd ed. Jossey-Bass).

Sound institutional policies often incorporate AAUP recommended policies and procedural standards. One commentator has observed that "[p]ublic institutions have successfully overcome a vagueness challenge to 'adequate cause' standards by adopting the AAUP *Statement on Professional Ethics* and incorporating the statement in the

faculty handbook." *Dismissal for Cause* at 15. In *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984), for example, a federal appellate court rejected a professor's challenge to his dismissal, which was based on the sexual advances he made to male students. The administration claimed that the incorporation in the university's faculty handbook of the *Statement on Professional Ethics*, which prohibits exploitation of students and promotes the professor's proper role as counselor, properly provided a basis for the professor's dismissal. The court rejected the argument of the faculty member, finding that the grounds for dismissal were not unconstitutionally vague, and opining that the institution did not need to list every type of impermissible conduct, so long as the grounds for dismissal were consistent with reasonable professional standards that were understood by the faculty.

Failure to clearly define adequate cause may lead courts to invalidate particular actions or other severe sanctions. *See, e.g.*, *Tuma v. Board of Nursing*, 593 P.2d 711 (Idaho 1979) (invalidating suspension for "unprofessional conduct"); *Davis v. Williams*, 598 F.2d 916 (5th Cir. 1979) (invalidating regulation prohibiting "conduct prejudicial to good order"). But *see Ohio Dominican College v. Krone*, 560 N.E.2d 1340 (Ohio App. 1990) (state court declined to discuss whether the institution's standard of dismissal for "grave cause" was vague).

B. Substantive Grounds for Dismissal

Dismissal should, of course, be a "last resort." Brian Brooks, "Adequate Cause for Dismissal: The Missing Element in Academic Freedom," 22 *J. Coll. & Univ. L.* 331, 353 (Fall 1995) ("Adequate Cause"). The substantive grounds for dismissal for cause generally include incompetence, neglect of duty, insubordination, and immoral or unethical conduct. *Dismissal for Cause* at 21; *Adequate Cause* at 331; Robert M. Hendrickson, "Removing Tenured Faculty For Cause," 44 *Educ. L. Rptr.* 483, 491 (1998); Timothy B. Lovain, "Grounds for Dismissing Tenured Postsecondary Faculty For Cause," 10 *J. of Coll. & Univ. L*. 419, 422 (Winter 1983).

Courts tend to look favorably upon opportunities provided to faculty to "remediate" their perceived deficiencies before dismissal. As one commentator observes:

> When a person who once proved himself to be competent is eventually judged to be incompetent, there is no winner. The university has lost a valuable asset in the form of an active, competent professor (remember, he was once judged competent) and the professor has lost his livelihood. Therefore, whenever possible, action should be taken to restore the faculty member to his former position of competence. Such action may take many forms. If the professor is simply not "participating," informing him of the eventual result of that course of action may remedy the problem. The teacher may suddenly teach and the scholar may suddenly publish. When the problem involves the quality of the teaching or scholarship, then the remedial actions will need to be more aggressive. Specific weaknesses and areas for improvement should be identified. The professor should be given a timetable for compliance. Assistance might also be provided in the form of leave, a sabbatical or a decreased class load so that the professor can devote his time to the recommended improvements. The essential point is that the focus should be on rehabilitation not on dismissal.

Adequate Cause at 353; *see also Dismissal for Cause at 48* (observing that "a plan of remediation and a reasonable period of time to address deficiencies may be warranted" depending on the faculty conduct at issue).

