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ABSTRACT

This eighth chapter of "The Yearbook of School Law, 1986" summarizes and analyzes over 330 state and federal court cases litigated in 1985 in which institutions of higher education were involved. Among the topics examined were relationships between postsecondary institutions and various governmental agencies; discrimination in the employment of postsecondary educational personnel; employment policies and practices affecting tenured and nontenured faculty members, administrators, and staff members; collective bargaining by college personnel; the sexual harassment of college employees; student rights related to admission, tuition, financial aid, civil liberties, and dismissal from a school; institutional liability in relation to personal injuries, workers' compensation, contractual agreements, deceptive practices, educational malpractice, and negligence; the authority of the National Collegiate Athletics Association over intercollegiate sports; and suits involving the impact on business enterprises of actions taken by postsecondary institutions. (PGD)

HIGHER EDUCATION

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INTRODUCTION

This year's litigation was again voluminous. Over 330 cases were reviewed in the preparation of the chapter. The Supreme Court ruled on the question of academic dismissal and refused to hear an appeal of a decision regarding the recognition of a gay rights organization. Title VII litigation involving discrimination against employees or applicants for positions continues to increase. One case in particular established a standard of proof of discrimination in class action cases. Sexual harassment of employees was added to the employment section of the chapter. Disputes over the award of fringe benefits and other privileges continue in significant numbers.

Student issues continue to focus in several areas. For example, nonresident tuition cases are present again this year, as are a substantial number of cases involving financial aid and loan defaults. Cheating cases dominate the section on discipline, while academic dismissal cases continue to reflect deference to academicians.

Educational malpractice cases created a new subsection in the liability section. A subsection on deceptive practices also was added. The application of NCAA regulations to students and institutions continues to result in litigation. In particular, rules surrounding eligibility were challenged in several cases.

INTERGOVERNMENTAL RELATIONS

This section is concerned with the relationships between postsecondary institutions and various governmental agencies. Litigation included questions of a municipality's authority to control construction of institutional facilities through zoning laws, conflicts over powers delegated either to the state legislature or board of trustees, the

assessment of sales tax in the transfer of a student newspaper, and whether state funds can aid private institutions. In a related case, the authority of a voluntary accrediting agency is challenged.

The section opens with a challenge to the federal government's taxing authority over a faculty offspring tuition assistance plan and retirement annuities. In Ohio, a private institution sought a refund on withholding and Federal Insurance Contribution Act (FICA) taxes assessed on foundation money paid to faculty to defray the cost of the college tuition for their children. The institution had set up a foundation to distribute funds to faculty for their children's education at an institution of their choosing. A federal district court ruled that cash tuition assistance grants were "taxable income" but were not wages requiring FICA taxes or withholding.[1] In an appeal of a lower court decision, Temple University sought an exemption from paying FICA tax on amounts employees elect to use to purchase retirement annuities which qualify for income tax deferral. Temple was asking for a refund on FICA taxes paid for these amounts for the taxable years 1979 to 1982. The Third Circuit Court affirmed the lower court decision, since no federal statutory provision supported the FICA exemption claim.[2]

Challenges to the authority of the Board of Trustees was the issue in several cases. In a Louisiana case, the Board of Trustees of Southwestern Louisiana University renamed the institution Louisiana University. The Louisiana Board of Regents brought suit, seeking to enjoin the action of the S.L.U. Board. The trial court ruled that the constitution and statutes empowering the Board of Trustees do not allow them to change the name of the institution, but confer those powers solely to the state legislature. The Louisiana Court of Appeals, in affirming the trial court decision, ruled that a subsequent statute did not render the question moot, because the trial court's interpretation was based on state constitutional provisions which supersede state statutes.[3]

In a South Dakota case, taxpayers brought an action to prevent the enforcement of legislation enacted by the state legislature to close the normal school at Springfield and turn the property over to the Board of Charities and Corrections for use as a prison.[4] The state su-

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1. Western Reserve Academy v. United States, 619 F. Supp. 394 (N.D. Ohio 1985).
2. Temple Univ. v. United States, 769 F.2d 126 (3d Cir. 1985).
3. Board of Regents of La. v. Board of Trustees, 460 So. 2d 80 (La. Ct. App. 1984).
4. South Dakota S.B. 221 (1985).

preme court found, based on the enabling act establishing the state and the state constitution, that any land given to the state for educational purposes must either be used for educational purposes or sold at fair market value and the proceeds used for education.[5] Senate Bill 1 would violate the nature of the trust, since it simply turned over land to another state agency which is not in the business of education. The court stated that this does not mean that the state is prevented from closing the institution at Springfield, but rather that it must sell the land and use the proceeds for education.[6]

A Pennsylvania case involved the state system's purchasing powers. A law required state agencies to purchase products from a "nonprofit-making" agency for the handicapped if their products were offered at fair market value.[7] This controversy arose out of legislation which formed a separate agency for the higher education system and empowered the board and institutions to make purchases and enter into contracts.[8] The court found that, under state law, the state system of higher education was required to purchase goods offered at fair market value from the nonprofit-making agency.[9]

Another case involved the jurisdiction of the Mississippi Chancery Court over a tort liability suit against a Louisiana private university conducting business in Mississippi. The court had attached certain indebtedness owed to a Louisiana university by Mississippi corporations or individuals.[10] The university's involvements, sufficient to implicate court jurisdiction, included recruitment of students, provisions for medical services and medical education, solicitation of alumni, and membership in an athletic conference which included a Mississippi public university. The court found these contacts to be significant so as to override the immunity provisions of the Constitution under the due process clause of the fourteenth amendment.[11]

Aid to private institutions was at issue in a Washington case involving the issue of whether the sale of bonds under the Washington

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5. *See* Enabling Act, 25 Stat. 676 (1889), South Dakota Constitution art. VIII, § 7.

6. Kanaly v. State, 368 N.W.2d 819 (S.D. 1985). *See* Merkwan v. State, 375 N.W.2d 624 (S.D. 1985), for a similar ruling on the transfer of a closed university's trust land and funds.

7. 24 Pa. Admin. Code 2409.1 (Sheppard's 1929).

8. 1982 Pa. Laws § 660.

9. Pennsylvania Indus. for the Blind and Handicapped v. Commonwealth State Sys. of Educ., 485 A.2d 1233 (Pa. Commw. Ct. 1985).

10. Administrators of the Tulane Educ. Fund v. Cooley, 462 So. 2d 696 (Miss. 1984).

11. Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Higher Education Facilities Authority[12] for facilities at two private church-related institutions violated the state's constitutional provisions preventing the use of public funds for sectarian activities. The court found that the sale of bonds was simply the granting of the state's tax exempt status to the bonding authority. The granting of the use of the tax exempt status was neither the conferring of public money or property, nor did the scheme used by the bonding authority involve the issue of public credit or the assumption of debt by the state. Therefore, the act was held constitutional.[13]

In a Florida case, a newspaper purchased by the student government from a publisher and donated at no charge to students was ruled by a lower court to be a sale by the publisher requiring the assessment of sales tax. On appeal, the court ruled that because the newspaper was given away and not sold did not, under the tax statutes, change its definition as a newspaper exempt from sales tax.[14]

Sunshine laws were again before the court. Under Michigan's Freedom of Information Act,[15] the plaintiff sought information on grants and payments from a research institute at a public university. The plaintiff indicated that it would take approximately three months to conduct a review of the records. Since the records were on microfilm, the university required that an employee be present to monitor the review to prevent damage or destruction of the records. Absent provisions in the statute, the court ruled that a two-week time period would be adequate and that the cost for additional monitoring must be borne by the plaintiff.[16] In a Mississippi case, the court ruled that the Board of Trustees of State Institutions of Higher Learning would be subject to the open meeting provisions of the state's sunshine laws.[17]

Questions of the application of zoning laws to facilities of colleges and universities were litigated in several jurisdictions this year. In a New York case, the zoning code exempted schools, but said nothing about colleges; as a result, the zoning board required a university to seek a variance, which later was denied. The court ruled that a college is no different than other schools and ruled that the zoning law was

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12. Wash. Rev. Code § 28B.07.010 *et seq.* (1984).

13. Washington Higher Educ. Facilities Auth. v. Gardner, 699 P.2d 1240 (Wash. 1985). *See* Cortez v. Independence County, 698 S.W.2d 291 (Ark. 1985) (for a similar case involving a county's bonding authority).

14. Campus Communications, Inc. v. Department of Revenue, 473 So. 2d 1290 (Fla. 1985).

15. Mich. Code Law §15.231 *et seq.* (1979).

16. Cashel v. Regents of Univ. of Mich., 367 N.W.2d 841 (Mich. Ct. App. 1985).

17. Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985).

void insofar as it treated colleges differently from other institutions.[18] A Pennsylvania law[19] exempting the state university medical center from certification by the Department of Health prior to expansion of its medical facilities was challenged by other hospitals located in the metropolitan area of the medical center. The basis for the challenge was the supremacy clause, the fourteenth amendment due process clause, and the equal protection clause of the United States Constitution. The district court ruled that the state law was not in conflict with the National Health Planning and Resources Act of 1974, therefore not implicating the supremacy clause. Furthermore, the alleged loss that plaintiff might suffer because of the exemption did not implicate the due process clause. Finally, legislation aimed at promoting a public interest would survive an equal protection challenge.[20]

A number of zoning cases involved the construction of residence halls in neighborhoods near the campus. A Pennsylvania court found that dormitories fit within the meaning of educational purposes as defined in the zoning laws of the municipality. This determination affirmed the zoning board's action, awarding a private college a permit to build a dormitory in a residential neighborhood zoned for single-family dwellings.[21] In another case, petitioner filed this action in court after the community's superintendent ruled that a variance in the zoning laws was not required for a college to build a dormitory on its property zoned as residential. The petitioner also was seeking adjudication of the planning board's report of no detrimental environmental impact resulting from the college's construction plans. The court found that an administrative remedy of appeal to the zoning board existed for both the superintendent's and planning board's decisions. Failure to seek the available administrative remedy barred this litigation by petitioner.[22] A Massachusetts case involved a long drawn out battle over a zoning decision to prevent a college from utilizing a building as a residence hall. The selectmen of the community denied the college's request based simply on their discretion to do so. The institution's residence halls met the lodging house licensing requirement necessary to operate a residence hall. The appeals court found that the selectmen's action violated the "Dover Amendment,"[23] which prohibited the denial of variance for land used for educational pur-

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18. Cornell Univ. v. Bagnardi, 486 N.Y.S.2d 964 (N.Y. App. Div. 1985).
19. Health Care Facilities Act, 35 Pa. Cons. Stat. § 448.101 *et seq.* (1984).
20. Harrisburg Hosp. v. Thornburgh, 616 F. Supp. 699 (M.D. Pa. 1985).
21. Dale v. Zoning Hearing Bd. of Tredyffrin Township, 496 A.2d 1321 (Pa. Commw. Ct. 1985).
22. Jonas v. Town of Colonie, 488 N.Y.S.2d 263 (N.Y. App. Div. 1985).
23. Zoning Enabling Act, Mass. Gen. Laws Ann. ch. 40A § 3 (West 1975).

poses. While normally the court would remand the case to the selectmen for a new decision, the longstanding nature of the controversy and the selectmen's continuing effort to stop the college from opening the residence halls was an adequate basis for the superior court to order the issuance of a lodging house license.[24]

Two cases involved the issuing of a license or certification. A federal district court upheld the right of the National Association of Trade and Technical Schools, Inc. (NATTS), an accreditation agency, to withdraw the accreditation of a member trade school. The court found that NATTS had not acted in an arbitrary and capricious way and had afforded the school due process in the accreditation process.[25] The Educational Institution Licensure Commission of the District of Columbia denied an educational institution permission to award a degree within the District, since it failed to meet the minimum standards for faculty and library facilities prescribed by law.[26] The court found that neither the law nor the commission's action violated the provisions of the first amendment. Furthermore, the court noted that the criteria used by the commission were neither vague nor improperly applied in this case.[27]

EMPLOYEES

The amount of litigation surrounding employment issues continued to increase while many cases emanated from states with financial problems. Disputes ranged from charges of discrimination in employment to allegations of a breach of contract. A new section on sexual harassment of employees was added to this year's chapter.

Discrimination in Employment

Title VII litigation continued to increase, while very few cases relied on title IX as a basis for a complaint. Several cases alleging discrimination based on a physical disability were actually brought

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24. Newbury Junior College v. Town of Brookline, 472 N.E.2d 1373 (Mass. App. Ct. 1985).

25. North Jersey Secretarial School, Inc. v. National Ass'n of Trade and Technical Schools, 597 F. Supp. 477 (D.D.C. 1984).

26. D.C. Code Ann. §§ 29-815–818 (1981). To Regulate Degree-Conferring Institutions in the District of Columbia.

27. Nova Univ. v. Education Inst. Licensure Comm'n, 483 A.2d 1172 (D.C. 1984).

under state laws rather than under the Rehabilitation Act of 1973. Sexual harassment continued to be a developing area of litigation.

Title VI. Allegations of discrimination based on race involved the issues of hiring and dismissal for cause. In a North Carolina case, black extension agents alleged discrimination in salaries, hiring, promotion, and the organization and sponsorship of 4-H Club programs, in violation of title VI of the Civil Rights Act of 1964. The district court, using multiple regression analysis and specific hiring and salary data on a comparative basis, found no discrimination on the basis of race in any of the areas alleged. The Fourth Circuit Court, after a thorough analysis of both the regression analysis and the comparative data, affirmed the lower court decision.[28]

In another North Carolina case, a white male faculty member charged discriminatory treatment by a predominantly black institution. The court found that he had failed to establish a *prima facie* case. While differential treatment did exist between black and white faculty at the institution, it could be accounted for by the nature of the institution as a predominantly black college.[29]

In an Iowa case, the Eighth Circuit affirmed a lower court decision. The court ruled that the denial of the promotion of a black professor was for reason other than race. They also dismissed his equal pay claim since he had been involved in an earlier class action settlement.[30]

Title VII. This section will lead off with a case which may set the standard for future class action cases under title VII. In a very complex case involving both title VII and the Equal Pay Act (EPA), the University of Rhode Island (URI) found itself in a class action suit filed by female employees.[31] This case is a consolidation of several individual cases filed by Misses Chang, Seleen, Kraynek, and Roworth.[32] The court first analyzed the affirmative action policies of URI and found that they were characterized by a period of inaction. The court then turned to an analysis of the proof required in a class action suit under title VII. In class action, the court found that the proof beyond

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28. Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).
29. Turner v. Barber-Scotia College, 604 F. Supp. 1450 (M.D.N.C. 1985).
30. Anderson v. University of N. Iowa, 779 F.2d 441 (8th Cir. 1985).
31. Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985).
32. *See* Chang v. University of R.I., 554 F. Supp. 1203 (D.R.I. 1983).

the establishment of a *prima facie* case was different than in individual law suits. Citing the *International Brotherhood of Teamsters v. United States*,[33] the court stated:

> Class action litigation implicating [t]itle VII is, however, a fundamentally different breed of cat. The essence of a class action is an endeavor to prove that there was a systemwide pattern or practice of disparate treatment or that facially neutral policies had the effect of impacting one or more protected classes in disparate and less favored ways.[34]

The focus of the proof in class action cases is not on individual cases, but rather on patterns of discrimination. The court further defined the framework for its analysis by discussing statistical analysis and the court's refusal to quibble over standard deviations but rather to use appropriate statistical analysis in combination with "anecdotal evidence" (specific facts and individual fact situations) to arrive at an overall perspective as to whether the class had been discriminated against. After defining this framework, the court analyzed the issues of the complaint one by one. These issues were hiring, rank at hiring, salary at hiring, annual compensation, tenure, and promotion.

