GENERAL COUNSEL'S
CORNER
FEBRUARY 22, 2024 • ISSUE 11

Fostering Faculty Collegiality: Legal and Practical Challenges

Although colleges and universities have always had their share of critics, the current cultural and political environment has heightened the scrutiny of institutions of higher education and, in particular, the conduct of their faculty. While institutional policies usually deal with serious behavioral problems such as sexual or racial harassment and research misconduct, the day-to-day interactions among faculty (and staff) may, particularly in the current climate, not be on the radar of academic administrators and their legal counsel. But they should be.

Many faculty, and some academic administrators, believe that academic freedom and, in public institutions, Constitutional free speech protections mean that a wide array of behaviors (or misbehaviors) may be legally protected. That is not necessarily the case, as this short article will demonstrate.

Collegiality, or "the cooperative relationship of colleagues," as the Merriam Webster dictionary defines the term, is an important aspect of academic governance and the daily operations of colleges and universities. And while some institutions have incorporated collegiality requirements into policies or criteria for promotion, tenure or salary increases, others have not. The good news is that state and federal courts have understood and reinforced the significance of collegiality for institutions of higher education and have, nearly uniformly, rejected claims that a determination that a faculty member is insufficiently collegial, and therefore a decision to impose discipline, or deny promotion, tenure or even continued employment, is unlawful.

Legal Issues

Much of the litigation about institutional actions taken when uncollegial faculty behavior is the basis for discipline or dismissal involves speech. Not all speech is protected by law, even at public institutions that otherwise must comply with Constitutional speech protections. For example, the U.S. Supreme Court ruled in 2006[1] that the speech of employees of public organizations does not enjoy Constitutional protection if the speech is related to their job duties. The Court did not create an exception for college faculty, although some lower federal courts have.[2] The work-related speech of employees at private colleges and universities may be unprotected as well, unless the institution has incorporated free speech protections in institutional policy, collective bargaining agreements or faculty handbooks such that a breach of contract claim might be brought if a faculty member is disciplined or dismissed for speech.

The American Association of University Professors (AAUP) has issued several policy documents that some institutions have incorporated into institutional policy. While these documents lay out protections for faculty members' academic freedom, they also include responsibilities of faculty to use their academic

1 *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

2 See, for example, *Adams v. University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

freedom appropriately. For example, the *AAUP 1940 Statement on Academic Freedom and Tenure* states that: "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject," and "[a]s scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others and should make every effort to indicate that they are not speaking for the institution."[3] The AAUP's *Statement on Professional Ethics* discusses faculty members' obligations to their colleagues:

> Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from their own. 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]

Even if an institution has not incorporated these statements into policy or contracts, some courts have cited their provisions when a faculty plaintiff claims that a negative employment action was unlawful.

Judicial Analyses of Noncollegial Faculty Behavior

Although the facts of each case differ, of course, similar circumstances lead academic administrators, and often the individual's faculty colleagues, to seek to discipline, dismiss or deny tenure to an individual who is disruptive, divisive and/or engages in verbal attacks against faculty colleagues (and sometimes against students). For example, in *Wozniak v. Adesida*,[5] a tenured professor who was upset that a student group had not recommended him for a teaching award called the students in, abused them verbally, and, despite instructions from the dean to desist from continuing to express his frustration in writings that identified the students and their emotional reaction to his verbal abuse, he continued to "wage an extensive campaign" against the students. The trial and appellate courts upheld his dismissal, saying that the dismissal was for disobeying the instructions of the dean and "intentionally causing hurt to students," not for protected speech. And in *Fagal v. Marywood University*,[6] a federal appellate court upheld the dismissal of a tenured faculty member who circulated videos depicting the president and other administrators in offensive ways. The court interpreted the University's discipline policy that allowed dismissal without using progressive discipline as permissible under circumstances in which "serious violations of professional responsibilities" have occurred.

In *Burton v. Board of Regents of the University of Wisconsin System*,[7] the trial and appellate courts upheld the dismissal of a tenured faculty member who engaged in numerous divisive actions, which included "(1) her disclosure of private information by posting recordings of faculty meetings online, including discussions of tenure, salary, and professor reviews; and (2) her repeated episodes of disrespectful, harassing, and intimidating behavior toward colleagues, despite being warned in two formal 'letters of direction' to desist."[8] The courts rejected the plaintiff's claims that her dismissal was motivated by sex discrimination.

---

3 https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure

4 https://www.aaup.org/report/statement-professional-ethics.

5 932 F.3d 1008 (7th Cir. 2019).

6 786 Fed. Appx. 353 (3d Cir. 2019).

7 2022 U.S. App. LEXIS 31520 (7th Cir., Nov. 15, 2022).

8 Id. at *4.

A recent case, decided by a split panel of the U.S. Court of Appeals for the Fourth Circuit, affirmed the trial court's dismissal of a tenured faculty member's claim that discipline for various statements he made at a faculty meeting and later in writing violated his free speech rights. In *Porter v. Board of Trustees of N.C. State University*,[9] the plaintiff had asserted that his verbal criticism of a faculty member during a meeting, an email to the entire department in which he referred to a recent news article and commented sarcastically about a colleague, and a post on his personal blog in which he referred to a scholarly organization as a "woke joke," constituted protected speech.