1. Immoral Behavior

. One commentator has observed that "[j]udicial decisions do not provide a precise definition of immorality in the context of higher education." *Dismissal for Cause* at 35. In the end, allegations of immoral behavior must be

understood in the context of higher education. *See, e.g.*, *Texton v. Hancock*, 359 So.2d 895 (Fla. App. 1978) (where professor was dismissed for immorality, and the charges included using profanity in the classroom and drinking heavily in a student's home, the court found insufficient grounds for dismissal because "Ms. Texton's conduct must be judged in the context of her more liberal, open, robust college surroundings"). Immoral behavior as grounds for dismissal of faculty members tends to cover sexual misconduct, harassment, and dishonesty. Plagiarism is a typical basis for academic dishonesty. *See, e.g.*, *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8th Cir. 1986) (upholding university's dismissal of faculty member for the immoral conduct of plagiarizing a laboratory manual); *Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993) (upholding termination of faculty member appointment at University of Utah because of plagiarism found by faculty committee, which determined that Dr. Yu "knowingly held out the disputed paper as his own work, with knowledge that it included extensive duplications or close paraphrasing of the co-authored report").

2. *Neglect of Duty*

Neglect of duty, which is sometimes alleged to constitute insubordination, involves the failure of faculty members to carry out their professional obligations. As numerous courts have noted, definitions of these terms in the higher education context are "rather meager." *See Botts v. Shepherd College*, 569 S.E.2d 456 (W. Va. 2002). *See, e.g., Stastny v. Board of Trustees of Central Wash. Univ*., 647 P.2nd 496 (Wash. App. 1982) (upholding termination of tenured faculty member for unapproved leaves of absences, including a trip to Israel during the beginning of the semester, after repeated "liberal grants of absences," because professor's conduct "directly related substantially" to his fitness as a faculty member); *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) (remanding case for further proceedings in breach-of-contract action by professor who challenged his dismissal for "neglect of professional responsibilities"); *Prebble v. Broderick*, 535 F.2d 605 (10th Cir. 1976) (upholding dismissal of tenured faculty member for neglect of duty, which involved professor's failure to teach eight days of scheduled classes in one semester). *But see Trimble v. Southern West Virginia Community and Technical College*, 549 S.E.2d 294 (W. Va. App. 2001) (ruling that administration violated West Virginia constitution when it "immediately terminated. . . a tenured public higher education teacher, who has a previously unblemished record . . . for an incident of insubordination that is minor in its consequences," specifically the professor's failure to submit his syllabi using new campus software"). *See generally* Annotation, "What Constitutes 'Insubordination' as Grounds for Dismissal of Public School Teachers," 78 ALR 3rd 83 (1977 & Supp. 2003).

3. Incompetence

Efforts to dismiss faculty for incompetence generally rely heavily on the evaluations of peers in determining whether a professor is no longer competent to carry out his or her duties. AAUP policy provides that in pre-termination hearings involving dismissals for incompetence, "the testimony will include that of qualified faculty members from this or other institutions of higher education." RIR 5(c)(12), *Redbook* at 27. *See, e.g. Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (upholding dismissal where professor failed to cover relevant topics in the course syllabus, organized lectures poorly, failed to attend class regularly, and failed to provide students the opportunities to meet with him one-on-one); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985) (upholding dismissal of tenured faculty member based, in part, on the evaluations of colleagues and consecutive department chairs about his poor teaching, research and service, that he often had teaching assistant substitute teach, and that he failed to grade 16 of 22 students in one course).

4. Ethical Misconduct

AAUP's *Statement on Professional Ethics* provides that faculty should "avoid any exploitation, harassment, or discriminatory treatment of students," and that "professors do not discriminate or harass colleagues. They respect and defend the free inquiry of associates." *Redbook* at 133-34. See, e.g., *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984) (upholding dismissal of faculty member for violation of professional ethics based on AAUP's statement); *Filippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992) (upholding dismissal by Rutgers University of a tenured chemistry professor, relying in part on the university's adoption of AAUP's professional ethics statement 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"); *Yao v. Board of Regents of The University of Wisconsin System*, 649 N.W.2d 356 (Wis. App. 2002) (upholding board's decision to dismiss professor for "intentionally tampering with a colleague's laboratory materials").

C. Procedural Protections in a Dismissal for Cause

1. Due Process under the Law

Tenured appointments or appointments with fixed terms are entitled to due process legal protections in public colleges and universities. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wieman v. Updegraff*, 344 U.S. 183 (1952). The U.S. Supreme Court in *Roth*, 408 U.S. at 564, spoke to the property interests of faculty members:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits.