The court found that the statistical evidence, when reviewed in light of the anecdotal evidence, failed to show that the university was discriminating against women applicants in hiring. The court found that the small number of female faculty could be explained by factors other than a hiring bias.[35] However, in rank at hiring, the court found that the statistical evidence and the anecdotal evidence pointed to a policy of assignment of rank at hiring which was both uneven and unexplained. The findings showed disparity in the ranks assigned to men and women at instructor/assistant level and assistant/associate level not accounted for by criteria such as degrees held or prior experience. The finding of discrimination in setting rank at hiring also affected the setting of salary at hiring. The court acknowledged the acceptability of market value factors in arriving at salaries, but found no scheme using these factors in the setting of salary at hiring at URI. The statistical evidence and anecdotal evidence taken in light of a finding of discrimination in the setting of rank yielded a finding of discrimination in the setting of salary at hiring.[36] The court found no

33. 431 U.S. 324 (1977).
34. 606 F. Supp. at 1184.
35. *Id.* at 1197.
36. *Id.* at 1226.

discrimination in annual compensation, promotion, and the award of tenure.[37]

The court awarded back pay for the class of women based on a reassessment of their rank at hire, salary at hire, and salary increases for each subsequent year of pay, based on the formula used for increases each year. On the individual claims, they found that Kraynek was able to prove discrimination in pay, and that Roworth was able to show an impermissible denial of early tenure. Since this was a bifurcated process and damages were not addressed by the court here, litigation of these two claims for damages will proceed. Furthermore, attorney fees were awarded to those who had prevailed in their individual claims.

A number of cases raised the question of the court's authority to adjudicate a title VII claim. Issues ranged from questions of *res judicata* to state immunity claims. In one case involving *res judicata*, a minority employee lost his position with the county extension service. The employee alleged that his complaint about the discriminatory practices towards students, staff, and 4-H clubs precipitated his removal from his position. A state administrative judge found the plaintiff guilty on four charges and ordered him transferred to a new county rather than being dismissed. The plaintiff's title VII claim also included an injunction to prevent transfer until the title VII claim was litigated. The defendants, on appeal, argued that the federal district court lacked jurisdiction over a state administrative judge's decision and claimed that *res judicata* prevented relitigation in federal court. The Sixth Circuit ruled that a title VII claim was within the district court's jurisdiction and was not barred by previous litigation on state charges.[38]

In another case, the Seventh Circuit reversed and remanded a title VII case involving a white male painter who charged that the university had discriminated against him in hiring. The circuit court found that the district court had erred.[39] *Res judicata* did not apply where a state claim filed by the plaintiff had been dismissed. Furthermore, the state administrative judgment providing relief did not bar a title VII action in federal court.[40]

In another title VII case involving court jurisdiction, an appeal of

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37. *Id.* at 1242, 1253, 1266.

38. Elliott v. University of Tenn., 766 F.2d 982 (6th Cir. 1985).

39. Patzer v. Board of Regents of Univ. of Wis. Sys., 577 F. Supp. 1553 (W.D. Wis. 1984).

40. Patzer v. Board of Regents of Univ. of Wis. Sys., 763 F.2d 851 (7th Cir. 1985).

a summary judgment[41] had been transferred to a state agency. The state agency sent the complaint back to EEOC, stating it would not process the charge at that time. The circuit court noted that the intent of title VII was not to prevent double coverage by both state and federal statute, but rather to prevent concurrent adjudication. Under the "work-share" agreement between the state agency and EEOC, the state had in effect terminated ("halted") prosecution at the time of the filing of the complaint with the court, as stipulated by law.[42]

Several cases were dismissed because the damage claims could not be adjudicated in federal court. A title VII case involving claims for punitive damages and damages for pain and suffering was dismissed. Plaintiff based these claims on defendant's acts of removing her secretary and phone from her office prior to dismissal. The court ruled that title VII does not provide remedies for these employer actions.[43] In another case, plaintiff's attempt to attach breach of contract and tort claims to a title VII claim was dismissed because the state had immunity under the eleventh amendment from prosecution in federal court on state claims.[44]

Title VII litigation also involved complaints involving the nonrenewal of a contract or removal from a position for cause. In an Indiana case, a psychiatrist fired from her position because she refused to adjust her private practice schedule and meet her work obligations alleged a title VII violation. The district court had granted the defendant a summary judgment. The circuit court ruled that the establishment of a *prima facie* case did not prevent the lower court from granting a summary judgment if adequate nondiscriminatory reasons were provided by the defendant and if the plaintiff failed to show an issue of material fact which indicated that a pretext may have existed.[45]

In another case, a female brought a title VII charge of employment discrimination due to the institution's refusal to grant her part-time status and for firing her for holding down two jobs in violation of institutional policy. The institution had warned the plaintiff that she would be fired if she failed to relinquish her other full-time position. The plaintiff was able to substantiate that the president of the institution had stated that he saw no reason why a woman needed to hold down two jobs. The Eleventh Circuit remanded the case to the district

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41. Isaac v. Harvard Univ. 603 F. Supp. 22 (D. Mass. 1984).
42. Isaac v. Harvard Univ., 769 F.2d 817 (1st Cir. 1985).
43. Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984).
44. Hoferek v. University of Mo., 604 F. Supp. 938 (W.D. Mo. 1985).
45. Klein v. Trustees of Ind. Univ., 766 F.2d 275 (7th Cir. 1985).

court since the plaintiff was able to show that she was denied part-time employment status granted to males and that discriminatory statements were made by her employer.[46]

In the Eighth Circuit, the court upheld a lower court ruling. A female administrator charged both race and sex discrimination in a community college's action to remove her from an administrative position and place her in her former teaching position. At trial, the district court found that the plaintiff succeeded in establishing a *prima facie* case of discrimination, but the institution was able to substantiate nondiscriminatory reasons for its action.[47]

The hiring practices of colleges and universities were also at issue in title VII litigation. A hiring discrimination case with a complicated history was in the circuit court on appeal. Earlier, the circuit court found that the lower court had erred in ruling that the plaintiff was no longer a candidate for the position as a physician in the health center.[48] On remand, the district court found that, while the plaintiff was an active candidate for the position, the defendants had adequate reasons to believe that she was not a candidate and, therefore, hired someone who had equal or better qualifications. On appeal, the circuit court noted that, while the discriminatory allegations involved the most recent hiring by the health center, the plaintiff had been a candidate five times in which she was passed over for male applicants even though she had been told at least on one occasion that she was next on the list for hiring. The lower court had erred while the facts supported the defendant's knowledge that the plaintiff was an active candidate for the position. The circuit court found the plaintiff to be equally qualified but discriminated against due to her sex. Acknowledging her entitlement to appropriate relief, including hiring and backpay, the case was remanded to the district court.[49]

In another case, a university hired a Hispanic male over a white female for a position in the English department. The Hispanic was hired because the institution had a student population which was 80% Hispanic, but had no Hispanic faculty in the English department. The female filed sex discrimination charges under title VII, but did not file charges of discrimination based on national origin. The circuit court upheld a district court ruling that the plaintiff could not use discrimi-

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46. Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985).

47. Adolphe v. St. Louis Community College, 753 F.2d 687 (8th Cir. 1985).

48. Joshi v. Florida State Univ., 486 F. Supp. 86 (N.D. Fla. 1980), *aff'd in part, rev'd in part, and remanded*, 646 F.2d 981 (11th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

49. Joshi v. Florida State Univ. Health Center, 763 F.2d 1227 (11th Cir. 1985).

nation based on national origin to establish a *prima facie* case of discrimination based on sex. The fact that she was a female played no role in the institution's hiring decision, and she had not filed charges on other grounds.[50]

In the Fifth Circuit, an institution's job requirement of a master's degree from an accredited library science program did not have a disparate impact on the plaintiff, a female, when 79% of the recipients of the degree were women. Furthermore, the plaintiff was not discriminated against by the refusal to recognize her master's degree in education as fulfilling the position requirements.[51]

A Florida case involved hiring practices under an affirmative action plan implemented by court order. The plan involved the use of a racial quota in hiring and stipulated that, if no minority candidates were in the final four reviewed for hiring, the person selected would be hired on a temporary basis and the position would be reopened. Plaintiff, hired on a temporary basis, applied for the reopened position and emerged as one of four candidates for the position. A minority candidate was hired, and the plaintiff filed suit under both title VII and the ADEA (age discrimination). The circuit court ruled that the court-ordered affirmative action plan using racial quotas was valid and "did not result in 'discharge' nor a trammelling of [plaintiff's] interests."[52]

Tenure awards were at issue in a number of title VII cases. In a Wisconsin case involving the denial of tenure, the plaintiff (a female) charged disparate treatment under title VII, based on sex. The court found that, even when comparing her with a similarly situated male, the promotion committee had nondiscriminatory reasons for its differential decision between the two candidates. The male candidate's peers in biology, through a unanimous vote to promote, had more confidence in his future promise, based on the quality of his publications and a recently acquired research grant. On the other hand, the female's peers in zoology had mixed assessments on the quality of her published works and future promise, which was reflected in a closely divided vote to promote. The evidence, according to the court, showed that her department anguished over its decision and that tenure decisions, while closely scrutinized by the court, must be in the hands of experts capable of making such judgments.[53]

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50. Lyford v. Schilling, 750 F.2d 1341 (5th Cir. 1985).

51. Merwine v. Board of Trustees for State Inst., 754 F.2d 631 (5th Cir. 1985).

52. Palmer v. District Bd. of Trustees of St. Petersburg Junior College, 748 F.2d 595, 601 (11th Cir. 1984).

53. Namenwirth v. Board of Regents of the Univ. of Wis. Sys., 769 F.2d 1235 (7th Cir. 1985).

In a limited ruling on a defense motion to grant a summary judgment on the portion of the plaintiff's charge seeking judicial relief in the award of tenure, the court did not want to rule out the possible award of tenure, since the nature of the alleged discrimination was yet to be established. If discrimination was found, the remedy would be determined by what would make the plaintiff whole again. Such a finding might result in a remand for a *de nova* evaluation of the tenure question or a court-ordered award of tenure.[54]

In a Virginia case, a minority female charged disparate treatment in the denial of an award of tenure. She alleged violations of title VII and due process. In reviewing her dossier under the appropriate tenure procedures, she was found to be deficient in scholarship—a nondiscriminatory reason she was unable to rebutt as pretextual.[55]

One case involved promotion, but is closely related to the tenure award cases. This Maryland case, on appeal, involved a black female who was rejected for a full professorship. An earlier decision rejected a motion to dismiss, but also ruled that the plaintiff was only entitled to back pay and reinstatement.[56] In this disparate treatment case, a *prima facie* case of discrimination based on race was established by the plaintiff. The university established three nonpretextual reasons for their refusal to promote the plaintiff. The reasons—her failure to provide a recommendation from a full professor outside the university, the limited quality and quantity of her publications, and her failure to receive unqualified approval of full professors in the department—were valid and nondiscriminatory. However, the court noted that the university's search and screen procedures, while not discriminatory, lacked the professional standards expected.[57]

The question of award of attorney fees was before the court as part of a title VII claim settled through a "Stipulation of Settlement." The court awarded a one-half reduction in the normal attorney fees to the plaintiff. They found that the agreement clearly allowed plaintiff to seek such fees and that the plaintiff could be viewed as a "prevailing party" in this case. The reduction in fees accounted for the plaintiff's partial success on the claims in the settlement.[58]

The question of tolling was again before the court in a number of cases. An Indian psychiatrist's failure to file a charge of discrimina-

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54. Pyo v. Stockton State College, 603 F. Supp. 1278 (D.N.J. 1985).
55. Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984).
56. *See* The Yearbook of School Law 1985 at 310; McAdoo v. Toll, 591 F. Supp. 1399 (D. Md. 1984).
57. McAdoo v. Toll, 615 F. Supp. 1309 (D. Md. 1985).
58. Thomas v. Board of Trustees of Regional Community Colleges, 599 F. Supp. 331 (D. Conn. 1984).

tion for ten years was inexcusable and severely hampered the defendant's rights to mount a defense.[59] In Illinois, a move to dismiss a title VII claim on tolling grounds was successful, in part. The plaintiff was given thirty days to show that the state agency had terminated its action within the requisite time. Also, the court noted that the state laws' tolling provisions of 180 days did not apply to title VII. The court also rejected the plaintiff's argument that a series of separate hiring decisions constituted a continuous act of discrimination, meeting the tolling requirement counting from the last discriminatory incident. The court noted that, while several decisions may be viewed as continuous when the applicant did perceive the discrimination, the repeated denials, in this instance, were bold enough to have alerted the plaintiff earlier and should have resulted in the timely filing of charges.[60] A New York plaintiff filed a charge in 1977 for discriminatory acts which occurred in 1973, 1975, and, after the filing, in February 1977. The court ruled that the discriminatory acts of 1973 and 1975 were beyond the tolling requirements of title VII and that the complaint could not cover alleged discriminatory acts occurring after the filing of the complaint. Plaintiff must file a new claim for those acts.[61]

In a title VII case also involving equal pay, an emeritus professor filed suit in 1974 alleging discrimination under title VII and in 1976 under the EPA. In 1983, the circuit court awarded her damages back through 1977 on her equal pay claim, applying the three-year limitation based on the 1980 filing date.[62] The 1974 claim was previously remanded because the circuit court found that the trial court had erred in ruling that pre-Act evidence was inadmissible.[63] On remand, the plaintiff was able to use evidence back to 1947 to prove that she was treated differentially from similarly qualified male professors. The Eleventh Circuit affirmed the trial court ruling that she should receive compensation for the effects of sex discrimination in rank and salary since 1972, the year of the enactment of title VII.[64]

The Equal Pay Act. The issue of equity in pay involved questions of comparable work, discrimination in employee decisions, awards based on sex, and reverse discrimination.

