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ABSTRACT

This chapter reports 1982 cases involving aspects of higher education. Interesting cases noted dealt with the federal government's authority to regulate state employees' retirement and raised the questions of whether Title IX covers employment, whether financial aid makes a college a program under Title IX, and whether sex segregated mortality tables used in retirement plans violate Title XII. A new question raised was whether the federal government has the authority to collect defaulted student loans. A review of cases involving intergovernmental relations precedes the chapter's longest section, which addresses employment questions including complaints of discrimination under various federal regulations and in hiring, complaints involving nontenured faculty, complaints from tenured faculty, and collective bargaining cases. Litigation in the area of students' rights includes cases involving admissions, nonresident tuition, financial aid, First Amendment issues, and dismissal procedures. Analyses of liability cases and an antitrust complaint conclude the chapter. (MJL)

8

HIGHER EDUCATION

Robert M. Hendrickson

8.0 INTRODUCTION

Nineteen eighty-two was a year which saw some interesting cases advance through the court system. Among these, one was a case dealing with the federal government's authority to regulate the retirement of state employees. Several cases now on the docket of the United States Supreme Court raised the question of whether financial aid makes a college a program under Title IX. The Supreme Court also dealt with the question of whether Title IX covered employment. Another case raised the issue of whether sex segregated mortality tables used in retirement plans violated Title XII. A new issue made its debut questioning whether the federal government had the authority to collect defaulted student loans. Questions of liability, whether athletic scholarship recipients should receive Workmen's Compensation, and whether the NCAA held a monopoly in the scheduling of telecasts of football games, round out another active year.

8.1 INTERGOVERNMENTAL RELATIONS

The question of federal authority versus state authority in the regulation of higher education is a continuing controversy. The Constitution reserves education as a prerogative of the states, but does not prohibit federal aid or regulation upon the receipt of federal financial assistance. A case on state and federal powers which could have significance for higher education was one dealing with whether the federal interest under the commerce clause was larger than those powers reserved to the states under the tenth amendment, thus allowing the federal government to regulate retirement policies for state employees. In a Wyoming case now on the docket of the United States Supreme Court and argued on November 4, 1982,[1] the state of Wyoming alleged that the Age Discrimination in Employment Act as applied

1. EEOC v. Wyoming, Docket No. 81-554, 50 U.S.L.W. 3527 (Jan. 12, 1982).

to state employees violated the tenth amendment to the United States Constitution. The Equal Employment Opportunities Commission sued the state of Wyoming for discriminating on the basis of age in setting mandatory retirement for law enforcement officials at age fifty-five. The district court found that *The National League of Cities v. Usery*[2] applied here. The federal government's regulations under the commerce clause must loom larger as a national interest when balanced against the defendant's nominal interest in discriminating on the basis of age. The court saw the federal government's policy of age discrimination with foreign service and law enforcement employees as giving any national interest argument a hollow ring. They found that the Age Discrimination Act did not apply to game wardens because of the state's defined powers under the tenth amendment.[3] The *National Cities* case specifically covers police protection, sanitation, public health, and parks and recreation. Whether this opinion can be extended to tenured faculty depends upon the ruling in the current case by the Supreme Court and future litigation involving higher education. Moving the retirement age of tenured faculty to seventy, as the federal regulation could do, would have severe economic and eductional implications for institutions of higher education. According to the *United States Law Week*, oral argument indicated a leaning by the Justices toward the Wyoming position.[4]

8.2 EMPLOYEES

Litigation involving questions of employment was voluminous. This reflects both the financial condition of higher education and the shrinking job market. The employee cases have been organized under several broad topic areas. First, were complaints alleging discrimination under various federal regulations (Titles IX and VII, The Equal Pay Act, Age Discrimination, and 94-142) and in hiring. Second, were complaints involving nontenured faculty. Third, were complaints from tenured faculty, and finally, cases concerned with collective bargaining.

8.2a Discrimination

After a number of years of litigation at the circuit court level, the United States Supreme Court finally agreed to hear a case involving the

2. 426 U.S. 833 (1976).
3. EEOC v. State of Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).
4. 51 U.S.L.W. 3273 (Oct. 12, 1982).

question of whether Title IV covers employment. Title IX prohibits gender discrimination in educational programs or activities receiving federal financial assistance. In *North Haven Board of Education v. Bell*, the issue was whether Congressional intent in passing Title IX of the Education Amendments of 1972[5] included discrimination in employment. This case consolidated two cases at the Second Circuit Court of Appeals involving the North Haven Board of Education and the Turnbull Board of Education. The district court in both cases found in favor of the female plaintiffs and ruled that the school boards had discriminated on the basis of sex in violation of Title IX and subpart E[6] of the regulations. The Second Circuit upheld the lower court opinions.[7]

The school boards on appeal have asked that subpart E be declared outside the scope and intent of Title IX. The court through an analysis of the legislative history and post enactment history including congressional review of the regulations found that subpart E was within the scope of Title IX. Congressional intent was to include employment in "specific programs" receiving federal financial assistance. In further elaboration, the court ruled that the statute and regulations were program specific, applying only to those programs receiving federal financial assistance.[8]

While clearly opening up Title IX to discrimination in employment, the case left unanswered the definition of the scope of the program specific provisions of the statute and what constitutes federal financial assistance. Two cases concerning these two issues have been decided subsequent to the *North Haven* decision and illustrate the continuing controversy. One of these cases is now on the docket of the United States Supreme Court. In a Virginia case, a private institution asked for injunctive and declaratory relief to stop an investigation by the Department of Education's Office of Civil Rights (OCR). OCR based its authority to investigate the institution's athletic programs on the receipt of a $19 hundred library resource grant. They maintained that the institution was a program within the meaning of the statute. The University of Richmond maintained that OCR's authority went only to programs receiving direct financial assistance and that their atnletic program received no federal financial assistance. Citing the *North Haven* decision, the district court ruled in favor of the institution.[9] The Justice Department elected not to appeal this case.

5. 20 U.S.C. § 1681 *et seq.*
6. 34 CFR § 106.1 *et seq.* § 106.51-106.61.
7. North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980).
8. North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).
9. The University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982).

In a Pennsylvania case, students brought suit against the United States Department of Education (DOE). The department had withdrawn Basic Education Opportunity Grants (BEOG) and Guaranteed Student Loan (GSL) funds after the college had refused to file an assurance of compliance in accordance with the Title IX regulations. The federal district court had ruled that the regulations on Title IX were invalid and granted summary judgment to the college. The appeal to the Third Circuit Court of Appeals by DOE resulted in reversal of the district court position.

The Third Circuit reviewed the question of whether indirect financial aid in the form of BEOG's and GSL's constituted federal financial assistance within the meaning of Title IX. They concluded that both financial aid programs constituted federal financial assistance. Further, since the money was dispersed throughout the college, the college was a "program" receiving federal financial assistance. Therefore, it was within the authority of DOE to require this institution to complete an Assurance of Compliance form. Failure to complete the Assurance of Compliance form allowed DOE to remove BEOG and GSL grants from students attending the college.[10] They also ruled that the department would not be required to give students a hearing at the time of termination. If this ruling is upheld by the Supreme Court, any educational institution whose students receive federal financial assistance becomes a "program" within Title IX. All hiring within the institution thus comes under the prohibitions of gender discrimination.