When an institution's decision implicates property interests, constitutional due process provides for certain procedural safeguards before a final decision, specifically notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Due process protections at private institutions are often dictated by contractual and, in some instances, state law.

The extent of legal due process required to faculty members tends to vary by jurisdiction, including the degree to which a formal pre-termination hearing is legally required. See generally The Law of Higher Education at 288-295. One federal appellate court set forth its views as to minimum legal procedural safeguards in the academy:

> These safeguards may include (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon.

Chung v. Park, 514 F.2d 382 (3rd Cir. 1975) See also *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1227-28 (5th Cir. 1985) (a hearing should be before "a tribunal that possesses some academic expertise and apparent impartiality toward the charges").

But see Hulen v. Yates, 322 F.3d 1229 (10th Cir. 2003) (ruling that professor's due process rights were not violated when he received no "formal [evidentiary] hearing" before "being laterally transferred" to a different academic department, because the Tenth Circuit interprets *Loudermill* as providing for "not very stringent" pre-termination hearings"); *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995) (ruling that due process rights afforded to tenured professor need not follow all six steps in *Chung v. Park* before termination of tenured appointment).

Dismissed faculty members often challenge their dismissal on procedural grounds. Accordingly, administrators at public institutions would be well advised to provide more (*Chung*) not fewer (*McDaniels*) procedural protections, not only because greater due process often ensures a more considered decision, but also because affording such procedural protections communicates to courts that significant due process protections were afforded and that, therefore, the internal decision should be respected. *See The Law of Higher Education* at 175-78 (Supp. 2000).

Faculty participation in dismissal procedures often helps institutions defend their dismissal decisions in court. In *McConnell v. Howard University*, 818 F.23d 58 (D.C. Cir. 1987), the federal appellate court remanded a dismissal case for further examination of "neglect of professional responsibilities," finding that the administration's dismissal decision was suspect because, in part, it rejected the faculty committee's determination in favor of the professor. The faculty committee had found that while failure to teach an assigned course might justify dismissal, mitigating circumstances in this case—the failure of the administration to deal with a disruptive student—dictated otherwise. *See also Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976) (faculty committee rejected professor's argument that his failure to report and account for research funds was a protest of the university's accounting policy, and the federal district court relied on that faculty committee decision to affirm the professor's dismissal); *Filippo v. Bongiovanni*, 961 F.2d 1125 (3rd Cir. 1992) (report of faculty committee, which found professor to have violated AAUP's ethics statement, relied on by court in upholding institution's decision to dismiss tenured faculty member).

NOTE: Constitutional due process protections would not generally attach to the nonrenewal of a faculty member's contract, unless, for example, proper notice is not provided. *See, e.g., Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969) (ruling that failure to provide timely notice of nonrenewal meant that administration was required to establish just cause for the termination of an appointment because the faculty member had a legitimate expectation of another annual contract); *Soni v. Board of Trustees of University of Tennessee,* 513 F.2d 347 (6th Cir. 1975) (ruling that a nonrenewed nontenured professor of mathematics had a property interest because he had been told that he could expect his contract to be renewed and he had exercised voting and retirement plan privileges).

2. Academic Due Process

AAUP recognizes that "[t]he governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority." *Statement on Government of Colleges and Universities, Redbook* at 217, 220; see also 1958 *Statement*, Redbook at 13-14 (acknowledging that board of trustees has final decisionmaking authority regarding dismissal of faculty). Nevertheless, faculty are generally regarded as having a primary role to play in determining faculty status, including dismissal. *See Statement on Government of Colleges and Universities, Redbook* at 221.