In a case involving two professional groups, nurse practitioners challenged the higher pay received by physician assistants in a uni-

59. Pande v. Johns Hopkins Univ., 598 F. Supp. 1084 (D. Md. 1984).
60. Zewde v. Elgin Community College, 601 F. Supp. 1237 (N.D. Ill. 1984).
61. Zangrillo v. Fashion Inst. of Technology, 601 F. Supp. 1346 (S.D.N.Y. 1985).
62. Jepsen v. Florida Bd. of Regents, 710 F.2d 838 (11th Cir. 1983).
63. Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980).
64. Jepsen v. Florida Bd. of Regents, 754 F.2d 924 (11th Cir. 1985).

versity health center. The nurse practitioners argued that they possessed the training to perform the same functions as physician assistants but were not allowed to perform the tasks and were paid a different salary solely because they were females. The district court reviewed the training programs for both professionals and also heard testimony of faculty from the respective training programs and of practicing physicians. The court found that women were employed as physician assistants and that there was a clear distinction in the skills possessed by each profession, which justified the salary differential.[65]

In a Georgia case, the Eleventh Circuit affirmed several lower court decisions.[66] This case used a similar analysis to that used in the title VII class action case discussed above.[67] Using comparative data between similarly situated men and women within the same department and teaching similar courses, the lower court had found discrimination in the setting of rank at hiring and in salaries. While the institution claimed that differences were due to market value factors, they were unable to demonstrate how such a scheme had operated at the time of hiring or in the award of annual compensation. The court also upheld the district court's finding that the removal from a position of the husband of one of the plaintiffs was clearly in retaliation for filing suit.[68]

In a Massachusetts EPA case, the institution appealed a lower court finding of "willful violation of the Equal Pay Act"[69] based on the argument that the Fair Labor Standards Act did not cover educational institutions. The First Circuit Court rejected this argument, along with the institution's allegation that evidence of salaries of faculty hired prior to 1974 (the year of enactment of the Act) was inadmissible and should not have been included in EEOC's multiple regression analysis. The court also rejected the argument that ability, listed as one of the factors in the regulations, must be included, along with experience, training, and education, in order for the multiple regression to be valid under the law.[70]

A reverse discrimination case was appealed from the lower court.[71] The district court had found that the male plaintiff had been

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65. Beall v. Curtis, 603 F. Supp. 1563 (M.D. Ga. 1985).

66. *See* Marshall v. Georgia Southwestern College, 489 F. Supp. 1322 (M.D. Ga. 1980); Donovan v. Georgia Southwestern College, 580 F. Supp. 859 (M.D. Ga. 1984).

67. Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985).

68. Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985).

69. EEOC v. McCarthy, 578 F. Supp. 45 (D. Mass. 1983).

70. EEOC v. McCarthy, 768 F.2d 1 (1st Cir. 1985).

71. *See* The Yearbook of School Law 1984 at 290, Ende v. Board of Regents of Regency Univs., 565 F. Supp. 501 (N.D. Ill. 1983).

discriminated against in the award of salary, but that such discrimination was allowable because of a previous administrative finding by EEOC of salary discrimination against women. The EEOC-ordered and implemented salary adjustment formula was the focus of this litigation. The Seventh Circuit, in affirming the lower court ruling, found that the evidence presented by the plaintiff only showed the existence of a *prima facie* case and not a clear violation. The institution clearly had a nondiscriminatory reason for the salary differential.[72]

Title IX. Only two cases were litigated using title IX. A female buildings and grounds employee brought suit alleging discrimination based on sex in her dismissal. Citing *North Haven v. Bell*,[73] the court found that the buildings and grounds department of the institution was not an educational program or activity within the meaning of title IX.[74]

A female Colorado plaintiff, removed from a physical education position for financial exigencies while two male teachers continued in the institution's employment, unsuccessfully raised a title IX claim.[75] The district court found that the physical education program was not a direct recipient of federal financial assistance, consistent with the ruling in *Grove City v. Bell*.[76] In another case, the defendant's motion to dismiss was denied and the parties were to address the issue of whether title IX permits an individual claimant the remedy of a cutoff of federal funds.[77]

Age Discrimination in Employment. In a Fifth Circuit age discrimination case, a supervisor had been inconsistent in his statements about why the employee had been dismissed. At trial, the jury chose to accept the supervisor's explanation of these inconsistencies and to find that the employee was removed for poor job performance. On appeal, the Fifth Circuit Court found no evidence to refute the jury's conclusion and affirmed the decision.[78]

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72. Ende v. Board of Regents of Regency Univs., 757 F.2d 176 (7th Cir. 1985).
73. *See* The Yearbook of School Law 1983 at 294, 456 U.S. 512 (1982).
74. Walters v. President and Fellows of Harvard College, 601 F. Supp. 867 (D. Mass. 1985).
75. Mabry v. State Bd. for Community Colleges, 597 F. Supp. 1235 (D. Colo. 1984).
76. *See* The Yearbook of School Law 1985 at 312, 104 S. Ct. 1211 (1984).
77. Storey v. Board of Regents of Univ. of Wis. Sys., 600 F. Supp. 838 (W.D. Wis. 1985).
78. Lewis v. Millsaps College, 759 F.2d 1239 (5th Cir. 1985).

In another age discrimination case, the plaintiff was passed over for a promotion. The district court found that age discrimination was present and awarded the university a summary judgment, based on errors at trial.[79] The circuit court, reversing, found no error at trial. Additionally, the court noted that, while no specific evidence proved age discrimination, a jury viewing evidence collectively could reasonably reach that finding. The case was remanded for a determination of a damage award.[80]

A New York court found that removal for budgetary constraints was a legitimate reason and that the plaintiff had failed to establish discrimination based on age.[81] The Sixth Circuit affirmed in part a district court decision,[82] where a plaintiff was removed as department head due to discrimination based on age. However, the circuit court reversed in part, finding error by the lower court in not allowing the plaintiff the opportunity to establish an alleged property interest in the position and, therefore, pursue a claim of denial of due process.[83]

Rehabilitation Act of 1973. Several cases involving discrimination based on a person's handicap were before the courts. The federal district court dismissed a complaint, under the Rehabilitation Act of 1973, against the secretary of education for failure to investigate charges against an institution.[84] The plaintiff alleged that the institution failed to adjust its academic program to accommodate the plaintiff's handicap—a learning disability. The court ruled that a private right of action does not exist under the handicapped law.

Several cases are included here because of the subject matter. They actually involve state law, as opposed to the federal act. In New York, a disabled grounds keeper, removed for budgetary reasons, filed suit under New York's Rehabilitation Act. The court found a nondiscriminatory reason for removal.[85] In Illinois, an individual accepted for a position was eventually not hired because the applicant, an amputee below one knee, was ruled physically unfit to be employed as a painter for the institution's grounds department. The Illinois Court of Appeals found that the plaintiff was not given an adequate opportun-

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79. *See* The Yearbook of School Law 1984 at 291, EEOC v. University of Okla., 554 F. Supp. 735 (W.D. Okla. 1982).

80. EEOC v. University of Okla., 774 F.2d 999 (10th Cir. 1985).

81. Baranowski v. Cornell Univ., 484 N.Y.S.2d 202 (N.Y. App. Div. 1984).

82. *See* The Yearbook of School Law 1985 at 315, McLaurin v. Fischer, 595 F. Supp. 318 (S.D. Ohio 1983).

83. McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985).

84. Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985).

85. Guilfoose v. New York State Agriculture Experiment Station, 488 N.Y.S.2d 491 (N.Y. App. Div. 1985).

ity to substantiate his ability to perform the tasks. The institution based its rationale solely on the existence of the handicap, not on whether he was an otherwise-qualified handicapped individual, resulting in a violation of the state's Fair Employment Practices Act.[86]

Hiring Discrimination. In a hiring discrimination case, a Washington court found that an institution's attempt to alleviate underrepresentation by women did not result in discrimination against a male applicant.[87] In a New York case, the court found that a faculty member was not denied the position as chair of the accounting department because of his arrest and acquittal for a crime, but rather based on his qualifications.[88]

A Rhode Island hiring dispute, before the court earlier over a consent decree,[89] was decided on the merits. The plaintiff had been selected as third on a short list of candidates, but lacked the qualifications of the other two. The committee made a decision not to hire the plaintiff after the first two on the list refused the endowed chair. The committee decided to search for a candidate whose qualifications would be evaluated at the "senior level" (full professor). The district court found that the defendant institution had provided nondiscriminatory reasons for not hiring the plaintiff, who had failed to establish a *prima facie* case of discrimination.[90]

A related case involved licensure. An individual was unable to support claims of a violation of equal protection and an arbitrary and capricious decision by the Minnesota Board of Psychology.[91] The board refused his license application as a consulting psychologist because his doctoral degree was from an institution lacking accreditation.

Nontenured Faculty

Issues surrounding nontenured faculty continue to be litigated. While the first amendment issues included in this section are not exclusive to nontenured faculty, they are demonstrative of the kinds of problems faced in this constitutional area. Part-time faculty rights continue to come before the courts in large numbers.

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86. Board of Trustees of Univ. of Ill. v. Human Rights Comm'n, 485 N.E.2d 33 (Ill. App. Ct. 1985).

87. Stahl v. University of Wash., 691 P.2d 972 (Wash. Ct. App. 1984).

88. Lebensbaum v. Adelphi Univ., 489 N.Y.S.2d 601 (N.Y. App. Div. 1985).

89. *See* The Yearbook of School Law 1983 at 296, Lamphere v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).

90. Lamphere v. Brown Univ., 613 F. Supp. 971 (D.R.I. 1985).

91. Draganosky v. Minnesota Bd. of Psychology, 367 N.W.2d 521 (Minn. 1985).

First Amendment Freedom of Speech. In an Illinois case, an art faculty member refused to remove his art work from an exhibit in the main mall of the college because it depicted explicit sexual acts. The college had offered to move the art work to another room located away from the main traffic areas of the college and solicited the faculty member's proposal as to the new location. The Seventh Circuit found that the decision as to where within a public forum to display sexually explicit art was less menacing and did not infringe on the first amendment rights of the plaintiff.[92]

In a highly publicized controversy over the selection of a department head, a first amendment case surfaced. The case involved a Marxist political science professor's slander suit against the syndicated columnists Evans and Novak. In a column in the *Washington Post*, they interpreted the professor's writings as indicating that he used his "classroom as an instrument for preparing what he called the revolution." The column appeared after it was announced that the professor had accepted an appointment at the University of Maryland. The District of Columbia Circuit Court found that the expression of opinion was a protected right. The fact that the column was written on the opinion page of the paper and that the article, in its content, clearly did not misrepresent fact, but rather was stating opinion, did not support a finding of defamation.[93]

Nonrenewal Procedures. Nontenured faculty members filed suit when their contracts were not renewed. The controversies concerned charges of discrimination, the existence of a property right, and breach of contract. This section concludes with several unsuccessful claims involving denials of tenure.

The lead case in this section involves the issue of access to confidential information gathered for the tenure review process.[94] Involved was the disclosure of confidential peer review materials. The faculty member, of French origin, was denied tenure, allegedly on the basis of national origin. The EEOC asked not only for confidential information on the plaintiff's nontenure decision, but also for information on other tenure decisions made from 1977 to the present. The institution maintained that such information should not be provided unless fact and circumstances indicate that some impermissible consideration figured in the decision. The Third Circuit Court rejected the Seventh

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92. Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 528 (1985).

93. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

94. EEOC v. Franklin and Marshall College, 775 F.2d 110, 114 (3d Cir. 1985).

Circuit[95] and the Second Circuit[96] recognition of a qualified academic privilege and agreed with a prior Fifth Circuit decision.[97] The ruling stated that the institution should be compelled to provide the documentation to EEOC under a court-monitored guarantee of the confidentiality of personnel records.

Nonrenewal cases also raised the question of the existence of a property interest or a liberty interest. In a Texas case, a nontenured faculty member's contract was not renewed. The federal district court found that the plaintiff was not tenured and that her expectation of obtaining tenure status because she was awarded tenure at another institution did not give her a property right. Furthermore, refusal of tenure did not result in a stigma, implicating a liberty interest, and tenure at another institution did not mean that the defendant institution had acted in an arbitrary and capricious manner in refusing tenure.[98]

However, in New Jersey the Third Circuit Court remanded the case of three nontenured faculty members for a determination of whether a property right existed based on state laws governing the contract between the faculty and the institution. The court found that the district court had erred in giving "preclusive effect" to a state court decision which found that the sole remedy was arbitration under the collective bargaining agreement without addressing the question of due process.[99]

In a Texas case, a faculty member charged defamation resulting from a letter sent to the tenure review committee by two faculty members. The Texas Court of Appeals found that an affidavit filed with the court, stating that the defendant faculty members believed the information to be true, was not sufficient to allow a lower court to grant a summary judgment. An issue of fact exists as to the credibility of the defendants, which must be decided at trial.[100] In several cases, the plaintiffs, who were denied tenure, failed to show the existence of either a liberty or property interest or to substantiate a claim of discrimination.[101]

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95. *See* The Yearbook of School Law 1984 at 282, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

96. *See* The Yearbook of School Law 1983 at 305, Gray v. Board of Higher Educ., CUNY, 692 F.2d 901 (2d Cir. 1982).

97. *See* The Yearbook of School Law 1982 at 264, *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

98. LaVerne v. University of Tex. Sys., 611 F. Supp. 66 (S.D. Tex. 1985).

99. Kovats v. Rutgers, 749 F.2d 1041 (3d Cir. 1984).

100. Goodman v. Gallerano, 695 S.W.2d 286 (Tex. Civ. App. 1985).

101. *See* Amoss v. University of Wash., 700 P.2d 350 (Wash. Ct. App. 1985); Batla v. North Dakota State Univ., 370 N.W.2d 554 (N.D. 1985); Chen v. Wharton, 492

Several nonrenewal cases alleged the possession of tenure because of the institution's actions or inactions. In Louisiana, a faculty member was denied tenure but awarded a contract for one more year. The court rejected the plaintiff's allegation that the award of a contract for five consecutive years meant that the person has been awarded automatic tenure under institutional policy.[102] In Illinois, a faculty member's acceptance of a new contract at a lower rate precluded his right to bring a claim under the old contract.[103]

Cases involving failure of the institution to give timely notice of nonrenewal also were litigated. A Michigan plaintiff was able to get a case remanded on appeal because the board of trustees had failed to vote on his termination, as required by statute.[104] However, in Mississippi a plaintiff's demand for damages because the institution failed to give timely notice of nonrenewal was unsuccessful.[105] In a North Dakota case, a faculty member was successful in getting the state supreme court to remand his case because questions of fact in regard to employment at different ranks raised an issue regarding the institution's failure to review the plaintiff for tenure.[106] In an Iowa case, the plaintiff was able to get the case remanded for consideration of the question of whether he should have been granted tenure in December 1980.[107] A District of Columbia case was remanded because the plaintiff established a *prima facie* case of sex discrimination. However, the court ruled that the trial court had erred, awarding the plaintiff tenure based on the untimely notice of nonrenewal, since the contract was ambiguous on this point.[108]

One renewal case raised the issue of a breach of contract. The department chair notified the plaintiff verbally and in writing that the department would be unable to offer him a position during the second year of his contract and sought his resignation. After the plain-

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N.Y.S.2d 494 (N.Y. App. Div. 1985); Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1 (1st Cir. 1985); O'Connor v. Peru State College, 605 F. Supp. 753 (D. Neb. 1985); Sabet v. East Va. Medical Auth., 611 F. Supp. 388 (E.D. Va. 1985), *affirmed*, 775 F.2d 1266 (4th Cir. 1985); Staheli v. University of Miss., 621 F. Supp. 449 (N.D. Miss. 1985); Stensrud v. Mayville State College, 368 N.W.2d 519 (N.D. 1985).