As noted by Gilbertson and DeWitz, the majority clarified the test to be used when faculty claim that they have been punished for otherwise protected speech.[10] First, a court must determine whether the faculty member was speaking about a matter of public concern, or whether the speech at issue was related to the faculty member's job, and thus the individual was speaking as a public employee. "[I] f we determine that Appellant was speaking as a public employee, we must then determine whether his speech related to 'scholarship or teaching,' . . . If it did not, then it is unprotected pursuant to *Garcetti*."[11]

The majority, citing *Garcetti*, determined that the first two instances of speech were unprotected because they did not address Porter's scholarship or teaching, but rather referred to matters internal to the department, and thus he was speaking as a public employee. The dissenting judge, however, found that all three instances of Porter's speech addressed matters of public concern, and said that he would have ruled that they were protected. With respect to the blog post, the majority assumed without deciding that it was protected speech, but concluded that Porter's discipline was not in retaliation for that speech incident, but was done "because of his ongoing lack of collegiality" over a long period of time, pointing to additional complaints about his treatment of colleagues and at least one instance of profanity directed at a colleague at a faculty meeting.

Serious noncollegial conduct may also be the basis for a denial of tenure. For example, in *Davis v. Western Carolina University*,[12] a professor denied tenure asserted that the decision was based upon his mental disorder. The court disagreed, noting that:

> …the undisputed evidence amply demonstrates that WCU's decision was motivated primarily by Appellant's numerous instances of gross misconduct and not his disability. Appellant's gross misconduct included, but was not limited to, a poem he wrote depicting the rape of [the college's dean], a story he wrote about killing a faculty member, and threats directed against those involved in the tenure process. Because of the alarming and continuous nature of Appellant's misconduct, multiple faculty members suffered from anxiety, sleep deprivation, and were afraid to come to work.[13]

In *Ward v. Midwestern State Univ.*,[14] the plaintiff alleged that the university's refusal to renew his tenure-track contract was motivated by race discrimination. Rejecting that claim, the court explained that the plaintiff had shouted at colleagues at meetings, had sent a blanket email to all department

9 72 F.4th 573 (4th Cir. 2023). For a summary and analysis of this case, see Seth F. Gilbertson and Ariyana DeWitz, "The De-Evolution of Post-Garcetti Public Employee Speech Regulation in Higher Education," August 3, 2023, https://www.bsk.com/news-events-videos/the-de-evolution-of-post-garcetti-public-employee-speech-regulation-in-higher-education#_ftn6.

10 Id.

11 72 F.4th at 582 (citations omitted).

12 695 Fed App'x 686 (4th Cir. 2017).

13 Id. at 688.

14 217 F. App'x 325 (5th Cir. 2007).

faculty chastising a fellow faculty member for a presentation made at a department meeting and had missed every required department meeting for a full semester. The court rejected the plaintiff's race discrimination claim, ruling that "these incidents demonstrated that Ward lacked the interpersonal skills necessary to serve as coordinator or [tenured] associate professor."[15]

The cases briefly discussed above are just a sample of the numerous cases in which a faculty member has challenged some negative employment decision that resulted from a college or university's determination that the individual's uncollegial behavior violated its policies or otherwise served as the basis for dismissal, discipline, or denial of reappointment or tenure. Indeed, a review of such decisions between 2000 and 2010 concluded that courts

> …have given almost unanimous support for consideration of collegiality whether or not the term is identified as a criterion for consideration in tenure, promotion, or termination policies. Although opinions may remain divided about the precise definition of collegiality and the wisdom of its use as a separate criterion, courts have made clear that they are willing to embrace the concept and have regularly favored colleges and universities in defending litigation surrounding its use.[16]

Given what appears to be the clear consensus of the courts that it is appropriate for colleges and universities to expect faculty to behave in a professional and collegial manner, academic leaders, including department chairs and deans, may be encouraged to deal promptly and decisively with unprofessional and uncollegial conduct.

General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: Monica Barrett (Rutgers); Seth Gilbertson (State University of New York); E. Katherine Hajjar (Fashion Institute of Technology); Shelley Sanders Kehl (Pratt Institute); Barbara Lee (SVP for Academic Affairs at Rutgers); Gail Norris (University of Rochester); and Jane Sovern (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.

This post is brought to you by Barbara A. Lee, Ph.D. and Camisha Parkins*. Barbara, a higher education attorney in our New York office, previously served as Senior Vice President for Academic Affairs at Rutgers University where she continues on as a Distinguished Professor of Human Resource Management. She is a former director for the National Association of College and University Attorneys (NACUA), and a prolific author, speaker and editor. Barbara is also the former chair of the New Jersey Bar Association's Higher Education Committee.

**Special thanks to Associate Trainee Camisha Parkins for her assistance in the preparation of this memo. Camisha is not yet admitted to practice law.*

15 Id. at 328.

16 M.A. Connell, K.B. Melear, and F.G. Savage, "Collegiality in Higher Education Employment Decisions: The Evolving Law." 37 *Journal of College & University Law* 529 (2011).

BOND SCHOENECK & KING ATTORNEYS