The concept of "academic due process" entails more than the legal barebone procedural requirements described above. "Academic due process, an internal institutional procedure, is to be distinguished from due

process of law." *Faculty Tenure at 255-56*. Academic due process is "a system of procedures designed to produce the best possible judgments in those personnel problems of higher education which may yield a serious adverse decision about a teacher." Joughin, *"Academic Due Process," Academic Freedom: The Scholar's Place in Modern Society* 146 (Oceanna Publications 1964); *see also Statement on Government of Colleges and Universities, Redbook* at 217, 219 ("Joint action [with administration and faculty] should also govern dismissals . . . "). One court opined that "[t]he serious consequences of a 'just cause' dismissal are one reason why university regulations prescribe a rigorous process when accusations . . . are made." *Yao*, 649 N.W.2d 356.

As one scholar observed:

> Tenure is translatable principally as a statement of formal assurance that thereafter the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process. This accompanying complement of academic due process merely establishes that a fairly rigorous procedure will be observed whenever formal complaint is made that dismissal is justified on some stated ground of professional irresponsibility . . .

William Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense,'" *AAUP Bulletin* 57:328 (1971)

AAUP policy encompasses the following components of academic due process: a statement of charges in reasonable particularity; opportunity for a hearing before a faculty hearing body; the right of counsel if desired; the right to present evidence and to cross-examine; record of the hearing; and opportunity to the governing board.

The 1958 Statement, which was jointly drafted and approved by AAUP and AACU and has been incorporated into hundreds of faculty handbooks, observes that it is "[a] necessary precondition of a strong faculty that it have first-hand concern with its own membership," including the appointment, promotion, and dismissal of their colleagues. At the same time, "[t]he faculty must be willing to recommend the dismissal of a colleague when necessary."

The 1958 *Statement* further provides that "[t]he faculty member should have the option of assistance by counsel . . . " *Redbook* at 13. Please note that the law may vary by jurisdiction about the right to have legal representation at a termination hearing. *See, e.g., Frumkin v. Board of Trustees*, 626 F.2d 19 (6th Cir. 1980) (allowing counsel to be present and advise, but prohibiting counsel from cross examining witnesses); *Chan v. Miami Univ.*, 652 N.E.2d 644, 649 (Ohio 1995) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skills in the science of the law.").

In 2001, an AAUP investigating committee concluded that the University of Virginia administration had violated the academic due process rights of a tenured professor who had misused research funds. The AAUP found:

> Professor McCarthy was afforded no opportunity to respond to each action in 1998 before [the discipline] was imposed on him, and the administration did not consult with any faculty body before it acted as it did. He was dismissed without adequate cause having been demonstrated by the administration before a faculty body. He received no severance salary. The opportunity for a postdismissal hearing could not

> substitute for an appropriate [pre-dismissal] academic proceeding, and, in any event, would have wrongly required Professor McCarthy to carry the burden of proof.

AAUP, "Academic Freedom and Tenure: the University of Virginia," *Academe* 60 (Nov.-Dec. 2001); *see also* AAUP, "Academic Freedom and Tenure: Macomb County Community College (Michigan): A Report on Disciplinary Suspension," *AAUP Bulletin* 369 (Winter 1976) (finding as violative of AAUP-supported principles the institution's "official policy . . . on disciplinary suspension [that] permits the administration unilaterally to suspend, without prior demonstration of adequacy of cause, a faculty member who might be viewed as insubordinate").

AAUP's Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments provides guidance on appropriate academic due process protections for nontenured faculty. The statement explains that nontenured faculty "cannot . . . be dismissed before the end of a term appointment except for adequate cause that has been demonstrated through academic due process—a right they share with tenured members of the faculty." In such situations, the administration should provide the faculty member with adequate notice of nonreappointment with, upon request, a written explanation for the decision, and the opportunity to appeal the decision to a faculty body on grounds that the decision was based upon an impermissible consideration or inadequate consideration.

IV. Sanctions Less Than Dismissal For Cause

The notion of "progressive discipline" is not a term that one sees in many faculty handbooks. *But see Trimble v. West Virginia Board of Directors*, 549 S.E. 2d 294 (W. Va. 2001) (college "should not have fired [tenured professor] before resorting to other progressive disciplinary measures" under West Virginia constitution). Nevertheless, there are sanctions less severe than dismissal that 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

> 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.