102. Ford v. Stone, 464 So. 2d 380 (La. Ct. App. 1985); summary judgment to institution on a first amendment claim was granted at 599 F. Supp. 693 (M.D. La. 1984).

103. Davison v. Board of Trustees of C. Sandburg College, 478 N.E.2d 3 (Ill. App. Ct. 1985).

104. Blanchard v. Lansing Community College, 370 N.W.2d 23 (Mich. Ct. App. 1985).

105. Robinson v. Board of Trustees of E. Cent. Junior College, 477 So. 2d 1352 (Miss. 1985).

106. Brown v. North Dakota State Univ., 372 N.W.2d 879 (N.D. 1985).

107. Black v. University of Iowa, 362 N.W.2d 459 (Iowa 1985).

108. Howard Univ. v. Best, 484 A.2d 958 (D.C. 1985).

tiff acquired the services of an attorney, the institution notified him that it would honor the second year of his contract. Investigating other job possibilities did not change plaintiff's position in relation to the institution, and the institution's retraction nullified the breach of contract.[109]

In the final case in this section, a state court granted summary judgment to the institution because the plaintiff's charge of defamation relied on statements of which he was aware eight years earlier, making the claim time barred.[110]

Part-time Faculty. Issues surrounding the employment and rights of part-time faculty were again in the courts. A doctoral student who also was a teaching assistant became embroiled in a controversy over the content of a government course she was teaching. Complaints had been brought forward by several students. During an investigation, it was discovered that the government department was in violation of university policy in allowing teaching assistants to develop their own course syllabi rather than using syllabi approved by the departmental faculty. A new department head reassigned the plaintiff to a nonteaching assistantship. The plaintiff brought charges of constitutional violations since reassignment was alleged to be based on political pronouncements made in the classroom. The court found that reassignment was made for legitimate reasons other than plaintiff's pronouncements (i.e., her unwillingness to teach the course with a department-approved syllabus). Additionally, the court ruled that the plaintiff had no property interest mandating due process before reassignment. Even though the plaintiff had not raised the liberty interest question, the court chose to reject any claims since no charges were ever made public. The lower court judgment was affirmed.[111]

Another case involved a part-time employee who taught a 60% course load one semester, but had a 40% load during the remainder of his employment. However, the plaintiff also was employed full-time as a tutor in another program on campus. Plaintiff alleged that, since his total work assignment was over 60% when both positions were considered, he should have been awarded tenure since he met the minimum requirement of at least two consecutive years of employment in a 60% teaching assignment. The state court of appeals reversed the lower court's finding that the plaintiff should have been awarded tenure. The appeals court ruled that the tutorial position was not a teach-

109. Lowe v. Beaty, 485 A.2d 1255 (Vt. 1984).
110. Dominguez v. Babcock, 696 P.2d 338 (Colo. Ct. App. 1984).
111. Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985).

ing position within the statutory scheme controlling the award of tenure.[112]

Tenured Faculty

The court litigated a number of cases involving tenured faculty. Sexual harassment of students was again before the court this year. Other issues included first amendment violations and denial of employee privileges.

Termination for Cause. Litigation in this section involved several areas. One type of case posits whether a tenured faculty member's first amendment rights were violated through termination. A second type of case involves moral turpitude and sexual harassment of students. A third type of case involves termination for incompetence. The final type of case deals with highly irregular institutional procedures. The opening cases in this section appropriately involved the question of who was qualified to hold a tenured appointment. A laboratory instructor, dismissed without a hearing, sued. She had held the position for more than three years, the required time period for tenure. She alleged that her due process rights had been violated in her dismissal from a tenured position. The Seventh Circuit Court found that the definition of her full-time position, in "academic support services" with the main responsibility of teaching, fit the definition of faculty qualified for tenure as defined by state statute. The plaintiff was entitled to due process, and the case was remanded.[113] In a second case, a tenured faculty member at a two-year branch campus of a major university, alleging the possession of tenure within the system, demanded reassignment to the main campus. In 1977, after the plaintiff was hired, the institution had changed its policy so that tenure was awarded only on the campus of a faculty member's employment. A suit brought in 1985 was time barred since, as defined by the statute of limitations, it could only be brought within one year after the date of enactment.[114]

Several cases of termination of a tenured faculty member involved alleged violations of first amendment freedom of speech rights. In a long drawn out case involving Lincoln University, a predominantly

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112. McGuire v. Governing Bd. of San Diego Community College Dist., 208 Cal. Rptr. 260 (Cal. Ct. App. 1984).

113. Dauel v. Board of Trustees of Elgin Community College, 768 F.2d 128 (7th Cir. 1985).

114. Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985).

black institution in Pennsylvania, a key plaintiff in a previous litigation[115] was dismissed for cause. The Third Circuit found that the lower court had erred in granting summary judgment to the defendant institution. The plaintiff's conflicts with colleagues in his department and his pronouncements about academic standards and grade inflation were matters of public concern and not simply pronouncements within the work place, not covered by the first amendment. The case was remanded to the district court.[116] In a similar case, where removal was based on derogatory statements made about the faculty member's chair and a list of twenty other allegations, the Eleventh Circuit remanded the case to the district court. The appeals court found that the district court correctly noted that one of the charges involved first amendment-protected pronouncements, but erred in stating that thirteen other charges not covered by the first amendment would yield dismissal when the substantiation of the charges was never reviewed. The court also noted that an issue of fact existed as to the adequacy of the due process procedures followed by the institution.[117] In a third first amendment case, a tenured faculty member was dismissed for shutting down some university activities and interfering with a police order to disperse during a protest over the war in Vietnam. The plaintiff alleged that his first amendment rights were violated since he was dismissed for protected speech. Citing numerous Supreme Court decisions, a California court ruled that his disruption of university activities and interference with police attempts to regain order were not constitutionally protected, but violated the basic tenets of academic freedom so important to the maintenance of an intellectual community.[118] In the final case involving first amendment rights in termination for cause, a faculty member was removed for neglecting his professional duties. The plaintiff became embroiled in a controversy with a black student in his class. At a predominantly black institution, the faculty member complained about the skills of students in his class and told a story about monkeys, which generated a verbal retort from a student who called him a racist. The faculty member refused to teach his class until the student apologized and the student refused. Although the matter was referred to the administration, no effort was made to intercede and resolve the matter. The faculty member re-

115. *See* Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

116. Johnson v. Lincoln Univ. of the Commonwealth Sys. of Higher Educ., 776 F.2d 443 (3d Cir. 1985).

117. Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985).

118. Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228 (Cal. Ct. App. 1985).

mained adamant about resumption of teaching in the class. Charges eventually were brought against the faculty member and a grievance committee found him guilty of neglect of duty. He was subsequently removed. The federal district court awarded a summary judgment to the defendant institution, finding that no right had been violated in the institution's action against the employee.[115]

A number of terminations for cause involved sexual activity or harassment. In an Oklahoma case, a male faculty member was arrested and convicted of soliciting sexual activity in a student union restroom. The institution, after conducting appropriate hearings, dismissed the professor on the grounds of moral turpitude. The plaintiff argued that under the AAUP standards the institution should only review how this activity would interfere with the faculty member's teaching capabilities. The court rejected this argument as specious at best.[120] In another case involving a faculty member's sexual advances to females, the Fifth Circuit Court affirmed a district court decision awarding a summary judgment to the institution on the constitutional questions of due process and the question of prejudice of two members of the faculty review committee.[121] In a third case involving sexual harassment, the court ruled that two of the incidents of sexual harassment were time barred and the remaining charge did not support a finding of "a pattern or practice" of harassment as alleged by the institution. A California court stated that the excuse that the victims would not cooperate at the time of the two earlier incidents was not supported by the fact that the victims now had come forward to testify. The court directed the lower court to order the faculty member reinstated.[122]

A number of terminations for cause involved allegations of poor performance on the job. In one case, a tenured faculty member was removed as an oboeist in the Woodwind Arts Quintet, a group he organized and played in as part of his original contract with the institution. Plaintiff was able to establish material facts sufficient to reject a summary judgment motion by the defendants, since his original contract had a clause referring to performance in the woodwind group. He also was able to show a liberty interest, since testimony indicated serious impairment of the plaintiff's performing opportunities due to

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119. McConnel v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985).

120. Corstvet v. Boger, 757 F.2d 223 (10th Cir. 1985).

121. Levitt v. University of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985). *See* The Yearbook of School Law 1985 at 321, Levitt v. Monroe, 590 F. Supp. 902 (W.D. Tex. 1984).

122. Brown v. California State Personnel Bd., 213 Cal. Rptr. 53 (Cal. Ct. App. 1985).

the stigma of the removal action and the fact that it was common knowledge among members of the performing community. The case was remanded for a determination as to whether a property interest existed and the order for a name-clearing hearing was affirmed.[123] In a Minnesota case, the Eighth Circuit Court affirmed a lower court decision.[124] The district court had found that the plaintiff, removed for a record of poor teaching, advising, and meeting job responsibilities, was not denied due process or removed for discriminatory reasons based on his race. In an Illinois case, a professor with questionable teaching performance was given another contract commencing in December 1978 with the opportunity to improve his teaching with the aid of a faculty committee. In December 1979, based on reports of no improvement, he was notified that his contract would not be renewed when it expired in December 1980. The court ruled that the plaintiff did not come under the provisions of a new act giving faculty tenure, since he was not a faculty member in good standing with the institution on the date the law took effect.[125] In the last case involving incompetence, the plaintiff was not deprived of any rights by being required at a hearing to perform a number of chemistry experiments.[126]

An unusual case involved irregular activities by an institution in the termination of a tenured faculty member. The institution relied on a phone message given to a secretary and not on its normal procedure of written notification from the faculty member where a resignation is concerned. The phone message, which the faculty member denies ever giving, appeared to the court to be an opportunity of which the institution attempted to take advantage.[127]

In the final case in this section, a faculty member was moved from one department to another because of conflicts within the first department. The courses taught were similar and within the plaintiff's area of expertise. Plaintiff, at the time of unsuccessful state litigation, chose not to pursue a federal claim and could not raise it later in federal court.[128]

Denial of Employee Privileges. Several cases involved the earnings of full-time faculty engaged in private practice in university

123. Kramer v. Horton, 371 N.W.2d 801 (Wis. Ct. App. 1985).

124. King v. University of Minn., 774 F.2d 224 (8th Cir. 1985). *See* King v. University of Minn., 587 F. Supp. 902 (D. Minn. 1984).

125. Fleischer v. Board of Community College Dist. No. 519, 471 N.E.2d 215 (Ill. Ct. App. 1985).

126. Bevli v. Brisco, 212 Cal. Rptr. 36 (Cal. Ct. App. 1985).

127. Mahoney v. Board of Trustees of San Diego Community College Dist., 214 Cal. Rptr. 370 (Cal. Ct. App. 1985).

128. Stitzer v. University of P. R., 617 F. Supp. 1246 (D.P.R. 1985).

facilities. A university medical school sought recovery of business records of a physician's private practice conducted as part of his tenured position at the university. The court found that it was legal for the institution and the doctor to share equally in the profits from his practice conducted at the institution and that the records were the property of the university.[129] In another case, the faculty member sought injunctive relief from the institution's decision to limit the amount of money a tenured faculty member of the medical college can earn in private practice. The court found that the plaintiff's claims to constitutional protections, such as associational rights, a property interest, and a liberty interest protecting his private practice earnings, were far-fetched at best.[130]

The final cases of this section involved benefits accrued from tenure other than a property right. A faculty member alleged that tenure included the responsibility of the institution to provide him with adequate research facilities, teaching assignments, and nondiscriminatory treatment. The suit stems from a decision to relocate plaintiff's office, which he alleged was one of a number of incidents designed to undermine his career. The court found that the plaintiff was unable to establish a cause of action for a breach of contract or tort.[131] In a Pennsylvania case, the plaintiff was unable to substantiate a charge of discrimination based on sex in the denial of promotion to full professor.[132]

Termination Due to Financial Exigency or Program Elimination. Several cases involved either removal or reclassification to a part-time position due to a financial exigency. In an Alabama case, the court found that it was within the president's authority to reduce salaries as a result of monetary reductions and enrollment declines. When the plaintiff's employment was reinstated, he was entitled to the reduced salary, not a salary at the previous scale.[133]

In a West Virginia case, the court found that the plaintiff, an employee removed due to a financial exigency, held the right to first refusal on a position for which she was qualified. The institution's president had a responsibility to give her that right as soon as he was aware of a resignation and the existence of an unfilled position. The date of the resignation resulting in the vacancy.[134] In a Tennessee case,

129. Albany Medical College v. McShane, 481 N.Y.S.2d 917 (N.Y. App. Div. 1984).
130. Adamsons v. Wharton, 771 F.2d 41 (2d Cir. 1985).
131. Gertler v. Goodgold, 487 N.Y.S.2d 565 (N.Y. App. Div. 1985).
132. Molthan v. Temple Univ., 778 F.2d 955 (3d Cir. 1985).
133. Davis v. Owen, 461 So. 2d 1300 (Ala. 1984).
134. Hooper v. Jensen, 328 S.E.2d 519 (W. Va. 1985).

the court ruled that a tenured administrator could be removed as a result of budget cuts which eliminated his position. Furthermore, the institution could retain nontenured employees while removing a tenured employee.[135]

In a North Dakota case, a faculty member was reclassified from a full-time tenured position to a part-time position due to a decrease in enrollments. During verbal communications concerning the employee's contract, it was alleged that the employee had asked for the part-time position because it would be advantageous in his pending divorce settlement. The trial court decision was affirmed, since, on appeal, the court found adequate evidence that indicated that the plaintiff was offered and rejected a full-time appointment in favor of the part-time appointment, removing any due process obligation required of the institution.[136]

The final case was a motion for a summary judgment by the defendant institution. However, because there was so much confusion surrounding the plaintiff's employment status prior to his reclassification as a part-time employee, the summary judgment was denied and the matter will be litigated.[137]

Denial of Employee Benefits. Cases concerning the denial of other employee benefits included litigation over the award of unemployment compensation, retirement benefits, and the ownership of records of a faculty member's private practice conducted on university property.