This controversy over the meaning of program specific and federal financial assistance is before the Supreme Court in a case consolidated from the above case and two other cases reported in last year's volume of the *Yearbook*.[11] A decision will be forthcoming.

8.2a(2) Title VII

Title VII of the Civil Rights Act of 1964[12] prohibits discrimination in employment. A number of cases concerning discrimination in employment have been decided. Several of these cases dealt with the "shifting burden of proof" at trial. Another dealt with time limits within which charges can be filed, while one dealt with discrimination in the awarding of fringe benefits. One other case defined the limitations to the award of back pay where discrimination is charged.

10. Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982).
11. *See*, THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 225, Haffer v. Temple Univ., 688 F.2d 14 (3rd Cir. 1982) and Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981).
12. 42 U.S. § 2000e.

The burden of proof in Title VII shifts from plaintiff to defendant and then back to the plaintiff. In a case involving Brown University, the First Circuit Court of Appeals clearly outlined the procedures for review of Title VII cases. The court noted that first the burden of proof rests with the plaintiff to establish a prima facie case of discrimination. Once the plaintiff meets this obligation, the burden then shifts to the institution to show that the facts and rationale for an employee decision were not motivated by sex discrimination. If the institution meets that burden, then the burden shifts back to the plaintiff to show that the rationale offered was simply a pretext to justify discrimination on the basis of sex. In this case a female alleged discrimination based on sex in her nonpromotion, nonappointment to an editorial board, and the award of salary. The court noted that alleged discrimination prior to enactment of Title VII could not result in litigation, but it could be considered by the court as being demonstrative of a pattern of illegal conduct. In this case, the univrsity was able to provide an adequate rationale for its actions against this employee, including the use of market value factors in arriving at salaries. The university also used her poor publication record as a rationale for her nonpromotion and for not equalizing salaries between the plaintiff and her colleagues.[13]

In another case involving a female faculty member alleging discrimination, the court again noted the shifting burden of proof. The court noted that statistical anlysis, while important, is not the sole criteria in showing the existence of a prima facie case of discrimination. The university was able to present reasons such as plaintiff's failure to meet the university's standards for scholarship and research as adequate to justify the nonpromotion decision.[14]

The time limit for filing a charge under Title VII is 300 days. In a Wisconsin case, the court ruled that the plaintiff was within the time limit, even though the institution's policy clearly stated that the academic dean's notice was the official notice of dismissal. The court stated that the structure of the tenure procedure was such that the chancellor's role appeared to be decisive even though the prior decision by the dean was labeled official. Therefore, the professor met the time limit even though he waited more than 300 days after the official notice for the chancellor's decision before filing.[15]

Sex discrimination through the assessment and awarding of fringe benefits to employees is one which received attention this past year. A

13. Lamphere v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).
14. Laborde v. Regents of the Univ. of Calif., 686 F.2d 330 (9th Cir. 1982).
15. Carpenter v. Board of Regents of the Univ. of Wis. Sys., 529 F. Supp. 525 (W.D. Wis 1982).

Wayne State University case dealt with the issue of whether insurance companies can use sex segregated mortality tables to calculate the size of employees' monthly annuity payments after retirement. The university offered its employees Teacher Insurance and Annuity Association (TIAA) and College Retirement Equity Fund (CREF). Under these two policies, a female retiree received a smaller annuity check than a male based on the actuarial probability that women live longer.

The circuit court found that TIAA and CREF were not employees but rather contracting insurance companies. However, the university could not be insulated from the discriminatory actions of the insurance company and would be held culpable. They ruled that the use of sex segregated mortality tables to determine annuities of retirees did not violate Title VII as long as the total actuarial value is equal for similarly situated men and women. They noted that in fact gender neutral tables would not equalize the treatment of men and women since the university would have to contribute more to the women's retirement fund and they would receive more total actuarial amount if they lived to their predicted statistical age. They differentiated this case from *City of Los Angeles v. Manhart*[16] which required "men and women to make unequal contributions to an employee-operated pension fund."[17] The Wayne State case did not contain such a contribution plan.[18]

The issue of the award of back pay where discrimination was alleged under Title VII was raised in an Ohio case. The court noted that back pay should not be awarded where the professor was making more money in private practice than he would have made as a faculty member. The court noted that the case law indicates that back pay is not allowable where subsequent wages are at or exceed the wages he would have received if he had not been discriminated against. The court also noted that compensatory and punitive damages are not allowed under Title VII.[19]

8.2a(3) Equal Pay Act

The question of whether a suit against the state under Title VII and the Equal Pay Act was blocked by the immunity prerogatives of the eleventh amendment was an issue raised by a University of Maryland case. A faculty member brought a suit alleging discrimination in pay. In court, the university moved to have the case dismissed, arguing that the eleventh amendment barred this suit. The court found that intent

16. 435 U.S. 702 (1978).
17. *Id.* at 717.
18. Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).
19. Adler v. John Carroll Univ., 549 F. Supp. 652 (N.D. Ohio 1982).

of Congress was clearly to bypass the immunities prerogatives of the eleventh amendment and allow private parties to sue in discrimination cases under Title VII and the Equal Pay Act.[20]

In another case, a female faculty member relied on the university's regression analysis model to show a violation of the Equal Pay Act. The regression analysis model showed that forty-nine percent of the males were overpaid, while only thirty-one percent of the females were overpaid. These percentages, according to the analysis, have "less than eight chances in 10,00 of occurring by chance." The court held that a regression analysis model alone could not be relied on to reach a finding of pay discrimination. The statistical analysis must be further supported with expert testimony as to its reliability. The burden of proving the reliability of the regression analysis model falls on the plaintiff. Since she failed to support the validity of the model with adequate expert testimony, she did not meet her burden of showing that women were discriminated against in compensation.[21]

8.2a(4) Age Discrimination in Employment Act of 1967[22]

One case in this area deals with "equitable tolling" or waiving the time limit within which one can file a complaint. A fifty-six year old medical professor alleged age discrimination in salary adjustments, available secretarial assistance, and fringe benefits when he was compared to faculty under forty years of age. He filed his charges on December 23, 1980, more than 180 days after the last alleged violation which occurred on June 25, 1980. In taking up the question of "equitable tolling," the court found that the plaintiff could not rely on awaiting the outcome of a grievance procedure as a rationale for waiving the waiting period. Since the plaintiff had no reason to expect that the grievance procedures would automatically turn out in his favor, he should have simultaniously pursued other legal remedies. The court noted that tolling would have been allowed if it could be shown that the discriminatory action or its effects continued beyond the date of the last discriminatory act. The plaintiff failed to make such a showing. The university's motion to dismiss was, therefore, granted.[23]

In Georgia a sixty year old university bookstore clerk charged that her position as a cashier was downgraded to a part-time position because of her age. The university filed three motions to dismiss. On the first motion, the court found that the tenth amendment did not bar

20. Bickley v. University of Maryland, 527 F. Supp. 174 (D. Md. 1981).
21. Wilkins v. University of Houston, 662 F.2d 1156 (5th Cir. 1981).
22. 29 U.S.C. § 621 *et seq.*
23. Sanders v. Duke Univ., 538 F. Supp. 1143 (M.D.N.C. 1982).