Faculty Tenure at 76. Accordingly, the commission recommended as follows:

> [T]hat 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.

Id.

Some institutions have clear policies that cover sanctions other than dismissal, such as those at Michigan State University, "Policy and Procedure for Implementing Disciplinary Action Where Dismissal Is Not Sought" ("Disciplinary action may include but is not limited to reprimand, suspension with or without pay, reassignment of duties, foregoing salary increase and/or benefit improvements, and mandatory counseling and/or monitoring of behavior and performance. Suspension without pay

may not exceed six months."); University of New Mexcio, Appendices II and III (incorporating AAUP's procedural protections); Northwestern University (discussing suspensions and minor sanctions), http://www.northwestern.edu/provost/faculty/handbook.pdf.

A. AAUP Policy

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 due 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.

Faculty Tenure at 75-77.

AAUP RIR 7 distinguishes between "major" and "minor" sanctions, categorizing suspension as major and reprimand as minor. AAUP 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, which 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. *Redbook* at 27. Immediate suspension with pay, pending a hearing, is appropriate under AAUP policy if an individual poses a threat of immediate harm to him or herself or others. RIR 5(c)(1), *Redbook* at 25. Moreover, Regulation 5(c) of the Association's *Recommended Institutional Regulations* states that the administration, before suspending a faculty member, will consult with an appropriate faculty committee concerning the "propriety, the length, and other conditions of the suspension.

The AAUP further provides 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 feels that a sanction was unjustly imposed.

B. Case Law

Below are some higher education faculty cases involving sanctions, excluding dismissal. As noted above, like the legal claims of faculty threatened with dismissal, litigation arising from the imposition of sanctions flow from a number of legal sources, including the constitutional law for public institutions, contractual obligations at private and public sector institutions (faculty handbooks, letters of appointment, collective bargaining agreements), and regulations and statutes (internal and external).

1. **Warning or Reprimand**

In *Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So.2d 312 (Miss. S.Ct. 1998), the University of Mississippi issued a written reprimand to a nontenured professor of medicine who in responding to a student's question about interpreting mammograms, touched the student's breasts. The Mississippi Supreme Court ruled that the written reprimand did not violate the professor's due process rights, but required that the document be maintained in a separate file. *Butts v. Shepherd College*, 569 S.E.2d 456 (W. Va. 2002) (ruling that

professor's refusal to obey supervisor's order to release student grades to supervisor was not grounds for reprimand); *Powell v. Ross*, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis., Feb. 27, 2004) (rejecting professor's defamation claim arising in part from recommendation of administrator that chancellor issue "a strong letter of reprimand" and place it in professor's personnel file). *See also* AAUP, "Academic Freedom and Tenure: Tulane University," AAUP *Bulletin* 424, 430 (1970) (acknowledging faculty committee's recommendation as proper for reprimand as opposed to dismissal for professor's interference with on-campus ROTC drill).

2. **Public Censure**

See, e.g, Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991) (upholding the public censure of a faculty member for plagiarism by the University of Massachusetts, Boston administration after an investigation and hearing by a faculty committee). *But see Booher v. Northern Kentucky University*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky., July 22, 1998) (holding that departmental censure of faculty member in response to his comments to the media about a controversial university art exhibit provided a basis for professor's First Amendment retaliation claim, and noting that 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"); *Meister v. Regents of the University of California*, 78 Cal.Rptr.2d 913 (Cal. App. 6 Dist. 1998) (finding by arbitrator that professor's reputation had been injured by circulation of letter of censure, which was recommended by campus committee, for the professor's unauthorized circulation of a confidential planning document).