A number of cases concerned the issue of whether a dismissed employee was entitled to unemployment compensation. In an Oregon case, the Employment Appeals Board could not reverse the finding of the referee based on *ex parte* testimony without communicating that testimony to all parties involved. Failure to communicate required the court to reverse and remand the case. On remand, the burden will be on the plaintiff to prove that he left his job for a good reason.[138] In a South Carolina case, the institution was not liable for part of the unemployment compensation mistakenly paid to the former employee absent notification of the claim with the employer prior to payment.[139] In another Oregon case, an instructor whose full-time position was

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135. Smith v. State Technical Inst. of Memphis, 682 S.W.2d 915 (Tenn. 1984).
136. Wastvedt v. State, 371 N.W.2d 330 (N.D. 1985).
137. Cabarga-Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 609 F. Supp. 1207 (D.P.R. 1985).
138. Turnquist v. Employment Div., 694 P.2d 1021 (Or. Ct. App. 1985).
139. Newberry College v. South Carolina Employment Sec. Comm'n, 333 S.E.2d 58 (S.C. Ct. App. 1985).

terminated was not precluded from receiving unemployment compensation because he had accepted a part-time position in the fall.[140]

A fringe benefit case involved a plaintiff's eligibility for workmen's compensation after she had resigned from her position and later returned for a short period to train her replacement. The court, denying compensation, ruled that, since she had voluntarily resigned her position, the time of temporary employment did not change her status under the state's unemployment compensation laws.[141] A Minnesota former employee, removed from his position but still receiving his salary and fringe benefits for the final year of his contract, was not entitled to unemployment compensation.[142]

A series of cases involved retirement benefits. In a California case, a group of teachers, who were time barred from adjudicating salary claims based on their reclassification as permanent employees, were not barred from adjustments to their retirement benefits based on the salaries they should have received. The statute of limitations would not begin counting until the day the retirement benefits are payable.[143] In Florida, it was inappropriate for the retirement system to use the date of original membership to accrue interest rather than the date plaintiff returned from maternity leave, when she had withdrawn all funds from the system at the time of the leave.[144] In Pennsylvania, a faculty member was not allowed to purchase credit in two state retirement systems for public and state education employees because she worked at a state-related but private institution.[145] The Pennsylvania retirement system could not be compelled to honor a contract between the Department of Education and a former president, giving him the opportunity to pay into the state retirement system, when the system was not allowed to make such arrangements by statute.[146] On the issue of federal tax, the federal district court ruled that money received by the plaintiff as a survivor's insurance benefit under the university's retirement program was exempt from classification as income under the Internal Revenue Code.[147]

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140. Kelly v. Employment Div., 701 P.2d 448 (Or. Ct. App. 1985).
141. *In re* Kindlon, 494 N.Y.S.2d 830 (N.Y. App. Div. 1985).
142. Martinson v. University of Minn., 370 N.W.2d 462 (Minn. Ct. App. 1985).
143. California Teachers Ass'n v. Governing Bd. of the Yosemite Community College Dist., 214 Cal. Rptr. 777 (Cal. Ct. App. 1985).
144. Fiorentino v. Department of Admin., Div. of Retirement, 463 So. 2d 338 (Fla. Dist. Ct. App. 1985).
145. Trotz v. Pennsylvania State Employees' Retirement Bd., 495 A.2d 650 (Pa. Commw. Ct. 1985).
146. Watrel v. Pennsylvania Dep't of Educ., 488 A.2d 378 (Pa. Commw. Ct. 1985).
147. Barnes v. United States, 611 F. Supp. 413 (C.D. Ill. 1985).

This section closes with a case involving a wife's attempt to get part of her husband's salary withheld, based on a judgment in matrimonial court. The court ruled that withholding amounts from the paycheck which were part of the judgment against the husband was an appropriate practice.[148]

Administration and Staff

A number of cases involving administrative personnel have been litigated this year. Several categories of cases include nonrenewal of a contract and termination for cause.

One case was an appeal of a case reported last year.[149] A president alleged that he possessed a property interest requiring a hearing prior to removal by the board. The court ordered the board, in compliance with the state administrative code, to provide the specific reasons for denial of an appeal. Subsequently, the board denied the petition and, in a letter to the plaintiff, stated six reasons for the denial. On appeal, the court again affirmed the board's action.[150]

In a Pennsylvania case, the plaintiff complained about the way his superiors managed the Instruction Services Division at a public institution. He alleged that his dismissal was the result of his pronouncements on matters of public policy, since he was making recommendations on how to save the state taxpayers money. The court found that, under common law, the employee could be dismissed at will and that the plaintiff's pronouncements did not concern public policy, but rather were differences of opinion on how to manage the division. The defendant institution may dismiss an employee who becomes troublesome or hostile to his superiors.[151] In a related case, the procedures followed in the suspension of an employee for three days did not violate the due process and equal protection rights of the plaintiff.[152]

Several cases dealt with the contract provisions involving notification of nonrenewal of an employee contract. In one case, an employee was not notified within the 120-day required time period for notification of the nonrenewal of her contract. A court ordered her reinstated

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148. Kahn v. Trustees of Columbia Univ., 492 N.Y.S.2d 33 (N.Y. App. Div. 1985).

149. *See* The Yearbook of School Law 1985 at 331, Sims v. Board of Trustees of N. Fla. Junior College, 444 So. 2d 1115 (Fla. Dist. Ct. App. 1984).

150. Sims v. Board of Trustees of N. Fla. Junior College, 473 So. 2d 1 (Fla. Dist. Ct. App. 1985).

151. Rossi v. Pennsylvania State Univ., 489 A.2d 828 (Pa. Super. Ct. 1985).

152. Petersen v. Board of Regents of the Regency Univ. Sys., 623 F. Supp. 235 (N.D. Ill. 1985).

with back pay and benefits.[153] A California case reached a similar result, with the rationale that a timely notification was the minimal due process required for employees serving at the will of the employer.[154] A New York court found that the employee had no property right, since the president's verbal statements about continuous employment at the time of hiring were not incorporated into the contract.[155]

A number of cases concerned the issue of removal of administrators for cause. Probably one of the more interesting cases involved a nurse anesthetist at a university medical center. She refused to administer certain drugs to a patient, as ordered by the physician who subsequently administered the drugs. The patient died, and his estate sued the doctor for malpractice. Prior to giving a deposition and testifying at the trial, the nurse was threatened and told not to divulge what had transpired. She gave an accurate testimony, resulting in award of damages to the deceased's estate. Subsequent to the trial, she was harassed and eventually dismissed. The court found that the dismissal after eleven years of outstanding service was not supported by adequate reasons. Also, the plaintiff had raised an enforceable claim that she was dismissed for her refusal to give false testimony, and the lower court decision was reversed and remanded.[156]

In another dismissal for cause, the plaintiff had agreed to resign if the university would not place any derogatory information in his personnel file. A statement in an annual report that he "had been terminated" was not viewed by the court as derogatory, nor was it a part of his personnel file.[157]

An allegation of due process rights in dismissal closes this section. An Alabama plaintiff had been given a hearing on a charge of acts of insubordination. On review of the hearing committee's report, the president considered information in the personnel file and a memo from the personnel director. This information was not presented at the hearing, thus denying plaintiff the opportunity to mount a defense. The court ruled that his due process rights had been violated and ordered the institution to reconsider his dismissal. More than nominal damages could not be determined until after the court-ordered hearing.[158]

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153. Dennis v. Dobbs, 474 So. 2d 77 (Ala. 1985).
154. Harris v. State Personnel Bd., 216 Cal. Rptr. 274 (Cal. Ct. App. 1985).
155. Bykofsky v. Hess, 484 N.Y.S.2d 839 (N.Y. App. Div. 1985).
156. Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985).
157. Elias v. Youngken, 493 A.2d 158 (R.I. 1985).
158. Davis v. Alabama State Univ., 613 F. Supp. 134 (M.D. Ala. 1985).

Collective Bargaining

The section on collective bargaining continues to include litigation in a number of areas. Cases involving the issue of whether faculty are employees or managers continue to work their way through the courts. Other litigation included questions of dues refunds to nonmembers for money used for political activity, waivers of rights in the collective bargaining agreement, unfair labor practices, and the authority and scope of arbitration procedures.

The lead case for this section follows the *Yeshiva*[159] decision. The court found that the Lewis University faculty were managers, not employees.[160] The court noted that the full-time faculty of the College of Arts and Sciences at Lewis University "have substantial control of the formulation and implementation of educational policies within the college."[161] Faculty determine admission policies, grading criteria, course offerings, calender, and faculty promotion, tenure, and hiring.

A related issue involving the authority of the NLRB over private church-related institutions also was before the First Circuit.[162] The court held that the NLRB ruling requiring private church-related institutions to bargain with the employee's bargaining unit did not violate the establishment clause or the free exercise clause of the first amendment.

A New York case raised the question of the refund policy to nonunion members of that portion of the union dues used for political activities. A professor brought a claim of unfair practice over the amount of the refund he received from his agency shop dues. State law required that the portion of the fee used for political activities be refunded to nonmember employees who, by law, are required to pay the dues. The state labor relations board refused to hear the case, saying it lacked jurisdiction in these matters. The court agreed and referred the plaintiff to the legislature for a remedy.[163]

In an Illinois decision, a union agreement preventing outside employment by faculty was found to form a constitutional waiver. This decision affirmed the institution's requirement that employees disclose their outside earnings.[164]

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159. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).
160. NLRB v. Lewis Univ., 765 F.2d 616 (7th Cir. 1985).
161. *Id.* at 628.
162. Universidad Cent. De Bayamon v. NLRB, 778 F.2d 906 (1st Cir. 1985).
163. Bodanza v. Public Employment Relations Bd., 490 N.Y.S.2d 445 (N.Y. 1985).
164. Cook County College Teachers Union v. Board of Trustees of Community College Dist. No. 508, 481 N.E.2d 40 (Ill. App. Ct. 1985).

Several cases involved alleged unfair labor practices. In Connecticut, a collective bargaining agreement was negotiated, approved, and accepted by the state legislature. The agreement did not take into account changes, passed by the legislature prior to the agreement, in the retirement benefits assigned to the state's public college teachers. These changes went into effect in the middle of a contract period. The state association of teachers charged that the state had refused to bargain in good faith. The state labor relations board refused to hear the complaint, deferring to the authority of the legislature to change the statute. The court affirmed.[165]

In a Washington case, the state legislature, due to a financial exigency, decided not to award salary increases to community college faculty, as previously agreed in a collective bargaining agreement. The court ruled that, since the state was fully aware of the financial problems at the time of signing the agreement, it could not now defer the salary increase. Deferral was viewed as being the same as cancellation of the contract.[166] In a similar case, the court found that the community college could not cut salaries in the middle of the contract period for financial reasons. Furthermore, they could not use these reduced salaries as the base for the next year's salary increases.[167]

A Florida institution attempted to get the faculty association to waive, in the bargaining agreement, any bargaining over employment decisions made by management during the contract period. The court found this to be an unfair labor practice resulting in a bargaining impasse.[168]

Cases questioning the rulings of arbitrators also were before the courts. In a California case, the court set aside a labor relations board ruling that a nonexclusive bargaining agent had the right to meet and discuss contemplated employee changes with the employer.[169] A Michigan court reversed an arbitrator's decision overturning an institution's dismissal decision.[170] The arbitrator, ordering the employee reinstated even though there was just cause for the dismissal, had exceeded his authority. In a New Jersey case, a faculty member was

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165. Connecticut State College AAUP v. State Bd. of Labor Relations, 495 A.2d 1069 (Conn. 1985).

166. Carlstrom v. Washington, 694 P.2d 1 (Wash. 1985).

167. Compton Community College Fed'n of Teachers v. Compton Community College Dist., 211 Cal. Rptr. 231 (Cal. Ct. App. 1985).

168. Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985).

169. Regents of the Univ. of Cal. v. Public Employment Relations Bd. (Laborers, etc.), 214 Cal. Rptr. 698 (Cal. Ct. App. 1985).

170. Board of Control of Ferris State College v. Michigan AFSCME, 361 N.W.2d 342 (Mich. Ct. App. 1984).

dismissed during his contract period and notified of nonrenewal of his subsequent year's contract. The reasons for the firing were falsification of records, illegal use of institutional property, and insubordination. In arbitration proceedings, the employee was found guilty, but only temporarily suspended, because the arbitrator thought that the contract provided for a progression of actions in employee discipline. The court reversed the suspension decision, stating that the arbitrator had exceeded his authority. The institution had a right to permanently dismiss the employee for cause.[171]

Two final cases in this section raised questions of when arbitration takes precedence over other legal authorities. An Iowa court found that arbitration procedures took precedence over the statutory procedures established for termination.[172] The Third Circuit Court affirmed the lower court decision.[173] The court found that the university was obligated under its collective bargaining agreement to seek arbitration in a controversy surrounding the reorganization of its dietetics department.

Sexual Harassment of Employees

A new section has been added to deal with litigation resulting from sexual harassment of one employee by another employee or supervisor. These cases should not be confused with cases involving sexual harassment of students, summarized in the section on *Termination for Cause*. This new area should continue to see increasing litigation.

In one case, a female employee alleged sexual harassment by another employee of the college and filed charges under title VII of the Civil Rights Act of 1964. Plaintiff sought damages for emotional distress from both the employee and from the institution, under the theory of vicarious liability. The court granted summary judgment to the institution in this case, because such allegations are compensable under Missouri Workers' Compensation Laws. Additionally, the court held that the defendant employee was not acting as an agent of the college, but rather was acting as an independent agent. The court noted that this ruling should not prejudice any claims against the defendant employee as an individual in state court.[174]

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171. County College of Morris Staff Ass'n v. County College of Morris, 495 A.2d 865 (N.J. 1985).

172. Borgen v. Anderson, 366 N.W.2d 583 (Iowa 1985).

173. Hahnemann Univ. v. District 1199C, Nat'l Union of Hosp. and Health Care Employees, 765 F.2d 38 (3d Cir. 1985).

174. Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985).

In another case, it was alleged that the plaintiff's death was the result of sexual harassment. On several occasions, the plaintiff had notified a superior that her supervisor was taking various actions in an effort to coerce her into having sexual relations with him. While initially a meeting was held and the supervisor was warned that his activity should not interfere with his work, the matter was never fully investigated, in violation of university policy. The federal district court rejected the defendant's (the supervisor and his superiors) motion for a summary judgment, and ordered the case to be heard on the factual issues.[175]

STUDENTS

The litigation in the student area continues to be diverse. The Supreme Court decided an important academic dismissal case. Cases revolving around commercial speech and recognition of gay organizations also were decided. The gay rights case, in fact, was significant because it involved recognition at a private institution. Nonresident tuition laws are receiving increasing attention. The courts seem to be flooded with a large number of cases involving financial aid.