a suit by a private party nor did Congress exceed the commerce clause powers of the federal government in allowing the Age Discrimination Act to apply to state agencies. Further, the eleventh amendment did not provide immunity since the state statutes governing the board of regents give it the power to sue and be sued in any court of law, a position clearly upheld by the Georgia Supreme Court. However, the court dismissed the plaintiff's suit against the individuals, noting that the Age Discrimination Act does not make an individual personally liable. However, those persons in their official capacity should be named in the suit against the corporate entity. Ultimately, the court dismissed the charges since the plaintiff failed to seek informal administrative remedy through the Secretary of Labor, as the law provides, prior to litigation.[24]

The final case involved both the Age Discrimination Act and Title VII racial discrimination. The case is unique in that a Missouri college formerly under the Saint Louis Board of Education was transferred to the state college system. In the transfer process, all employment at the college was terminated and applications were taken to fill all positions. The plaintiff at forty-seven years of age applied for a tenured associate professor's position, having held a tenured position with the college under the Saint Louis Board of Education. When not hired, he charged that hiring a thirty year old nontenured faculty member and a sixty-two year old black tenured faculty member constituted discrimination on the basis of age and race.

The court found that this claim under the Age Discrimination in Employment Act was valid since the institution's reservation of some positions for nontenured faculty had a "disparate impact" on tenured faculty over forty years of age. The institution's defense of "economic savings" was inadequate as a defense in a prima facie case of "disparate impact." Further, the court found discrimination on the basis of race under Title VII of the Civil Rights Act of 1964. The plaintiff was able to show that the rationale for his employment decision was a mere pretext for discrimination on the basis of race. In every case where a qualified black and an equally qualified white were interviewed for a job the black was hired, indicating that race was the key factor upon which employment decisions were made. The court ordered the institution to award the plaintiff a tenured position. Back pay was denied since his salary during the interim was slightly higher than what he would have received at the institution. The court noted that plaintiff's property interest was not transferred when control of the college was transferred to a new board.[25]

24. McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982).
25. Leftwich v. Harris Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).

8.2a(5) Rehabilitation Act of 1973[26]

While no cases specifically dealt with higher education, one case could have future significance for discrimination of handicapped in employment. The Third Circuit Court of Appeals held that sections 504 and 505 of the Rehabilitation Act of 1973 covered discrimination of handicapped individuals employed by federal contractors or by organizations receiving federal financial assistance. The case was remanded to the district court for determination on the merits.[27]

8.2a(6) Hiring Discrimination

A number of cases involving discrimination dealt with the hiring process. While these cases could also be included under other sections, they were selected for presentation here because they deal with specific procedures in the hiring process which administrators and legal counsel should consider in designing a search.

In the first case, a black female brought suit alleging discrimination in the selection of an accounting lab assistant at a community college. The plaintiff held a Bachelor of Science degree in economics and had taken four accounting courses as an undergraduate. The person hired for the position, a white female, had completed a two year accounting program at the school, had advanced accounting courses, and was already employed as a lab assistant in the evening program. The Fourth Circuit Court of Appeals overturned the lower court decision which found discrimination in hiring. In reviewing the shifting burden of proof, the court found that the critical question is whether the plaintiff was better qualified than the person hired. The record showed that the plaintiff was not as qualified as the person hired. The court noted that under cross examination the plaintiff showed a lack of knowledge of double entry accounting and that the person employed had a greater knowledge of the job. The plaintiff failed to show that the rationale for selecting the other candidate was a pretext for discrimination.[28]

In another case several female faculty members brought a class action suit alleging discrimination on the basis of sex. One charge concerned the selection of the head of the department of health, physical education and recreation when the male hired had been introduced as the new head at a luncheon prior to announcing the vacancy. Also, the female candidate appeared to have superior qualifications. Another charge concerned the new director of educational experience

26. 42 U.S.C. § 2000(d) *et seq.*
27. LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982).
28. Lewis v. Central Piedmont Commun. College, 689 F.2d 1207 (4th Cir. 1982).

where a female candidate alleged that she held superior credentials compared to those of the new director and that the job qualifications of math and statistics were a pretext for discrimination. Several other faculty charged harassment by the new health, physical education and recreation department head.

The court found that discrimination had clearly taken place at the institution. The record showed the female applicants to be more qualified than the persons hired. The job description written for the director of educational experience contained no functions which required math and statistics. The male faculty member did not need to become the director to develop new math courses, his area of expertise. The court awarded the females back pay of what they would have received had they been selected as the department head and director. An award of adjusted compensation was made where discrimination in compensation had been proved. Finally, negative information was expunged from a personnel file where it was apparent that the information was being used as retaliatory action arising out of this complaint.[29]

In the final hiring case, a white male applicant for the assistant editor of a university alumni magazine charged he was discriminated against as a result of a memorandum sent by the affirmative action officer. The memo sent after the editor had placed the plaintiff first and a black female second in his hiring priority list reminded the editor of the institution's affirmative action plan and the importance of the qualification of familiarity with the institution on which the second candidate was better qualified. In a compromise, the editor tried to hire both top candidates on a part-time basis. Only the white candidate accepted and after a month of work the editor began to feel that the white candidate, who possessed substantial journalistic experience, was overqualified for this position. The editor reordered the priorities of the candidates, making the white applicant number four and hired someone else. The court found that overqualification for the position and lack of familiarity with the institution to be legitimate nondiscriminatory reasons for selecting another applicant.[30]

8.2b Nontenured Faculty

The amount and scope of litigation in the nonrenewal of an untenured faculty member's contract is ever increasing. These cases continue to be concerned with two areas: (1) removal based on first amendment protected speech and (2) procedures for nonrenewal.

29. Greer v. University of Ark. Bd. of Trustees, 544 F. Supp. 1085 (E.D. Ark. 1982).
30. Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981).

8.2b(1) First Amendment Freedom of Speech

Freedom of speech under the first amendment is viewed as a fundamental right. Faculty members have the right to be protected from removal from their position or denial of tenure based on speech covered by the constitution.

In a Texas case the director of research sued claiming that the sole reason for his denial of tenure was protected speech under the first amendment. The director had spoken out publically concerning improprieties in the use of research funds. At one point his immediate supervisor informed him that his job was in jeopardy if he continued to make these pronouncements. The district court found that the plaintiff's first amendment rights had been violated when his pronouncements became the sole reason for denial of tenure. They awarded damages consisting of attorneys' fees and back pay. The Fifth Circuit Court of Appeals affirmed the portion of the district court decision, finding that this first amendment rights had been abridged. The institution could not show any rationale other than his pronouncements which resulted in the nontenure decision. Charges that he was disruptive were not substantiated and really went to the unsettling nature of his pronouncements. However, the circuit court did not find that the officials of the institution acted maliciously, but rather that they had acted in the best interests of the institution. Therefore, they would not assess damages against the officials. They also disallowed the back pay award, since there was no clear indication that Texas statutes waived sovereign immunity under the eleventh amendment. State statutes clearly made the institution a state agent, bringing it within the immunity prerogatives of the eleventh amendment. The court, therefore, reversed the award of back pay, but allowed the award of attorneys' fees.[31]

In another Texas case, a faculty member claimed his first amendment rights were violated when he allegedly was denied tenure for refusing to change the grade of a student. The district court found his first amendment rights had been violated. The Fifth Circuit Court of Appeals reversed, stating that the district court erred in not looking beyond the first amendment violation to other reasons for nonrenewal. The court, based on precedent, ruled that a first amendment violation does not prevent nonrenewal if the record shows that nonrenewal would have taken place anyway. In this case, the university adequately showed that sound reasons such as inadequate performance of job responsibilities resulted in nonrenewal, not first amendment speech.