3. **Departmental Reassignment**

On occasion an institution decides to transfer a faculty member from one academic department to another where significant problems exist in the former department, and the faculty member has claimed that the transfer amounts to a sanction that should not have been affected without due process. *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990) (upholding transfer of tenured professor from one department to another, and finding no property interest in a particular position); *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988) (Auburn University's professors' property interests not violated when engineering professors were transferred from mechanical engineering to other engineering departments with no reduction in salary or rank). *But see Hulen v. Yates*, 322 F.3d 1229 (10th Cir. 2003) (ruling that professor "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 transfer from one academic department to another).

4. **Actions on Salary for Disciplinary Reasons**

a. *One-time denial of a salary increase*. Depending on the facts and circumstances, AAUP might view a one-time denial of a salary increase to be a minor sanction. *See, e.g., Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), *cert. denied*, 522 US. 1016 (1997) (dean's denial of pay increases to white law professors did not constitute adverse employment action); *Wirsing v. Board of Regents of University of Colorado*, 739 F. Supp. 551 (D. Colo. 1990), aff'd, 945 F.2d 412 (10th Cir. 1991) (table), cert. denied, 503 U.S. 906 (1992) (university did not violate tenured professor's rights by denying her a merit increase when she refused to distribute standardized teacher evaluation forms to her class on academic freedom grounds). *But see Power v. Summer*, 226 F.3d 815 (7th Cir. 2000) (ruling that administration violated the First Amendment rights of three professors by awarding

them merit increases of only $400 instead of $1,000 because they were outspoken on issues of faculty salaries). For a discussion of the Vincennes University case, see Donna R. Euben, "Judicial Forays into Merit Pay," 89 *Academe* 70 (Jul.-Aug. 2003).

b. *Long-term salary increase denial*. *See, e.g., Vaughn v. Sibley*, 709 So.2d 482 (Ala. Civ. App. 1997) (finding that University of Alabama at Birmingham violated the rights of an associate professor of mathematics by denying him any salary increase from 1982 through at least 1994 [and maybe 1997, the date of the court decision], because the administration either had to follow its salary policy and pay the professor the minimum salary, or it had to file an exception to exclude him from the established salary range).

c. *Salary Reduction*. *See, e.g., Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (5th Cir. 1993), *cert. denied*, 510 U.S. 1194 (1994) (tenured professor sued, claiming that he should have been provided a hearing before the medical school reduced his compensation from $68,000 to $46,500 because he failed to generate as much grant money as had been expected; court ruled that the professor's interest in a specific salary level did not outweigh the administration's interest in making budget any decisions for educational programs, and that the professor had received six months' notice and the opportunity to seek additional funding.) For a discussion of efforts to reduce salaries in medical schools, see Donna R. Euben, "Doctors in Court? Salary Reduction Litigation", 85 *Academe* 87 (Nov.-Dec. 1999). State law may permit salary reduction. As previously noted, state law governing the salaries of public employees may provide particular protections. For example, a New Jersey statute provides that no tenured professor in a public college may be "subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause." N.J.S.A. 18A:6-18.

5. **Fines or Restitution**.

An administration might seek reimbursement, restitution or a fine from a faculty member. Please note that such fines may raise issues under the Fair Labor Standards Act.

6. **Suspension**

There are a variety of suspensions, including paid suspensions, unpaid suspensions, and immediate (paid and unpaid) suspensions.

a. **Paid Suspensions**. *See, e.g., Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) (while tenured professor was being investigated for the use of inappropriate language in the classroom, he was suspended with pay; court found that suspension did not violate his constitutional rights).

b. ***Unpaid Suspensions***. For the AAUP, a suspension pending a faculty hearing should be with pay. If an administration instead of moving to dismiss a faculty member, intends to suspend with or without pay, that action should be preceded by a hearing with the same procedural protections as afforded in a dismissal case. *See, e.g., Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001) (Macomb Community College professor initially put on leave without pay while sexual harassment investigation pending; he was later put on indefinite leave with pay); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994) (involving professor who was suspended without pay for one year for violating institution's sexual harassment

policy; the trial court ruled that professor was entitled to preliminary injunction on his First Amendment and due process claims).