Admissions

In a case involving a state maritime academy, a prospective woman student filed a complaint with the United States Attorney General, claiming that she had been discriminated against in her attempts to gain admission. The institution, which had been single-sex before 1973, informed the student that she would not be accepted at the academy. That same year, the institution made the decision to accept females, but not to actively recruit them for admission. In 1980, the United States commenced this action under Title IX for discrimination based on sex. Involved in the claim was the former policy preventing the admission of women, and allegations that the institution continued to discriminate against women in admission and recruitment after the policy change. At trial in the federal district court, the Academy was found to have discriminated against women by maintaining a single-sex admission policy prior to 1976 and, subsequently, in its admission and recruitment policies. The First Circuit Court, on appeal, rejected the Academy's argument that the single-sex policy is important to the national defense and that women are not to

175. Scott v. deLeon, 603 F. Supp. 1328 (E.D. Mich. 1985).

serve in combat positions. Furthermore, an analysis of congressional intent in enacting title IX and cases involving racial discrimination substantiated the authority of the Attorney General to intercede in this case, even though certain parallel statutes contain an exemption for the merchant marine academy.[176] Evidence had been presented that showed that women were treated differently than men in regard to interviews, scheduling for physical examinations, and the qualifications of admitted students. The circuit court affirmed the injunction issued by the district court, permanently enjoining the Academy from intentionally discriminating against women in recruitment and admission policies.

In an admission case concerning the Rehabilitation Act, an applicant to a school of nursing was admitted and, then, based on a physical examination which uncovered a handicap, was not allowed to matriculate. She sued, alleging discrimination against an otherwise qualified handicapped individual. The case had previously been remanded to the lower court.[177] As a result, the plaintiff was admitted, but the institution refused to accept credits taken in the interim at another institution. The school's physician testified that he had not evaluated her on an individual basis. The Ninth Circuit found that the lower court had erred and that she was an otherwise qualified handicapped individual.[178]

In a case which has been before the bench a number of times, the plaintiff filed charges alleging sex discrimination in her denial of admission to seven medical schools.[179] One of the previous cases reached the Supreme Court and established a private right of action under title IX.[180] The federal district court dismissed this claim, based on the doctrine of *res judicata* precluding subsequent litigation.[181] The plaintiff could not bring different claims against the defendant institution after having failed in previous litigation involving the same admissions denial.

The final case in this section involves test scores on a standardized test used in an admission decision. The plaintiff retook the LSAT

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176. United States v. Massachusetts Maritime Academy, 762 F.2d 142 (1st Cir. 1985).

177. Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980).

178. Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985).

179. *See* The Yearbook of School Law 1982 at 268, Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); The Yearbook of School Law 1984 at 304, Cannon v. University of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983).

180. *See* The Yearbook of School Law 1980 at 119, 200, Cannon v. University of Chicago, 441 U.S. 677 (1979).

181. Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985).

examination and received scores appreciably higher than in the previous exam. The plaintiff was admitted to and enrolled in a law school. Upon a routine examination of the test, the Educational Testing Service (ETS) found irregularities in the handwriting on the second exam. The ETS notified the plaintiff of the problem and gave her the option of retaking the test at no charge. Plaintiff, through her counsel, refused to retake the test. After analysis of four handwriting experts, three of them agreed that the writing sample was not the plaintiff's. The ETS notified the institution that the scores would be cancelled without explanation. The institution terminated the plaintiff's enrollment and she sued ETS, alleging a violation of due process. The federal district court found that ETS was not engaged in due process violations, since it did not come under the state action doctrine by providing scores to a public institution. Also, breach of contract claims were not supported, because ETS followed the procedures outlined in the contract entered into by the plaintiff.[182]

Nonresident Tuition

In a case involving nonresident tuition laws in Washington, a nonresident claimed he was eligible to pay resident tuition because he was a member of the National Guard. The state court ruled that only nonresident military personnel, as defined under the state statute, are exempt from paying out-of-state tuition. National Guard personnel and members of the reserves are not considered military personnel until they are called to duty.[183]

One year after a student moved to a new state and had been enrolled in a state-supported institution, he was denied his request for in-state tuition by a university committee on residency. He based his request on his employment for one year in a cooperative program sponsored by the university. In rejecting his request, the admissions committee found that he had failed to show an intent to remain in the state by occupying a full-time job in the state for one year prior to enrollment at the institution, nor had his employment been continuous. The court ruled that the student had not fulfilled the residency requirements as contained in university regulations, and the denial of his request was not arbitrary or capricious.[184]

In a Michigan case, an out-of-state law student was refused reclassification as a resident for tuition purposes. The committee, on re-

182. Johnson v. Educational Testing Serv., 615 F. Supp. 633 (D. Mass. 1984).
183. Ward v. Washington State Univ., 695 P.2d 133 (Wash. Ct. App. 1985).
184. *In re* Bybee, 691 P.2d 37 (Kan. 1984).

view of the evidence submitted by the plaintiff, ruled that she had failed to show a domiciliary intent to reside permanently in Michigan. The federal court found that due process rights had not been violated, nor was the committee's action arbitrary or capricious. Plaintiff's equal protection claim failed because she could not show how she was comparable to graduate students on assistantships, for whom the residency requirement is waived, since she had never held an assistantship.[185]

In a New York case involving voting rights and residency, the court affirmed a decision to issue a declaratory judgment and injunctive relief to students who had not been permitted to register to vote.[186]

Financial Aid

The lead case in this section involved the Solomon Amendment, which required applicants for financial aid to complete certain questions on the form as to whether they had registered for the draft. Three theological students, exempt from selective service, refused on religious grounds to complete the "Solomon questions" on their financial aid applications. The district court found the question on the application and the sanction for refusal to be outside the authority of the Solomon Amendment.[187] Reversing, the First Circuit Court found the regulations valid and enforceable.[188] This ruling is consistent with a Supreme Court decision.[189]

A number of cases involved attempts to recover the unpaid balance of student loans. A student and her father signed a promissory note for a National Direct Student Loan. Following her graduation, the institution made various attempts to work out repayment schedules with the defendant. After three years, the institution brought suit to recover the money after correspondence to the former student was returned unclaimed. The court ruled in favor of the institution, consistent with the agreement, because the plaintiff failed to notify the borrower of her enrollment in law school. Lack of notification denied her access to a deferment on the repayment of the loan.[190]

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185. Spielberg v. Board of Regents, Univ. of Mich., 601 F. Supp. 994 (E.D. Mich. 1985).

186. Williams v. Salerno, 622 F. Supp. 1271 (S.D.N.Y. 1985).

187. *See* The Yearbook of School Law 1985 at 336, Alexander v. Trustees of Boston Univ., 584 F. Supp. 282 (D. Mass. 1984).

188. Alexander v. Trustees of Boston Univ., 766 F.2d 630 (1st Cir. 1985).

189. *See* The Yearbook of School Law 1985 at 336, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 104 S. Ct. 3348 (1984).

190. MacMurray College v. Schiesser, 477 N.E.2d 65 (Ill. App. Ct. 1985).

A private institution's court action against a former student's promissory note was reversed. The former student was denied due process when notification of the action against him was improperly handled. A librarian at plantiff's current address of employment signed for a certified letter in his absence. It could not be substantiated that plaintiff actually received the notice, and he had not designated the librarian as his agent.[191]

In a Wisconsin case, a student with five student loans requested and received an altered repayment schedule. Later, in a Chapter 7 bankruptcy petition, the former student was discharged from the loan. The bankruptcy court ruled that a change in the repayment schedule constituted a suspension of the obligation. The district court, reversing, noted that the loan program regulations give the corporation great latitude to adjust repayments to reflect current financial situations.[192]

Questions of hardship in being required to repay the loan were raised in several bankruptcy litigations. In one bankruptcy case, the court noted that, regardless of whether the father or the son had signed the note, the regulations clearly provided that the loan cannot be discharged in a petition for bankruptcy. However, the court found that the repayment of the loan would cause undue hardship and the obligation was discharged.[193] A number of other cases ended with similar results.[194] Several other cases resulted in a denial of a discharge request, either because the debtor had not substantiated hardship or the court felt the current hardship was only temporary.[195] The Second Circuit Court ruled that the provision in a New York student loan program prohibiting the award of loans to former defaulters did not conflict with the Bankruptcy Code prohibition of discrimination against discharged debtors.[196]

However, a Michigan bankruptcy court held that the institution could not withhold the transcripts of a discharged debtor until he paid back his loan.[197] Finally, an individual, ineligible for a federal loan because of previous defaults, filed a fraudulent loan application by using his father's social security number. The Second Circuit affirmed

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191. Administrators of Tulane Educ. Fund v. Ortego, 475 So. 2d 764 (La. 1985).
192. *In re* Eckles, 52 B.R. 433 (E.D. Wis. 1985).
193. *In re* Feenstra, 51 B.R. 107 (W.D.N.Y. 1985).
194. *In re* Binder, 54 B.R. 736 (D.N.D. 1985); *In re* Savercool, 51 B.R. 180 (W.D.N.Y. 1985).
195. *In re* Avila, 53 B.R. 933 (W.D.N.Y. 1985); *In re* Goldman, 48 B.R. 364 (S.D.N.Y. 1985); *In re* Luna, 54 B.R. 637 (S.D. Fla. 1984); *In re* Springer, 54 B.R. 910 (D. Neb. 1985).
196. *In re* Goldrich, 771 F.2d 28 (2d Cir. 1985).
197. Parraway v. Andrews Univ., 50 B.R. 316 (W.D. Mich. 1984).

his conviction for fraud and forgery.[198]

The state of New York's right to bring action against students to recover loans, interest, and costs was affirmed, even though there had been a change in the state law.[199] The University of Montana was successful in attaching half of the money from a defaulted student loan held for a debtor in a joint savings account. The court ruled that the joint account was tenancy in common entitling the university to half of the amount in the account.[200] A proprietary school was entitled to collect the full amount of an unpaid student loan, even though the student alleged that she failed to attend part of one session of the school year because of the poor quality of the education provided.[201]

Several cases involved the award of a loan viewed as income, resulting in the reduction of welfare benefits. The Sixth Circuit Court ruled that Pell Grant and loan money not specifically earmarked for educational purposes can be viewed as income for the determination of plaintiff's food stamp allotment.[202] A Hawaii court reached a similar ruling in a case involving a nonearmarked private grant and the determination of AFDC benefits.[203] In a related case, a husband in a divorced family was held responsible for the educational expenses of the daughter, even though she had a several year hiatus from college.[204] Finally, the Seventh Circuit ruled that an unsuccessful applicant for financial aid had no claim to a right to a public education at the public's expense. The alleged right was used in an attempt to get his father to release financial information required in the application for financial aid.[205]

One case involved conflicts between the state loan corporation and the lending agency. Several others involved conflicts between the United States Department of Education and a lending agency. A state college aid commission was created to serve as a guarantor of student loans. A financial bank corporation, made up of a number of state banks, obtained permission from the aid commission to act as an eligible lender. It made educational loans to qualified students who might have otherwise been refused by other banks, due to their loan policies. The relations between the two organizations became strained

198. United States v. Gibson, 770 F.2d 306 (2d Cir. 1985).
199. State v. Perkins, 490 N.Y.S.2d 900 (N.Y. App. Div. 1985).
200. University of Mont. v. Coe, 704 P.2d 1029 (Mont. 1985).
201. Louisiana Business College v. Crump, 474 So. 2d 1366 (La. Ct. App. 1985).
202. Burkett v. United States Dep't of Agriculture, 764 F.2d 1203 (6th Cir. 1985).
203. Yamamoto v. Sunn, 700 P.2d 938 (Hawaii 1985).
204. Thiele v. Thiele, 479 N.E.2d 1324 (Ind. Ct. App. 1985).
205. Dozier v. Loop College, City of Chicago, 776 F.2d 752 (7th Cir. 1985).

over delays in processing applications and other problems caused by the aid commission's loan carrier. The aid commission notified the bank corporation that it was exercising the sixty-day clause in the agreement and was terminating the relationship. The district court found that the commission could not terminate the relationship and, on appeal, the decision was upheld. Since the relationship between the loan corporation and the commission was one of licensure, a hearing on termination was required.[206]

The Second Circuit upheld the United States Department of Education's right to refuse to pay bills of a lending agency on loans to students at a now defunct institution. The lending agency could not charge interest and penalties.[207] In another case, the district court held that the Department of Education could not withhold payments to lending agencies for reasons unrelated to the specific loan program. In this case, the Treasury Department had asked that funds be withheld as a result of other debts the lending agency had involving forged treasury checks.[208]

First Amendment

Freedom of Speech. The lead case is one that has been before the bench on several occasions over the past few years. Students enrolled at a state-supported institution alleged that a mandatory fee scheme used to fund a Political Interest Research Group (PIRG) infringed upon their first amendment rights. In 1981, the district court held that the refund scheme rendered any constitutional deprivations harmless.[209] The Third Circuit remanded the case and raised the question of proof of the educational value of the organization.[210] On remand, the district court found that the PIRG met specific criteria set out by the institution, which clearly made it an organization operating within the objectives of the educational corporation. They again found the fee collection and refund scheme to be constitutional.[211] The Third Circuit, on appeal, found that the university failed to show any

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206. Hawkeye Bancorporation v. Iowa College Aid Comm'n, 360 N.W.2d 798 (Iowa 1985).

207. Citizens Savings Bank v. Bell, 605 F. Supp. 1033 (D.R.I. 1985).

208. American Bankers Ass'n v. Bennett, 618 F. Supp. 1528 (D.D.C. 1985).

209. *See* The Yearbook of School Law 1982 at 272, Galda v. Bloustein, 516 F. Supp. 1142 (D.N.J. 1981).

210. *See* The Yearbook of School Law 1983 at 315, Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982).

211. *See* The Yearbook of School Law 1985 at 338, Galda v. Rutgers, 589 F. Supp. 479 (D.N.J. 1984).

compelling state interest rights and presented no evidence that educational experiences gained through involvement in the PIRG could not be gained through other means. The court ruled that the compulsory fee payable to PIRG through the university could not be continued and halted the collection of said fees.[212]

A nonstudent organization, Socialist Workers Party and Young Socialist Alliance, had been allowed to set up and staff an information table in the student union building at a state-supported institution. They were allowed to distribute newspapers and related reading materials to interested students. When the plaintiffs were found trying to sell newspapers absent permission to solicit, they were removed from the area and ordered to cease their activity. A state-wide policy prohibited solicitation and sales except by groups directly connected with the institutions. The court held that expression had not been infringed and that commercial speech may be regulated without infringing on the right of expression.[213] The college has a right to preserve the campus for its intended purpose and to protect students from the pressures of solicitation. Opportunities were available to obtain student sponsorship and to solicit on campus.