31 United Carolina Bank v. Board of Regents, 865 F.2d 553 (5th Cir. 1982).

The record aslo showed abusive and uncooperative behavior to others used as another reason for the decision to terminate.[32]

In a third case, a community college nontenured faculty member was terminated at the end of her contract period. This faculty member was repeatedly outspoken concerning various curricular and schedule matters. Her supervisors at trial testified that her nonrenewal was based on her uncooperative attitude as evidenced by her pronouncements. The district court ruled and the Fourth Circuit Court of Appeals affirmed that her first amendment rights had been violated since her nonabusive but controversial pronouncements were the sole reason for her dismissal.[33]

8.2b(2) Nonrenewal Procedures

In the area of nonrenewal of a nontenured faculty member's contract, one case indicates the controversies within which an institution can become embroiled in the process of dismissal. This case goes back to the 1970-71 academic year when a nontenured faculty member was offered a contract but was notified that it was terminal. The court labeled this the "nonrenewal decision." That same year after becoming involved in a scheduling problem and refusing to hold his classes, the faculty member was given several warnings and then dismissed at midterm. The court labeled this the "dismissal decision." A series of very complicated litigations over eleven years involving the full federal court system followed. The district court found his current contract gave him a property interest and required due process in the "dismissal decision" and that under the school's policy, due process was required in the "nonrenewal decision." In 1977 he was reinstated to his faculty position, attorney's fees were paid, and procedures were commenced to provide him with due process as ordered by the court. The committee on professional affairs held hearings concerning the "nonrenewal decision." They found his contract was not renewed for reasons violative of academic freedom and recommended his reinstatement. The president withdrew the nonrenewal letter and immediately relied on the "dismissal decision." The same committee held hearings in which the professor refused to participate and recommended dismissal. Post committee briefs were filed and a hearing was held before the board of trustees with testimony from the professor's attorney. His official dismissal was approved.

32. Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982).
33. Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982)

The Third Circuit Court of Appeals ruled that state law would govern whether a state could be sued in its own court. However, immunity through the eleventh amendment must be clearly and precisely waived. The executive branch or legislative branch has the appropriate authority to make such a waive. If the judicial branch waived immunity, while not the most appropriate method, it must be very precisely stated by the court. Since Pennsylvania has not waived immunity, the faculty member does not qualify for damages. The court ruled that the new hearing procedures were fair and provided due process.[34] The court, in summary, with a certain amount of consternation, stated: "We continue to hope that the same spirit of light, of liberty, and of learning which we believe characterizes places of higher education applies not only to faculty and student learning and research, but also to the relations between faculty and administration."[35]

In a case involving the promotion criteria for nontenured faculty, the court ruled that the promotion criteria did not become part of the binding contract. The Supreme Court of Oklahoma held that the board of regents had the authority to change the promotion policy and apply it to those not yet promoted.[36]

In a Maine case, a faculty member's drinking problem was discussed at several closed meetings to decide whether to grant tenure. While the drinking problem was only a secondary reason for not granting tenure, its presentation at a private meeting did not implicate the faculty member's liberty interest because of defamation of character. The court stated that the nature of the tenure decision and its consequent job security should allow the institution access to "the exercise of subjective judgment, confidential deliberation and personal knowledge of the candidate."[37]

However, the confidential deliberations cited by one circuit court were breached in a potential discrimination case in another circuit court. In this case a black faculty member was denied tenure. In order to pursue a civil rights claim, he filed a motion to compel discovery of the votes of two members of the promotion and tenure committee. While the trial court denied his motion, the Second Circuit Court of Appeals ruled that the lower court erred in denying the motion to compel discovery. On balancing the need for disclosure to bring forward a charge of discrimination against the need for confidentiality to protect academic freedom and peer review, the court found that in the absence

34. Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142 (3rd Cir. 1982)
35. *Id.* at 115.
36. Randolph v. Board of Regents of Oklahoma Colleges, 648 P.2d 825 (Okla. 1982).
37. Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981).

of reasons for the denial of tenure the balance shifts to the plaintiff's need for discovery.[38] When a charge of discrimination in nonrenewal of a nontenured faculty member is present, the institution appears to have two options: They can either provide reasons for nonrenewal or face a court action to compel discovery of aspects of the peer review process.

Finally, an administrator who was notified that his seventh contract was terminal did not have a proprty interest. Since he was in a nontenured position, he had no reasonable expectation for reemployment. The fact that he was given a full year to find a job aided in diminishing any liberty interest, property interest and resulting due process claim.[39]

8.2c Tenured Faculty

The issues involving the rights of tenured faculty have resulted in a number of litigations. These cases can be subdivided into several areas, including, termination of employment for cause, awarding of salary increases, denial of privileges associated with the position, and removal due to a financial exigency or program elimination.

8.2c(1) Termination for Cause

A number of cases have been decided in this area. Two have been selected because of their unique facts. Three other cases are concerned with procedures utilized during removal for cause.

In an Arkansas case, the dean of instruction at a community college was removed after he made public pronouncements concerning the administrative skills of the president. He refused, however, to bring these charges to the attention of the board and refused to supervise a faculty member under his control and he acted in an angry and abusive manner to the president and others. The president commenced an action for dismissal, charging unbusinesslike conduct and insubordination. At a hearing before the board, the dean of instruction was not allowed to present witnesses who could testify concerning the president's alleged incompetence. The plaintiff alleged that his first amendment rights had been violated since his termination was the result of protected speech. He also claimed violations of his due process rights when the board refused to hear the plaintiff's witnesses. The court found that the dean's first amendment rights were not violated since he was not dismissed for what he said but the manner of his pronouncements. The

38. Gray v. Board of Higher Educ. CUNY, 692 F.2d 901 (2nd Cir. 1982).
39. Harrison v. A. B. Ayers, 673 F.2d 724 (4th Cir. 1982).

record clearly showed that he expressed himself in a hostile manner and resorted to threats of physical violence. The court stated that there is no constitutionally protected right to express oneself in an unbusinesslike or unprofessional manner. The court also held that the hearing committee was only required to hear tstimony about the dean's action and attempts to present witnesses to address the president's job performance were appropriately disallowed.[40]

In a Washington case, a tenured faculty member, who had been reprimanded for being absent from the institution several times, ignored a specific directive and was absent at the beginning of the semester from the institution for an extra day while giving a speech in Israel. He was dismissed immediately on charges of insubordination. The board, after a hearing, approved the dismissal. The faculty member charged violation of his due process and first amendment freedom of speech rights. The court ruled that the first amendment was not implicated since the reason for dismissal was based on his conduct, not his speech. The court ruled that due process had not been violated nor was the dismissal viewed as excessive punishment because of a history or misconduct.[41]

In another case, conditions in the contract determined the court's decision. A faculty member, who was hired with a written agreement that he would automatically receive tenure in his third year, was notified that his second year contract would be terminal. The court found that his contract granting automatic tenure gave him a property interest requiring due process before termination.[42]