c. ***Immediate Suspensions***. AAUP's RIR 5 provides that an institution may suspend a professor when immediate harm to the individual or others is threatened pending an ultimate determination of the individual's status. RIR 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. 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). Such suspensions should be with pay, and they can remain in effect during an investigation and disciplinary proceedings. In *Gilbert v. East Strousberg University*, 520 U.S. 924 (1997), the U.S. Supreme Court ruled that due process rights were not violated when an administration suspended a tenured public employee without pay and failed to provide a pre-suspension hearing. The Court's reasoning was based, in part, that drug-related felony charges were pending against the police officer. As commentators have noted, the *Gilbert* decision is not generally applicable to the due process 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." The *Law of Higher Education* 179-80 (Supp. 2000).

7. **"Demotion" in Rank"**

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 is obtained by fraud or dishonesty. *Compare Kirschenbaum v. Northwestern University*, 728 N.E.2d 752 (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") with Klinge v. Ithaca College, 167 Misc. 2d 458 (N.Y. Sup. Ct. 1995), *aff'd as modified by* 652 N.Y.S.2d 377 (N.Y. App. Div. 1997) (ruling that factual issue for jury existed regarding whether tenure breached for professor who was found guilty of plagiarizing when he was demoted from full to associate professor, his salary reduced, and his academic duties restricted).

8. **Modified Teaching Assignments**

Some institutions modify teaching assignments as a form of discipline. *See, e.g., McCellan v. Board of Regents of the State University*, 921 S.W.2d 684 (Tenn. 1996) (barring professor for three years from teaching the only section of a required course after he made inappropriate sexual comments to female students about EKGs). *But see Levenstein v. Salafasky*, 164 F.3d 389 (7th Cir. 1998) (noting that professor was "effectively deprived of a property interest in a job" by university decision to forbid professor from seeing patients and an assignment of reviewing old medical files). Please note that "shadow sections"—courses taught by other instructors to compensate for perceived problems in the teaching of the original professor—may violate a public university professor's constitutionally protected interests. *See, e.g., Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in relevant part*, 966 F.2d 85 (2d Cir. 1992).

9. **Class Monitoring**

If periodic monitoring is deemed necessary discipline, primary responsibility should be in the hands of faculty.

10. **Mandatory Counseling**

Some administrations have required that faculty undergo counseling. Generally such discipline implicates a number of legal concerns, including free expression, academic freedom, and privacy. *See e.g., Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001) (community college violated rights of outspoken professor by requiring him to meet with anger management counselor); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), cert. denied, 520 U.S. 1140 (1997) (English professor who used vivid sexual imagery in class ordered to attend sexual harassment seminar); *Silva v. University of New Hampshire*, 999 F. Supp. 293 (D.N.H. 1994) (English professor who was found guilty of sexual harassment was suspended from teaching for one year and required to obtain a "counseling evaluation" and, if prescribed, attend counseling); *Powell v. Ross*, 2004 U.S. Dist. LEXIS 3601 (W.D. Wis., Feb. 27, 2004) (rejecting professor's defamation claim arising in part from recommendation that professor attend sexual harassment training to identify his "problem areas"). *See generally* Jonathan Knight, "The Misuse of Mandatory Counseling," *The Chronicle of Higher Education* (Nov. 17, 1995) ("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 . . . ").

V. Practical Suggestions

- When faced with a "problem professor," consider a range of sanctions, not only dismissal.
- Focus on misconduct, not opinions or speech or popularity of faculty member.
- Explore informal resolutions if at all feasible; a negotiated settlement may serve all parties' interests.
- Ensure that faculty committees consider all faculty disciplinary issues. As noted earlier, such faculty participation provides further evidence to courts that due process was afforded and may encourage them to defer to the institution's decision.
- When moving to dismiss faculty, apply policies in a consistent and non-discriminatory fashion, and observe all notice and severance pay requirements.
- Follow institutional policies carefully to ensure the provision of adequate due process protections to faculty members designated for discipline or release.
- Advise faculty committees on their role in handling faculty discipline.

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