Freedom of Expression. Two student gay rights groups brought action against a Catholic university following its refusal to grant official recognition to the organizations. An earlier court decision ruled that the refusal was protected by the free exercise clause of the first amendment, even though the action had violated the Human Rights Act prohibition in effect in the locale in which the institution was located. Following established university guidelines, the groups had petitioned the student government for recognition. The student government approved the application, but the university administration refused recognition, claiming that recognition would imply endorsement of the gay organizations' goals antithetical to the goals of a Catholic institution. Using the *Bob Jones University*[214] decision, they argued that the Human Rights Act established a public policy against discrimination based on sexual orientation, superseding the free exercise claims of the university. The court ruled that the district interest in enforcing the Human Rights Act outweighed the burden that the Act places on the university's exercise of religious beliefs, and

212. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985).
213. Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985).
214. *See* The Yearbook of School Law 1984 at 280, Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

that the university must grant recognition.[215]

In another case involving recognition of a gay rights organization at Texas A & M University, the Supreme Court denied a petition for a rehearing.[216] This petition was from a Fifth Circuit Court ruling ordering recognition of the gay organization.[217]

Dismissal

Disciplinary Dismissal. This section saw a substantial number of cases involving cheating. Other cases involve actions arising out of a 1969 rally, and denial of a diploma due to unpaid parking violations.

The plaintiffs in this case, students at a state university, participated in a 1969 rally. The institution took disciplinary action against them in the form of probations and expulsions. Suit was filed in 1969, alleging violations of due process and a litany of litigations followed, including the case at bar.[218] In the present case, the plaintiffs alleged that the defendants violated their federal and state constitutional rights. The court held that there was no evidence to show that the students who attended the rally individually committed disorderly acts required to support the disciplinary action against them. This supported the plaintiffs' claim that their due process rights had been violated. The court remanded the case, with instructions for the lower court to order the destruction by the defendants of the plaintiffs' disciplinary records.[219] In another case, a New York state court upheld the university's procedures that were used in a disciplinary action against students.[220]

A law student had accumulated a large number of parking tickets in violation of university parking policy. He was refused re-admission for the spring semester for nonpayment of the tickets. After acquiring an injunction, he finished the requirements for his degree. The university refused to award the diploma until payment of the outstanding balance was made, but issued a certificate acknowledging satisfactory completion of the degree program. A Texas court found that the park-

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215. Gay Rights Coalition v. Georgetown Univ., 496 A.2d 567 (D.C. Cir. 1985), *vacated, reh'g granted*, 496 A.2d 587 (D.C. Cir. 1985).

216. Texas A&M Univ. v. Gay Student Servs., 105 S. Ct. 2369 (1985).

217. *See* The Yearbook of School Law 1985 at 3[illegible], Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984).

218. Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980); Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982).

219. Jackson v. Hayakawa, 761 F.2d 525 (9th Cir. 1985).

220. Fain v. Brooklyn College of CUNY, 493 N.Y.S.2d 13 (N.Y. App. Div. 1985).

ing and traffic regulations provide for a hearing which the individual waived. The administrative hearing in this case met the requirements of fairness.[221]

A number of cases involved cheating. A medical student was charged with falsification of his application and admission materials and a university disciplinary committee recommended dismissal. The president and the board upheld the decision. The plaintiff brought suit, challenging the administrative dismissal process. In refusing to grant relief, the court noted that his status as a student was dependent totally upon the submission of falsified documentation in support of his application.[222] Fraud in the procurement of an agreement negates the agreement. The court also found no evidence or material that supported the plaintiff's contention that bias had been shown by the members of the original hearing board, and that due process had not been followed.

A student at one of the service academies sought an injunction preventing him from being expelled and allowing him to receive grades and credits for that semester. The student had been charged with plagiarism, misconduct, cheating, and other conduct violations. Following the hearing, in accordance with the university regulations, the student was honorably discharged and disenrolled. The burden in this case was on the student to demonstrate irreparable harm. A motion for a preliminary injunction was denied, since the plaintiff failed to show the likelihood of success on the merits of his case.[223]

A University of Michigan student was suspended for one term for cheating on a final exam. The student sued, alleging denial of procedural due process in violation of his constitutional rights. The specific violation involved the switching of examination cover sheets and submitting his cover sheet with the responses of another student. The student was given notice of the charges and an opportunity to present his version of events to an impartial panel. The court ruled that his due process rights were effectively guaranteed.[224] Furthermore, the court noted that precedent shows no absolute right to legal counsel at disciplinary hearings.

Dental students involved in cheating were dismissed after hearings before a disciplinary committee and the academic dean. At trial, the court found that the university did not comply with its own rules

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221. Haug v. Franklin, 690 S.W.2d 646 (Tex. Ct. App. 1985).
222. North v. West Va. Bd. of Regents, 332 S.E.2d 141 (W. Va. 1985).
223. Tully v. Orr, 608 F. Supp. 1222 (E.D.N.Y. 1985).
224. Jaksa v. Regents of the Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984).

and due process procedures. As a result, one student was ordered readmitted; however, the dismissals of two other students were affirmed since they had admitted guilt. On appeal, the court found that the procedures followed in all of the dismissals satisfied the due process requirements of the Constitution. In reversing the trial court decision, the court affirmed the institution's disciplinary decision.[225]

In another cheating case, the district court found that fundamental fairness characterized the process of the dismissal of a student at a private university.[226] And, in a case where students at a public institution had given aid and assistance during a final examination, the district court found that procedural due process requirements had been met. The court also found that the evidence supported the finding of guilt by the institutional disciplinary tribunal and that the students' contract had not been breached.[227]

Academic Dismissal. The Sixth Circuit Court ruled that an institution's refusal to allow a student to retake a test a second time, a common practice for this particular testing program, was an arbitrary decision violating the student's property interest and resulting in his dismissal.[228] However, the Supreme Court overturned this circuit court decision. The Court found that the university had used adequate professional judgment in evaluating both previous academic performance and the performance on the first test as the basis for a refusal to retake the test.[229] The opinion stated:

> The record unmistakenly demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[230]

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225. Patterson v. Hunt, 682 S.W.2d 508 (Tenn. Ct. App. 1984).
226. Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985).
227. Nash v. Auburn Univ., 621 F. Supp. 948 (M.D. Ala. 1985).
228. *See* The Yearbook of School Law 1985 at 345, Ewing v. Board of Regents of the Univ. of Mich., 742 F.2d 913 (6th Cir. 1984).
229. Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507 (1985).
230. *Id.* at 513.

A number of cases have reached similar results. In one, the court refused to hold that a breach of contract existed when the school refused, based on poor performance, to award a certificate for completion of postdoctoral work.[231] A doctoral student's due process and equal protection rights were not violated because he received failing grades which resulted in his academic dismissal.[232] A Michigan case yielded a similar result, with the exception of state claims which are pending in state court.[233] In a Pennsylvania case, a student was unable to substantiate that sexual harassment rather than poor performance was the cause of her failing grade.[234] Action by a dismissed student against a private university, filed under the Family Educational Rights and Privacy Act, found that the Act did not yield access to a cause of action.[235] In two state claims involving academic dismissal, the court rejected both breach of contract and civil rights claims.[236]

In a Michigan case, a student who failed to complete a one-credit course and, therefore, did not receive his law degree filed suit. He was unable to show that he possessed a property interest in either the degree or the one credit.[237]

In a related case involving academic standards, the California Bar required those attending an unaccredited law school to pass a first-year law student examination before receiving credit for the year of study. A student in a law correspondence school failed the test the first time she took it and brought suit to have the requirement declared unconstitutional. The court ruled that the test met a legitimate governmental purpose, to certify only competent lawyers and training programs, and did not violate the equal protection clause.[238]

Other Constitutional Privileges

In one case, originally filed to challenge the constitutionality of student government requirements to ensure minority representation on a state university's judicial committee, the court struck down the

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231. Kraft v. William Alanson White Psychiatric Found., 498 A.2d 1145 (D.C. Cir. 1985).

232. Ikpeazu v. University of Neb., 775 F.2d 250 (8th Cir. 1985).

233. Litka v. University of Detroit Dental School, 610 F. Supp 80 (E.D. Mich. 1985).

234. Moire v. Temple Univ. School of Medicine, 613 F. Supp 1360 (E.D. Pa. 1985).

235. Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985).

236. Chism v. University of Kan., 699 P.2d 43 (Kan. 1985); Simmons v. Sowela Technical Inst., 470 So. 2d 913 (La. Ct. App. 1985).

237. Easley v. University of Mich. Bd. of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).

238. Lupert v. California State Bar, 761 F.2d 1325 (9th Cir. 1985).

provisions as a violation of plaintiffs' rights to equal protection under the fourteenth amendment.[239] The plaintiffs, as the prevailing party, were entitled to an award of attorney fees and the university was ordered to pay $136,714 for the plaintiffs' costs in this litigation.[240]

A student-teaching program at a state university allowed students to satisfy their practice teaching requirements at private and parochial schools. The plaintiffs alleged that the institution was funding and administering a program that advanced religion, in violation of the establishment clause of the first amendment. The legal precedents governing this case (i.e., the statute must have secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion) were set out by the Supreme Court.[241] The Court found that the policy advanced religion, because the parochial schools received funds for participation in the program; interaction with the university provided access to methods and ideas on improving education; and recruitment opportunities existed, while a visible connection between the public university and the private religious schools also was provided. The practice was ruled unconstitutional and the university was permanently enjoined from allowing students to practice teach in private and parochial schools.[242]

Individuals brought a racial discrimination charge against the state and the university. They charged that the institution was discriminating against blacks in publications, housing, financial aid, student employment, and hiring. The Fifth Circuit ruled that filing of the charge was correct so as to not offend eleventh amendment immunity. The lower court ruling was reversed and remanded.[243]

Two veterans who were in prison brought suit to declare unconstitutional a statute that limited education benefits to veterans who were incarcerated in a federal, state, or local correction facility to cost of tuition, fees, and supplies. They charged that these regulations denied them subsistence benefits, in violation of the equal protection clause. Subsistence benefits are limited to education costs not being paid from other governmental sources. Congress had enacted the provisions to reduce duplication of payments to those receiving the benefits and to reduce funds available to buy narcotics in prison. The court

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239. *See* The Yearbook of School Law 1985 at 343, Uzzell v. Friday, 592 F. Supp. 1502 (M.D.N.C. 1984).
240. Uzzell v. Friday, 618 F. Supp. 1222 (M.D.N.C. 1985).
241. Lemon v. Kurtzman, 403 U.S. 602 (1971).
242. Stark v. St. Cloud State Univ., 604 F. Supp. 1555 (D. Minn. 1985).
243. Jones v. Louisiana, 764 F.2d 1183 (5th Cir. 1985).

ruled that their needs are already being provided for by the government, and summary judgment was found for the defendants.[244]

In the final case of this section, a student sued an agent of the Federal Bureau of Investigation on charges of defamation and violation of constitutional rights. The court found no violations or defamation in the distribution of information on a black nationalist group and its leaders.[245]

LIABILITY

Personal Injury

There were a number of cases involving personal injury to members of the academic community or visitors to the campus.

A New York case involved the death of a man who fell after becoming intoxicated at a campus establishment which served alcoholic beverages. "The Pub" was alleged to have been negligent in failing to supervise the alcoholic consumption of the widow's deceased husband. The New York court held that the selling or giving of alcoholic beverages to an adult has never been a tort. Furthermore, the court found that the owner of the establishment had no common law responsibility to protect the individual from the results of his voluntary intoxication with the exception of injury to a third party by the intoxicant.[246]

In another case, a thirteen-year-old spectator was struck in the face by a puck at a collegiate hockey game. The spectator was seated behind the goal where a new glass barrier, one foot lower than the previous barrier, had recently been installed. Netting previously hung behind the barrier was also not in place. Since the plaintiff had not been notified of the changes and any additional risk, culpable conduct could not be attributed to any of her actions. Precaution taken at previous games was an indication of the state's awareness of what was required as a reasonable precaution. The court found that the state had a duty not only to provide adequate protection, but also to warn spectators that the current protection was less than what was previously provided. Damages were awarded to the plaintiff.[247]

Another case, involving injury from a fall on an icy sidewalk, concerned the standard of care required of a municipality. A student

244. Greenwell v. Walters, 596 F. Supp. 693 (M.D. Tenn. 1984).
245. Kenyatta v. Moore, 623 F. Supp. 220 (S.D. Miss. 1985).
246. Allen v. County of Westchester, 492 N.Y.S.2d 772 (N.Y. App. Div. 1985).
247. Sawyer v. State, 485 N.Y.S.2d 695 (N.Y. Ct. Cl. 1985).

fell on a pathway maintained by the community college. The court established that the standard of care required of the college was similar to that of a private owner of a premise. Also, the plaintiff must prove that the defendant had a duty to use reasonable care in keeping the pathway free of ice and snow where public use was foreseeable and that the danger to pedestrians should have been foreseen reasonably.[248]

A New York case, involving the rape and murder of a coed off campus by another student, was affirmed on appeal.[249] The state was found negligent in failing to inform the institution of the dangers of admitting a student with a previous record of drug abuse and violent crime. Furthermore, the public institution was negligent in not establishing reasonable criteria in its program to admit economically and educationally disadvantaged individuals. The court found the institution negligent in the murder of the student, but with no duty to the nonstudent also injured in the incident.[250]

Several cases involved the liability of institutions and their medical centers in malpractice suits against physicians in the institutions' employ who also had private practices at the medical centers. In a Massachusetts case, the institution was not liable for the suit against a physician in its employ who had been sued as a result of his private practice at the institution. Additionally, the physician could not claim sovereign immunity simply because he was a public employee.[251] However, in another case, where resident physicians in a burn unit improperly administered an anesthetic in the process of removing dead skin from the patient's hand, resulting in death, the private university medical center and the director of the burn unit were held liable. The director of the burn unit, a university faculty member in charge of training and supervising the residents, was negligent in providing supervision.[252]

Workers Compensation

Cases litigating issues of whether employees injured during work

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248. Mead v. Nassau Community College, 483 N.Y.S.2d 953 (N.Y. Sup. Ct. 1985).

249. *See* The Yearbook of School Law 1985 at 347, Eiseman v. State, No. 60491, (N.Y. Ct. Cl. 1983).

250. Eiseman v. State, 489 N.Y.S.2d 957 (N.Y. App. Div. 1985).

251. Smith v. Steinberg, 481 N.E.2d 1344 (Mass. 1985).

252. Jaar v. University of Miami, 474 So. 2d 239 (Fla. Dist. Ct. App. 1985).

qualified for workmen's compensation were before the courts again in 1985.