Procedures concerning release of the names of witnesses who will testify against a faculty member was the key issue in another case. A member of the music department faculty was notified of the charges against him, was given a hearing and was terminated for allowing students to consume alcohol and marijuana on a school-sponsored trip. The professor failed to request the names of the witnesses who would testify at the hearing against him. He filed suit alleging that his due process rights were violated when he was surprised by the testimony of witnesses which was not reflected in the charges, therefore, inhibiting his ability to defend himself. The court found that the charges against him were sufficient. They also ruled that by the contract he had a responsibility to supervise students on the band trips and failed to do so when he allowed them to consume alcohol and marijuana. The court

40 Bussy White, 541 F. Supp. 888 (W.D. Ark. 1981).
41 Stastney v. Board of Trustees of Cent. Washington Univ., 647 P.2d 496 (Wash. 1982)
42 Harris v. Arizona Bd. of Regents, 529 F. Supp. 987 (D. Ariz. 1981).

explained that even if he was surprised at the proceedings he failed to ask for a continuance. However, a concurring justice cautioned that institutions should be explicit and clearly spell out the charges the faculty member must defend himself against at the termination hearing.[43]

The board's prerogatives to take action contrary to the recommendation of a hearing committee was another procedural issue before the court. In a Kansas case, two faculty members were dismissed for disruptive activities over an extended period of time. Notice of charges was sent and a hearing was conducted. The hearing committee sent a recommendation not to terminate but the recommendation contained a minority report recommending termination. On review the board of trustees decided to issue a notice of termination. The court ruled that tenure statutes at Kansas public institutions require the board to make the final decision on termination or tenure decisions. The court noted that absent statutory authority, an administrative body performing a quasi judicial function, is not subject to inquiry concerning its mental processes in reaching a decision. The board was within its power to assess the evidence presented at the hearing and the hearing committee report and render a decision contrary to the hearing committee report. This decision did not violate due process.[44]

The final case presented in this section involves a leave of absence. A faculty member who had a one-year leave was offered a teaching position for the next year. He refused the position and elected to remain in graduate school. He never applied for or received approval for an extension of the leave, however, he stayed in communication with the college officials. The circuit court upheld a district court ruling that the timely offer and refusal of a teaching position constituted a "resignation or abandonment" of the faculty member's position removing any property interest requiring due process of terminating employment.[45]

8.2c Awarding Salary Increases

The awarding of salary increases has resulted in several cases in the last year. In an Alabama case an employee charged that due process was required when the university failed to grant a salary increase recommended the previous year by the salary review committee. The circuit court upheld the district court decision that an employee "has no protected property interest in the mere recommendation for a

43. White v. Board of Trustees of Western Wyoming Commun. College, 648 P.2d 528 (Wyo. 1982).
44. Kelly v. Kansas City, 648 P.2d 225 (Kan. 1982).
45. McGhee v. Miller, 680 F.2d 1220 (8th Cir. 1982).

raise." Therefore, due process was not required when the salary raise was denied.[46]

In another case, a retired professor charged that he was discriminated against in the awarding of salary because of speech covered under the first amendment. A jury trial found that the institution was able to show that legitimate reasons such as poor research efforts and not his pronouncements resulted in any salary differential. The circuit court affirmed both the district court and trial court decisions and held that due process hearings were not required when the university failed to give a pay raise.[47]

8.2c(3) Denial of Employee Privileges

When a tenured faculty member is denied certain employee privileges as a disciplinary action, is a property interest implicated? This issue was before the court in a Texas case. A faculty member of the medical school had his clinical privileges removed as a disciplinary action for repeated absence due to his wife's illness. The court found that removal of clinical privileges did not constitute denial of property interest requiring due process, nor was a liberty interest implicated because of an effect on the plaintiff's reputation. However, denial of plaintiff's right to communicate with any of his current patients may have constituted a violation of first amendment freedom of association and speech rights. The case was remanded for discovery and determination on this issue.[48]

8.2c(4) Termination for Financial Exigenices or Program Elimination

Because of the economic situations in many states, institutions in both the public and private sector have had financial exigencies resulting in staff reductions. In the face of reductions in state programs or enrollment decline, some state systems have chosen to simply eliminate whole programs at various institutions. While significant rulings on the procedures required to remove faculty under financial exigency conditions were decided in the seventies, this case law further refines legal problems associated with decisions to reduce higher education costs.

One of these cases which received much publicity involved action by the state of Michigan to implement budget reversions in the state system of higher education. A faculty member at Michigan State

46. Doyle v. University of Alabama-Birmingham, 680 F.2d 1323 (8th Cir. 1982).
47. Berry v. Battey, 666 F.2d 1183 (8th Cir. 1981).
48. Daly v. Sprague, 675 F.2d 716 (5th Cir. 1982).

University failed an action to stop the university from laying him off for several days, therefore reducing his annual salary because of a financial exigency. The university argued that a contrct to pay a certain amount for services should not be enforced in the face of financial exigencies as a matter of public policy. The Court of Appeals of Michigan found that no authority existed to breach an existing contract because of a financial exigency. Further, the court stated that honoring a binding contract would aid the university in acquiring and holding qualified faculty and such a policy would be in the best interest of the state and would promote sound public policy.[49]

In another case involving the elimination of a program, three tenured faculty received notices of termination of their teaching contracts at the end of the current contract period because the university was eliminating the program within which they taught. Selection of faculty to be terminated within the department was based both on teaching assignments and seniority. The plaintiffs argued that they held a property interest requiring substantive and procedural due process prior to termination. The court held that a bona fide implied right existed to terminate employment due to changes in an academic program. Such termination did not require due process procedures like those when terminating for cause. The fact that the university provided the plaintiffs with an opportunity to receive the rationale for the program change and access to a grievance procedure was sufficient. The court also noted the state system's good faith effort to find other positions within the state system for the terminated faculty.[50]

8.2d Collective Bargaining

At issue under a collective bargaining agreement is what procedures should be followed in denying tenure to a nontenured faculty member. The question in this case was whether access to the grievance procedures is part of required due process. A faculty member who was denied tenure filed for a declaratory judgment and injunctive relief. He claimed that refusal by the grievance committee to hear his case violated his due process rights. The university filed a motion for summary judgment. Upon granting the summary judgment, the court noted that the plaintiff could not simply rely on the fact that tenure was denied and the grievance procedures did not find in his favor, but rather must present genuine issues as to material facts. The merits of a

49. Karr v. Board of Trustees of Michigan State Univ., 325 N.W.2d 605 (Mich. Ct. App. 1982).
50. Jimenez v. Almodovar, 650 F.2d 363 (5th Cir. 1981).

tenure decision were clearly outside the perview of the grievance procedures as stipulated in the collective bargaining agreement.[51]

8.3 STUDENTS

In the area of litigation involving students' rights, this has been an active year. Issues involving admission to both undergraduate and graduate programs were before the courts along with the state's right to assess nonresident tuition. Cases involving the federal government's right to collect defaulted loans made their debut along with a claim involving a work study student's continued employment after the total yearly allowable financial award has been reached. The first amendment cases included the uses of student activity fees involving both association and speech rights and the recognition of organizations involved in political advocacy. Questions of students' rights in dismissal were also before the court addressing the issue of counsel's participation in disciplinary hearings and the procedures required for academic dismissal.

8.3a Admission

A United States Supreme Court case decided this year dealt with the denial of admission of a male to an all female institution in Mississippi. The petitioner filed suit alleging his equal protection under the fourteenth amendment had been violated when he was denied full admission to the Nursing School at Mississippi University for Women. His application was rejected solely on the basis of his gender. The university, created in 1884, was and continued to function as an educational institution for women. The university cited this long tradition, the philosophical belief in the benefits of a single sexed institution, and Title IX as a defense against this claim. Title IX expressly allows for institutions with a longstanding tradition of single sex enrollment to continue that tradition.

The district court granted a summary judgment to the university, saying that the plaintiff showed no issue in fact. The Fifth Circuit Court of Appeals reversed, finding that the state failed to show an important governmental objective related to discrimination on the basis of gender. The Supreme Court upheld the circuit court's position. The court held that regardless of Title IX, the Congress does not have the

51 Kaplan v. Ruggieri, 547 F. Supp. 707 (E.D.N.Y. 1982).

power to authorize state activity which violates the fourteenth amendment. Also, the state failed in its burden of showing that discrimination prohibited under the amendment should be allowed to alleviate existing disadvantage related to the classification, or that the gender-based classification achieved the compensatory objective of one-sexed institutions. The nursing program in opposition to the objective allowed males to audit courses and participate in continuing education and clinical work. Thus, the court found the university's admission policy based on sex to be a violation of the equal protection clause of the fourteenth amendment.[52]

Admission to professional school as an otherwise qualified handicapped individual was at issue in another case decided this year. A woman with severe emotional problems, a long history of repeated self attempts on her life, but an excellent academic record was admitted to medical school. On her application she failed to admit to any emotional problems. She was dismissed from medical school after repeated incidents manifested her psychological problems, and treatment resulted in little improvement. She later attended another university's public health masters program which she successfully completed. She spent seven years in government work at the highest levels of several agencies without recurring psychological problems.

She reapplied for admission to medical school and submitted to a psychiatric examination. The school refused to readmit her because of diagnosis of a continuing psychological problem which stood a high risk of being manifested under the stress of medical school. The plaintiff filed charges through the Office of Civl Rights (OCR), alleging discrimination in admission on the basis of handicap. The OCR found in her favor and attempted to reconcile the case. Failure of reconciliation resulted in a suit in district court. The district court granted her injunctive relief and ordered her admitted. On the merits, the court ruled that she was an otherwise qualified handicapped individual under the Rehabilitation Act of 1973.[53] They reached this opinion by disregarding the findings of OCR and the testimony of experts on emotional disorders and simply evaluating her ability to deal with life's stresses over the last seven years. The Second Circuit on appeal established the order of the shifting burden of proof in cases involving the Rehabilitation Act. First, the plaintiff must establish that she is a handicapped person under the Act and is qualified apart from the handicap. Second, the burden shifts to the institution to show that

52. Mississippi Univ. for Women v. Hogan, 50 U.S.L.W. 5068 (July 1, 1982).
53. Leftwich, *supra*, note 25.

the handicap was not improperly considered and is relevant to qualifications for the position sought. Third, the burden then shifts to the plaintiff ultimately to show how she is qualified in spite of the handicap and as equally qualified as other applicants admitted. The court found on the facts that the district court erred in not considering expert testimony and that the risk of recurrence of the debilitating emotional disorder was an acceptable reason for refusal of admission. The plaintiff failed to show that she was an otherwise qualified handicapped individual. Summary judgment was issued to the university and the injunctive relief issued by the district court to the plaintiff was vacated.[54]

8.3b Tuition

In a Supreme Court case, three G-4 aliens sued the University of Maryland for classifying them as nonresident students for tuition. This case had been before the Supreme Court on three other occasions. Initially, the University of Maryland held that a G-4 alien could not be domiciled in Maryland. The Supreme Court affirmed in part a lower court decision and sent the case back to the state court to determine whether aliens could establish domincile in Maryland.[55] In the interim, the University of Maryland changed its defense to one which describes the purpose of the policy as an attempt to differentiate between taxpayers and nontaxpayers in Maryland. On appeal to the Supreme Court, they refused to docket the case and remanded it to the district court to hear new constitutional issues raised by the change in the university's position.[56] On appeal in this opinion, the Supreme Court held that the University of Maryland policy violates the supremacy clause of the United States Constitution. The federal government has the power to regulate aliens and has granted them a tax exemption but permits them to establish domicile. The university policy of barring G-4 domiciled aliens from being classified as in-state students for tuition purposes violates the supremacy clause.[57]

8.3c Financial Aid

8.3c(1) Student Loan Default Collections

The first case in this section deals with right of the federal government to collect a defaulted Guaranteed Student Loan (GSL). The United States brought suit seeking recovery from a student who received the loan. The loan was given in 1968 and came due in 1970. In

54 Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981).
55 Elkins v. Moreno, 435 U.S. 647 (1978).
56 Toll v. Moreno, 441 U.S. 458 (1979), *per curiam*.
57 Toll v. Moreno, 50 U.S.L.W. 4880 (1982).

1974 the United States paid the lender's note. In 1979 the United States instituted this action to acquire the principal and interest accrued. The district court held that statutory provisions of federal insured student loan programs gave the United States no right to succeeed to the lender's claim against a student, nor did it give the government the right to direct recovery from the defaulting borrower. The circuit court reversed and remanded the case. It found that the statute gave the United States the right to seek recovery ("indemnification") upon its payment of the lender's claim. The court also held that the statute of limitations on recovery commences on the date of payment of the lender's claim.[58] This ruling on the statute of limitations was followed in another case.[59]

In another default case, a student raised questions about the inadequacy of the program enrolled in as a rationale for default. The United States brought suit seeking recovery from a student who had defaulted on a GSL. The student attended an institution during the 1975-1976 academic year. Repayment on the loan was scheduled for June 1978. In August of the same year, the United States Office of Education wrote the student requesting repayment or notification of any problem which would prevent repayment. The student failed to respond to this correspondence. The lender filed a claim with the Office of Education, the federal guaranty, and received payment on the claim in December of 1978. The student asked the court for a summary judgment claiming that the Office of Education was well aware of the inadequacies at the institution upon which he now bases his defense. The court ruled that the defendant (student) had the responsibility to inform the Office of Education of any defense for nonpayment prior to the processing of the claim and certainly should have responded to the August 1978 letter from the plaintiff. They also noted that the Office of Education had no responsibility of providing the defendant with notice of a hearing prior to payment of the cliam to the lending institution. The United States was entitled to reimbursement from the defendant.[60]

8.3c(2) Work Study Employment

A case was before the federal courts alleging that the institution had violated a student's rights by not allowing him to transfer from the workstudy account to the regular payroll when his workstudy money ran out. The student's employer, a faculty member, had asked him to continue working with his salary paid out of a grant held by the professor. Refusal by the university was based on federal regulations which

58. United States v. Bellard, 674 F.2d 330 (5th Cir. 1982).
59. United States v. Frisk, 530 F. Supp. 238 (N.D. Cal. 1980).
60. United States v. Griffin, 530 F. Supp. 604 (D.D.C. 1982).

do not allow a student on financial assistance to exceed the calculated financial need in any one year. The district court issued a summary judgment in favor of the university on all counts. The court ruled that section 1983 could not be applied to a private university where there was no finding of "state action." Secondly, there was no right to private action under the Federal College Work Study Statutes since the statutes dealt with the relationship between a federal agency and a state institution as opposed to the agency and citizens receiving benefits. The court also dismissed a third party beneficiary and civil conspiracy claim.[61]

8.3d First Amendment

First amendment cases this year involved two issues. The first issue involved the uses of activity fees, in which there were two types of cases. One case concerned funding a group alleged to be political through mandatory activity fees. The other case involved the use of fees to support abortions in the student health care facilities of the institution alleged to violate the free exercise of religion. The second issue dealt with the recognition of organizations and the freedoms of speech and assembly.