The widow of a faculty member killed in an automobile accident while on the way home alleged that his death occurred during work. She asserted that he often brought work home and completed it in the evenings and had work with him at the time of his death. The crux of her argument was that he was not "going or coming" from his job, but rather was enroute from one work location to another work location in the course of his job. The Workmen's Compensation Appeals Board awarded death benefits to the widow. The institution appealed that decision. The court rejected the claim of the home as a second job site and ruled that death occurred while commuting to or from the job. The workmen's compensation claim was, therefore, denied.[253]

In another case, a custodian alleged that she received a back injury on the job while she was lifting a heavy item. Evidence at trial cast doubt on plaintiff's testimony. Evidence included insurance forms which indicated a discrepancy in the date of the injury and whether the injury was actually work related. Plaintiff testified that the forms were filled out by a medical specialist and she had not read them when she signed the forms. Given the evidence at trial, the court found no error in the trial court's decision to deny compensation.[254]

An employee sought disability compensation for multiple sclerosis. The court ruled that the disease was not caused by employment nor was evidence presented to show that his job exposed him to hazards or stress greater than he would find in everyday living.[255]

Plaintiff, during a hearing before the workmen's compensation board, was required to be evaluated by various medical experts. These experts later provided differing results in terms of the plaintiff's cause of injury. The final expert recommended that a psychiatrist also be brought in for evaluative purposes. The board refused to seek this evaluation and denied benefits based on the inconclusive findings of the other medical experts. The court found that the board had erred in not relying on the testimony of the physician who treated the plaintiff immediately after the accident when no evidence was presented by the medical experts which clearly refuted his diagnosis. The case was remanded for an award of compensation.[256]

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253. Santa Rosa Junior College v. Workers' Compensation Appeals Bd., 708 P.2d 673 (Cal. 1985).

254. Neldare v. Board of Supervisors of Southern Univ., 460 So. 2d 26 (La. Ct. App. 1984).

255. Massie v. University of Fla., 463 So. 2d 383 (Fla. Dist. Ct. App. 1985).

256. Blackshear v. Bethune Cookman College, 467 So. 2d 721 (Fla. Dist. Ct. App. 1985).

Contract Liability

Litigation involving a breach of contract was voluminous again this year. Some cases involved the construction of buildings, others involved contracts for services. Contract cases involving both faculty and students also were present.

In one contract case, a food service purveyor had the responsibility to provide a building which would be leased by the institution during the five-year period of the contract. For one dollar, the building could be purchased by the university at the end of the contract period, provided the notice of purchase was received sixty days prior to the termination date of the contract. Otherwise, the purveyor had the responsibility of removing the building from the institution's land. Notification of purchase was given, but not in compliance with the sixty-day provision. The purveyor sued for damages and the cost of the building. The court found that the institution's failure to comply with the sixty-day provision was a harmless error resulting in no damage to the plaintiff.[257]

A number of cases involved successful claims against contractors and architectural firms for poor design or construction of buildings, resulting in costly repairs.[258] In one case, a contractor sought an injunction to prevent the award of a contractor to the highest bidder. A committee on the proposed research facility had recommended that the design of the highest bidder was the most durable, from the perspective of the research needs of the project. The court found that the institution had used reasonable discretion in the award of the contract.[259] The signature of a public university's vice president on a written agreement did not bind the institution to the agreement without specific ratification by the board, as provided by statute.[260] A New York court, in a similar ruling, found that an administrator at a public institution could not bind the institution to a contract without authority to do so.[261]

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257. Ames Contracting Co., Inc. v. City Univ. of N.Y., 485 N.Y.S.2d 259 (N.Y. App. Div. 1985).

258. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., Inc., 328 S.E.2d 274 (N.C. 1985); Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 492 N.Y.S.2d 371 (N.Y. App. Div. 1985).

259. Integrated Dev. & Mfg. Co. v. University of Minn., 363 N.W.2d 845 (Minn. Ct. App. 1985).

260. El Camino Community College Dist. v. Superior Court of Cal., 219 Cal. Rptr. 236 (Cal. Ct. App. 1985).

261. Dempsey v. City Univ. of N.Y., 483 N.Y.S.2d 24 (N.Y. App. Div. 1984).

In a Tennessee case, the plaintiff, a co-principal investigator for a funded research grant, claimed that another university and one of its faculty conspired to remove his name from the proposal and to resubmit it with one principal investigator. Based on the state's immunity from prosecution, and due to the fact that the tort claim was filed after the statute of limitations had expired, the case was dismissed.[262]

In another case, a researcher was given a tape recorder and, for a fee, traveled the New England area interviewing acquaintances of a renowned author. Without the university's approval, he also solicited and received papers and other memorabilia, which the donors had intended for the institution's library. When the university became aware that the researcher was in possession of rare documents intended for deposit with their library they made several requests to the researcher for the documents. The researcher's failure to respond resulted in the placement of a notice in *Bookmen*, indicating that this person was misrepresenting himself as an agent of the university and had illegal possession of rare documents of the famous author which were intended for the university library. In 1974, the institution filed action to replevin the documents, and the researcher filed a counterclaim alleging libel based on the published notice. The district court ruled that the notice in *Bookmen* was true and, therefore, not libelous, and that the giving of a tape recorder and expenses for travel was not authorization to solicit documents. The federal circuit court affirmed the district court decision.[263]

Several contract cases involved students or student organizations. Yale University sought an injunction to prevent *The Yale Literary Magazine* from using the university's name. On appeal, the court found that trade regulations restricting the use of a trade name was an adequate basis to issue an injunction restricting the use of the institution's name.[264]

In a nonrenewal of a lease to a tenant affiliated with the institution, the court ruled that the laws governing removal of tenants did not apply. Exempt from the law are tenants renting university housing who are affiliated with the institution either as employees or students. Therefore, the institution did not have to conform to the law's notification requirements in a nonrenewal of a lease.[265]

In a case involving a proprietary school, the plaintiff alleged a

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262. Carlson v. Highter, 612 F. Supp. 603 (E.D. Tenn. 1985).
263. Brown Univ. in Providence, v. Kirsch, 757 F.2d 124 (7th Cir. 1985).
264. Yale Literary Magazine v. Yale Univ., 496 A.2d 201 (Conn. Ct. App. 1985).
265. Trustees of Columbia Univ. v. James, 489 N.Y.S.2d 669 (N.Y. App. Div. 1985).

breach of contract in her removal from the institution for disciplinary reasons. Plaintiff became involved in a controversy over the use of school funds, which eventually resulted in a legal complaint being filed against the school. Both faculty and fellow students testified that the plaintiff had always handled herself in a mature and responsible manner, contrary to the reason given for her dismissal. The lower court dismissed the case on the defendant's motion. On appeal, the court found that the plaintiff had established evidence to indicate that her contract with the proprietary school had been breached by her dismissal and remanded the case for further action.[266]

Deceptive Practices

The deceptive practices of an institution in its admissions and programs, a new section to this chapter, was before the courts. In the case at bar, the plaintiff responded to an advertisement in the newspaper for applications to a geological drafting program at a proprietary institution. In a meeting with the school's counselor, whose salary is based in part on a commission for students recruited, she was advised to enroll in a drafting curriculum, since the geologic program was only in the formative stages with no guarantee that it would ever be offered. At the time of matriculation, earlier having completed financial aid forms for a BEOG and a HELP grant, the plaintiff was asked to fill out forms which were represented as part of the already awarded grant-in-aid programs. However, the forms were, in fact, for an NDSL loan. Later, after attending the institution for a time, the plaintiff was involved in an automobile accident and had to take a leave of absence from the college, for which she was advised she would not be charged tuition. After returning for a short period, she was sent a bill for tuition during the leave period and later withdrew and filed this action. The plaintiff charged the school with false advertising, misrepresentation of facts, intentionally suppressing or omitting facts, and offering property or services without the intent to deliver them. The trial court found the institution guilty and awarded damages to the plaintiff. The Kansas Supreme Court affirmed the lower court decision that the institution was guilty of a violation of the state's consumer protection act and was appropriately fined.[267]

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266. Fussell v. Louisiana Business College of Monroe, Inc., 478 So. 2d 652 (La. Ct. App. 1985).

267. Manley v. Wichita Business College, 701 P.2d 893 (Kan. 1985).

Educational Malpractice

Another new section was added to this year's chapter to deal with litigation related to educational malpractice in higher education. In one case, a physician who had just begun his internship at a hospital was involved in a delivery resulting in brain damage to an infant, and a medical malpractice suit was brought against him. He sued the director of medical education for educational malpractice. The plaintiff alleged that the proximate cause of the malpractice suit was the failure of the director to adequately supervise the internship program. The court, citing three prominent educational malpractice cases,[268] used the public policy argument to refuse to allow a cause of action for educational malpractice. The court stated:

> The legislature has vested the board of medical examiners, the board of higher education, and the advisory graduate medical education council with the authority to insure that the proper medical education is delivered within New Jersey. It would be against public policy for the court to usurp these functions and inquire into the day-to-day operation of a graduate medical education program. From the standpoint of court administration, it would be unwise to recognize a claim for educational malpractice where an individual physician is attempting to defend against a malpractice claim . . . . Therefore, for reasons of public policy, there is no legal duty which will support a tort for educational malpractice in this class of case.[269]

In another case, the plaintiff charged "athletic official's malpractice" over a controversial call at a college basketball game. After the game, the plaintiff, a novelty store owner, marketed a T shirt critical of the referee. The referee sought an injunction and damages, and the plaintiff counter-sued, bringing the malpractice allegation. The court found no basis in law for a cause of action based on "athletic official's malpractice."[270]

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268. Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); Donohue v. Copiague Union Free School Dist., 408 N.Y.S.2d 584 (N.Y. Sup. Ct. 1977), *aff'd*, 407 N.Y.S.2d 874 (N.Y. App. Div. 1978), *aff'd*, 418 N.Y.S.2d 375 (N.Y. 1979); Hoffman v. Board of Educ. of the City of N.Y., 410 N.Y.S.2d 99 (N.Y. App. Div. 1978), *rev'd*, 424 N.Y.S.2d 376 (N.Y. 1979).

269. Swidryk v. St. Michael's Medical Center, 493 A.2d 641 (N.J. Super. Ct. App. Div. 1985).

270. Bain v. Gillispie, 357 N.W.2d 47 (Iowa Ct. App. 1984).

Negligence

In a New York case, the court, on appeal, found that there were trial issues to support the denial of a summary judgment and to let stand an amended answer of contributory negligence. The case involved a college's charge against a bank to recover damages on forged checks or checks drawn on an unauthorized clerk's signature.[271]

Another case involved an appeal from a jury trial of a case in which a utility company was found negligent in the maintenance of a utility line to a music building on the college campus which, as a result, burned. The court found that adequate evidence was presented to find that the utility company's failure to maintain adequate clearance between power lines and trees was the cause of the fire. Furthermore, the court ruled that replacement costs of the building, not the value before or after the fire, was the appropriate damage assessment.[272]

NCAA Regulations and Sanctions

Regulations and sanctions issued by the NCAA were again before the courts. These cases continue to center on either eligibility rules or the sanctions placed on institutions violating the regulations. One case raised antitrust questions.

In a case involving Cornell University, an NCAA Division I school, a transfer student sued, alleging denial of due process and equal protection rights. The NCAA rule banning transfer students from playing in intercollegiate sports prior to completing one year of attendance at the institution resulted in the denial of the plaintiff's request to play football for the institution. Plaintiff alleged that he should be exempt, since he transferred for academic reasons and was not recruited. The court dismissed the case, finding that the NCAA and Cornell University, a private corporation, were not involved in "state action."[273]

In another case, a basketball player sought a preliminary injunction against the NCAA. The association has a rule which counts participation in organized sports after the age of twenty, but before attendance at a college, as one year of eligibility. In spite of allegations of

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271. Five Towns College v. Citibank, N.A., 489 N.Y.S.2d 338 (N.Y. App. Div. 1985).

272. Culver-Stockton College v. Missouri Power and Light Co., 690 S.W.2d 168 (Mo. Ct. App. 1985).

273. McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985).

possible discriminatory impact, the Third Circuit Court found that the district court was correct in refusing to grant the injunction, based on the association's legitimate nondiscriminatory reason for enforcing the rule. The NCAA had argued that the rule was established to foster equality of competition by preventing athletes from staying out of college to hone their athletic skills, giving more mature individuals an edge in the awarding of college athletic scholarships.[274]

In another case, a hockey player and his father, whose corporation was the sponsor of a Canadian hockey team, sued the university and the NCAA. The son questioned the legality of the rule which classified him as professional, because he played on a hockey team without compensation. The hockey team in question was sponsored by his father's company. His father attempted to join the suit, alleging damage to his team's ability to recruit players in light of the NCAA ruling concerning denial of amateur status. The district court found that the father had failed to meet the requirements of joinder and, therefore, his complaint was dismissed. Also, the son failed to establish a constitutional right to participate in intercollegiate athletics, nor had he shown that a liberty interest or a property interest were violated in the denial to participate.[275]

A Maryland court overturned a lower court ruling granting a permanent injunction against the NCAA, preventing it from sanctioning two lacrosse players and the institution, based on the NCAA enforcement program. The institution sought this injunction because previous litigation had resulted in a court-ordered injunction, allowing the two students to play lacrosse.[276] This court dismissed both of the previous litigations as moot as well as the judge's motion for a permanent injunction against the NCAA.[277]

ANTITRUST

This antitrust case involved the requirements of an institution that all freshmen under the age of twenty-one who were not residing with their parents must reside in university housing. Owners of a private dormitory brought this action. Not only was the institution requiring freshmen to live in its residence halls, but it also assigned

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274. Butts v. National Collegiate Athletic Ass'n, 751 F.2d 609 (3d Cir. 1984).
275. Karmanos v. Baker, 617 F. Supp. 809 (E.D. Mich. 1985).
276. *See* National Collegiate Athletic Ass'n v. Tucker, 476 A.2d 1160 (Md. 1984).
277. National Collegiate Athletic Ass'n v. Johns Hopkins Univ., 483 A.2d 1272 (Md. 1984).

them to temporary spaces, even after all of its rooms were filled. The private dorm proprietor alleged that, even though this was done with the option that they seek housing elsewhere, notice was at such a late date that the student could not effectively enter the market. The federal district court ruled that sovereign immunity prevented the award of monetary damages. Furthermore, as to the question of antitrust, the institution, as an agent of state government, was exempt from the antitrust law and could have rules requiring students to live in residence halls in order to fill available spaces. However, state action does not necessarily apply to the way the institution was implementing this regulation. An issue remains as to whether the implementation was a clear furtherance of a state policy rather than an intentional delay and misrepresentation, which goes beyond the public policy. While the case was remanded, the court ordered a pretrial hearing to attempt to resolve the issue, since no damages were involved.[278]

In another case, the University of Georgia Athletic Association sought a permanent injunction against a beer distributor's use of an English bulldog on its beer cans labeled "Battlin' Bulldog Beer." The district court issued an injunction. On appeal, the Eleventh Circuit Court found that under the Lanham Act[279] the choice by the association of an English bulldog as its "suggestive" mark meant that the institution was not required to prove some secondary meaning for the federal act to prevail. The court also found that the disclaimer on the cans did not serve to alleviate the confusion over their origin. The lower court decision was affirmed, preventing the distributor from using the English bulldog on the label of his product.[280]

278. American Nat'l Bank and Trust Co. of Chicago v. Board of Regents for Regency Univs., 607 F. Supp. 845 (N.D. Ill. 1984).

279. 15 U.S.C. § 1125(a), trademark infringement.

280. University of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535 (11th Cir. 1985).