8.3d(1) Uses of Activity Fees

In a New Jersey case, students questioned a fee collection procedure used to fund a group called Public Interest Research Group (PIRG). PIRG is involved in both political activities and educational activities. The university set up a separate but mandatory fee collection process with an accompanying refund card for those who objected to the political activities of the organization. The students in this claim alleged that such a procedure violated their first amendment rights. The district court issued a summary judgment to the university, finding that the refund policy made the mandatory fee constitutional.

The Third Circuit Court of Appeals reversing and remanding, applied the standard of *Abood v. Detroit Board of Education*.[62] The *Abood* case states that service fees used in part for political advocacy could only be extracted from those agreeing with the political advocacy. Therefore, the circuit court remanded the case to the district court to allow the plaintiffs to establish the extent to which PIRG is essentially a political action group as opposed to an organization existing for educational purposes. Also, the university should be allowed to

61. Murphy v. Villanova Univ., 547 F. Supp. 512 (E.D. Pa. 1982).
62. 431 U.S. 209 (1977).

challenge the plaintiff's position or show a compelling state interest in the sponsorship of the organization. The court ruled that the refund mechanism was not enough to blunt an alleged first amendment violation.[63]

In another case, students claimed a violation of the free exercise clause because part of student fees were used to fund abortions and abortion counseling at the student health center. They asked the university to pro rate their fees to exclude that part of the fees which was used to pay for abortion activities. The students filing the claim opposed abortions on religious grounds. The appeals court held that the activity fees in this case were like taxes. The university has the right to levy a fee for general student support services. A constitutional right is not violated because individual students object on religious grounds to some of the services provided. Therefore, like taxes, all students must pay the fees regardless of religious affiliation.[64]

8.3d(2) Recognition of Organizations

In one case, a state statute concerning withdrawal of state funding because of recognition of certain organizations was challenged on constitutional grounds. In this Florida case, a community college trustee filed suit alleging that a Florida statute violates the first amendment to the Constitution and the Florida constitution. The statute removed state funding from any institution which recognized an organization whose purpose was to advocate sexual activity between unmarried individuals, in violation of an individual's freedom of speech. The Supreme Court of Florida held that the trustee, while not having "standing" in his official capacity, could bring a suit as a private citizen. The court held that the statute violated freedom of speech under the first amendment to the United States Constitution. The court also found that the Florida constitution article III section 12 was violated in that the statute was "not directly and rationally related to appropriations of state funds" but rather would achieve some other legislative objective unrelated to funding.[65]

Another case involves recognition of organizations. The Gay Stud nt Alliance brought suit alleging that failure of the university to recognize their organization after it has met all requirements violated their rights under the first amendment's freedoms of speech and assembly. The university based its defense on the disruptive nature of the organization

63. Galda v. Bloustein, 686 F.2d 159 (3rd Cir. 1982).
64. Erzinger v. Regents of the Univ. of California, 185 Cal. Rptr. 791 (Cal. Dist. Ct. 1982).
65. Department of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1981).

and that the organization may have promoted and participated in activities which violated Oklahoma law. The Supreme Court of Oklahoma ruled that first amendment rights had been violated in refusal to recognize this organization. Failing to show written documents or evidence of activity which violated Oklahoma law, the state could not rely on the mere suspicion that some members would violate the laws of the state. The key issue noted by the court was whether the state, after the organization had met all requirements, could deny recognition based on the "content of messages espoused by the organization." They found that the first amendment clearly protected those who peaceably promoted the repeal of a criminal statute. The court, however, refused to award damages to the plaintiffs, finding that the board members neither knowingly violated the constitution nor held a malicious intent, but rather acted in what appeared to them to be the best interests of the university.[66] This case follows several other recent cases concerning recognition of organizations.[67]

8.3e Dismissal

8.3e(1) Disciplinary Dismissal

The question of procedures required in dismissal of students for cause related to nonacademic conduct at public institutions is well established. Periodically, cases come along which further clarify the extent of these due process requirements. A case this year deals with the issues of the participation of legal counsel in the hearing process and the student's ability to compel witnesses to testify.

A student suspended for discipline violations for one semester brought suit alleging violations of procedural due process. The student missed two prehearing conferences as provided in the institution's bylaws due to an error in his mailing address. He received a notice of the charges against him, a hearing was held, and legal counsel was present. However, legal counsel was only allowed to participate in a limited way. He was allowed to assist and advise the student and to participate in part in the hearing as per the institution's bylaws. The district court held that failure to hold the prehearing conference did not in any way violate the rudiments of due process. The institution's procedures were clearly adequate to protect the constitutional rights of the student. The limitations placed on legal counsel's participation and

66. Gay Activist Alliance v. Board of Regents of the Univ. of Oklahoma, 638 P.2d 1116 (Okla. 1981).

67. *See* Healy v. James, 408 U.S. 169 (1972); Gay Alliance of Students v. Mathews, 544 F 2d 162 (4th Cir. 1976); Gay Student Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974); and Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977).

the fact that the student could not compel witnesses to attend the hearing in no way compromised due process in this situation.[68]

8.3e(2) Academic Dismissal

The question of procedures required in academic dismissal was addressed by the United States Supreme Court in *Horowitz v. Board of Curators of the University of Missouri*.[69] However, challenges continue to result in litigation. In the past year, at least six cases have been reported which dealt with academic dismissal.

One case dealt with the question of gender discrimination in the assignment of grades. The plaintiff alleged that her academic dismissal was the result of sex discrimination in the assignment of grades. She filed her claim under Title IX. The First Circuit Court of Appeals failed to reach the merits of the case, finding the receipt of workstudy money not enough to implicate the institution as a program receiving federal financial assistance within Title IX.[70]

In another case a medical student failed to complete in a timely manner the requirements of a clincial course. The student offered no substantial reasons to merit an incomplete instead of an "F". One "F" results in dismissl from medical school. The student charged that the decision to give him a failing grade was arbitrary and capricious and violated his substantive due process. The circuit court citing *Horowitz* and other cases discussed the need for courts to give deference to academicians in academic questions. There were no substantial facts to establish that the grade was assigned in an arbitrary and capricious manner, but rather based on a reasoned evaluation of the student's performance. The court stated that the medical school, not the federal courts, should evaluate and determine the performance of a medical student.[71] Three state court cases came to the same conclusion about academic dismissal and the assignment of grades.[72]

The final case in this section dealt not only with academic dismissal, but also with the academic aid required when admitting disadvantaged students. A minority law student was dismissed from law school after repeating his first year and failing to raise his grade point above the minimum. As a special admittee, he was not only allowed to repeat the first year, but in calculating his grade point average was allowed to

68. Turof v. Kibbee, 527 F. Supp. 880 (E.D.N.Y. 1981).

69. 435 U.S. 78 (1978).

70. Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981).

71. Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981).

72. *See* Patti Ann H. v. New York Medical College, 453 N.Y.S.2d 196 (N.Y. 1982); Neel v. I.U. Bd. of Trustees, 435 N.E.2d 607 (Ind. Ct. App. 1982); and *In re* Levy, 450 N.Y.S.2d 574 (1982).

repeat the first year, but in calculating his grade point average was allowed to drop the lower grades in all courses taken a second time. The student filed suit, charging a breach of contract, arbitrary and capricious action, and discrimination.

The lower court had granted a summary judgment to the university on all three charges. The appellate court affirmed the lower court decision. First, they found no breach of contract when a specific type of academic aid was not offered while other types of aid had been given. Nor did the school have to change its policy of not rounding off grade point averages. Second, they found no arbitrary or capricious action, but rather a decision based on sound academic standards. Finally, they found that rather than being discriminated against, the plaintiff in fact received special treatment not given to all students but only to those classified as disadvantaged.[73]

8.4 LIABILITY

Questions of the institution's liability continue to come before the courts. These issues take number of forms. The first is in the area of personal injury. Second is whether college athletes on scholarship qualify for workmen's compensation if disabled while playing or practicing. The third area deals with the institution's liability to an injured employee of a company providing services under a contract with the institution. The final area deals with the question of misrepresentations in the institution's publications.

8.4a Personal Injury

In the first case, a number of the school's intercollegiate softball team was struck in the eye by a softball. She was sent to her dorm room by the coaches and told it would be all right. She subsequently lost sight in that eye as a result of the injury. Medical experts testified that immediate medical attention in this type of injury results in a 90 percent recovery rate. The student charged in her suit that the coaches failed to provide medical assistance. The district court found that the institution had a responsibility to provide immediate medical assistance in this type of injury and had breached that duty. The circuit court upheld the decision, but either reduced the damage award or allowed a retrial to settle the question of the amount of the damage award.[74]

73. Marquez v. University of Washington, 648 P.2d 94 (Wash. Ct. App. 1982).
74. Stineman v. Fontbonne College, 664 F.2d 1083 (8th Cir. 1982).

In another case, a student, as part of a course, was required to participate in a play. In his role, he was to fall down while holding a glass when a crutch was pulled out from under his arm by another actor. The student fell and a large piece of borken glass severed nerves and tendons in his hand. He filed suit, claiming personal injury as a result of the inappropriate use of a real glass as opposed to a substitute glass normally used in theatrical productions. The district court issued a summary judgment to the university, finding that the glass was not defective and that the Texas Tort Claims Act[75] does not allow a person to question the policy decisions of a state employee, *i.e.*, the selection of a real glass as opposed to a theatrical prop by the professor and director of the play. The circuit court found that the Texas Tort Claims Act concerns "discretionary matters" of governmental policies of the executive and legislative branches of government. The government is liable for "negligent exercise of discretion" by government officials where it is outside the above exclusion. The selection of the glass was not a governmental policy decision and, therefore, the case was remanded for trial.[76]

8.4b Workmen's Compensation

A varsity football player, while under a financial aid agreement with the university, was injured during spring football practice and rendered a quadriplegic. The financial aid agreement offered the student free tuition, room and board, laboratory fees, book allowance, and other benefits in exchange for his services on the varsity football team. This aid would continue during injuries suffered while playing football for the school. The student filed a claim under the state Workmen's Compensation Act[77] before the industrial board hearing member, seeking recovery for a permanent total disability and medical expenses. The industrial board ruled that no employer-employee relationship existed and that he was not qualified for workmen's compensation. The court of appeals reversed the industrial board decision, finding that the agreement between the student and the university was a contract within the meaning of the Workmen's Compensation Act. The trustees of the university held a contract with the student to play football for the institution in exchange for financial aid. They also found that this employment was not temporary, but of a somewhat permanent duration. The case was remanded to the industrial board to determine the amount of compensation.[78]

75. TEX. REV. STAT. art. 6252-19 (Vernon).
76. Christilles v. Southwest Texas State Univ., 639 S.W.2d 38 (1982).
77. IND. CODE § 22-3-1-1.
78. Rensiny v. Indiana State Univ., 437 N.E.2d 78 (Ind. Ct. App. 1982).

8.4c Contractor's Employee Injury

This section deals with the liability of the institution when a contractor's employee is injured. In a case involving Wake Forest University, an employee for the food service contractor was injured when a cash register table provided by the university fell on her foot. The appeals court found that the university had a responsibility to a cafeteria worker employed by an independent contractor with the university. Since the food service company was an independent contractor with the university rather than a lessee, the contractor's employee was an "invitee" of the university. Therefore, the university had a duty to exhibit due care under all circumstances and a jury should determine whether the university was negligent in this matter.[79]

8.4d Misrepresentation

A student brought charges that a medical school falsely represented the holdings of its library, equipment provided in laboratories, the sequencing of classes, and the number of current faculty. He also charged that a photograph in the bulletin of a nearby hospital implied access to its clinical facilities when in fact that was not the case. To substantiate these charges, the student was required to meet four criteria: (1) misrepresentation, concealment, or nondisclosure of facts had to be present; (2) the plaintiff had to prove intent to deceive on the part of the defendant; (3) he had to show that he was justified in relying on the misrepresentation; and (4) his reliance resulted in injury to him. The court found the student was able to meet all four criteria on all of the alleged misrepresentations. The court found that the institution's failure to "disclose detrimental changes" in their facilities as represented in the school bulletin was concealment. They also found the school to be involved in "scienter," an element in fraud, by falsely representing the facilities and programs through information known to be untrue. Damages were awarded the student in the form of tuition and fee costs, air fare, and interest on said moneys.[80]

8.5 ANTITRUST

The issue under antitrust deals with the question of the National Collegiate Athletic Association's (NCAA) right to control the telecasting of collegiate football games under the guidelines of the Sherman Antitrust

79. Aarhus v. Wake Forest Univ., 291 S.E.2d 837 (N.C. Ct. App. 1982).
80. Idress v. American Univ. of the Carribean, 546 F. Supp. 1342 (S.D.N.Y. 1982).

Act.[81] The plaintiff in this case, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association, alleged that the NCAA control of the televising of college football games violated the Sherman Antitrust Act. The court found that the NCAA was involved in price fixing and restricted output, that its controls constituted a group boycott, that it controlled the market of televised college football games, and, therefore, was subject to an injunction under the Clayton Act. The court found it clear that the NCAA exercised monopoly power and granted the following relief. The current contracts negotiated between the NCAA and ABC, CBS and TBS television networks should be illegal and unenforceable. Further, the NCAA should be enjoined from enforcing the provisions of future contracts, acting as the exclusive bargaining agent for the sale of telecast rights and that membership in the NCAA did not give the NCAA the right to control a member institution's telecast rights.[82]

81. 15 U.S.C. §§ 1-2 (1960).
82. Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982).