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ABSTRACT

Themes in 1989 higher education case law reflect the difficulty in reducing the federal deficit, increased service demands on state budgets, and an economic condition of marginal growth. The interpretation of constitutional rights in relationships between the institution and students, employees, and communities continues to be heavily litigated. Cases dealing with contracts, copyright, patents, and antitrust prohibitions point to the growing business-university relationships. Cases discussed in this chapter are organized under seven major topics: (1) intergovernmental relations; (2) discrimination in employment; (3) faculty employment; (4) administrator and staff termination; (5) all employees; (6) students; and (7) liability. (MLF)

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HIGHER EDUCATION

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with Dorothy E. Finnegan

INTRODUCTION

In 1989, distinct themes ran through the litigation. These themes reflect the difficulty in reducing the federal deficit, increased service demands on state budgets, and an economic condition of marginal growth. One of the more interesting themes is the balance of authority among various agencies, political entities, and boards of trustees of higher education institutions. The definitions of authority impact students, faculty, administrators, alumni, and donors of postsecondary institutions. While the interpretation of constitutional rights in relationships between the institution and students, employees, and communities continue to be heavily litigated, other challenges involve the authority to determine educational policy and management prerogatives. Cases dealing with contracts, copyright, patents, and antitrust prohibitions point to the growing business-university relationships.

INTERGOVERNMENTAL RELATIONS

This section presents issues concerning the application of tax laws, zoning statutes, sunshine laws, environmental laws, governmental ethics, and jurisdictional statutes to systems and institutions of higher education. Cases in this area serve to define the balance of authority between city government, state and federal agencies, and institutional boards of trustees in their interactions with educational policy and management. The section also discusses questions of sovereign immunity.

The legality of tax provisions were again before the courts. In Oklahoma, a city experiencing economic decline, formed an economic development corporation and implemented a voter approved

sales tax for the sole purpose of saving a private sectarian college located in the city.[1] The state Supreme Court ruled that the tax was designed to promote the public good and, therefore, the use of public money for a private purpose was not within the meaning of the statute. Citing *Hunt v. McNair*,[2] the court found that the funding scheme which involved buying the campus and leasing it back to the private school did not violate the separation of church and state provisions of the state constitution or the first amendment "free exercise" or "establishment" clauses of the United States Constitution.

In Iowa, the court upheld the assessment by the city of a franchise fee on cable television service offered to students at a public university located within the city but owned by the state.[3] The court reasoned that the city could charge the fee since the cable company ran its cable through city easements to serve the university.

City authority was also challenged in a case involving a proprietary institution.[4] The school sought to enjoin the city from distributing money under the Job Training Partnership Act and to gain city approval for its application for job training funds. The court ruled that the decision of the Commission of the City of New York to exclude proprietary schools from the fund dispersion program was a misinterpretation of the legislative intent under the act and an arbitrary decision on the Commission's part. On remand the court ordered the city to reconsider the school's application.

The authority of the board of trustees of higher education institutions was before the courts in several cases. In California, an organization of small family farms charged that the University of California was in violation of the Hatch Act of 1887[5] because its programs and research waged financial hardship on the small farmer and were designed to promote farming as a big business.[6] The court reversed a lower court decision, and found no reference to the small family farm in the legislation. Citing from the legislation the court noted that the Hatch Act sought "to promote the efficient production, marketing, distribution, and utilization of farm products."[7]

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1. Burkhardt v. City of Enid, 771 P.2d 608 (Okla. 1989).
2. Hunt v. McNair, 413 U.S. 734 (1973).
3. City of Ames, Iowa v. Heritage Communications, Inc., 861 F.2d 185 (8th Cir. 1988).
4. SCS Business & Technical Inst., Inc. v. Barrios-Paoli, 542 N.Y.S.2d 965 (Sup. Ct. 1989).
5. 7 U.S.C. § 361a *et seq.*
6. California Agrarian Action Project, Inc. v. Regents of Univ. of Cal., 258 Cal. Rptr. 769 (Ct. App. 1989).
7. *Id.* at 771.

A hunting and fishing club challenged the authority of the Board of Trustees of the University of Michigan to prohibit fishing on a stretch of a river which runs through University property.[8] The court found that the Board had the power to regulate its property for educational purposes including the banks of a navigable river running through the campus. The court refused to judge the appropriateness of the reasons for the ordinance since they are nonjusticiable legislative matters.

In Nebraska, taxpayers were unsuccessful in an attempt to prevent the board from closing the branch campus of a community college.[9] Another community college board's contract with a private book company to establish a bookstore on campus was challenged by an off-campus bookstore.[10] At issue was whether the statute allowing the board to contract with a book company authorized not only the sale of educational materials and texts but also general trade books. The court ruled that the sale of general trade books was outside the provisions of the statute.

Questions concerning the authority of agencies over the educational activities of postsecondary institutions were also litigated. In Massachusetts, a dental hygienists school sued the Board of Registration in Dentistry over the procedures followed in the Board's denial of the school's application for a license to teach the administration of certain local anesthesia techniques.[11] The court found that the decision of the professional board was based on sound information and the presentation of that information did not require the board to observe the rudiments of an adjudicatory proceeding.

A university security guard claimed he was qualified for state police officers' retirement benefits because the local retirement board said he was involved in hazardous duty. The court found that the statutory language excluded security guards.[12] In New Jersey, the court overturned an Executive Commission on Ethical Standards ruling prohibiting a Rutgers law professor, while conducting a clinical teaching experience for law school students, from represent-

8. Michigan United Conservation Clubs v. Board of Trustees, 431 N.W.2d 217 (Mich. Ct. App. 1988).
9. Koenig v. Southeast Community College, 438 N.W.2d 791 (Neb. 1989).
10. 1st Street Books v. Marin Community College Dist., 256 Cal. Rptr. 833 (Ct. App. 1989).
11. Forsyth School v. Board of Registration, 534 N.E.2d 773 (Mass. 1989).
12. Arizona Bd. of Regents v. State, 771 P.2d 880 (Ariz. Ct. App. 1989).

ing a client who sued another state agency.[13] The court found that the effect of the statute would make it impossible for a public law school to provide clinical experiences for law students. This effect, the court reasoned, was outside of the intent of the legislature in passing the statute.

Sunshine laws were again in the courts. A federal agency, the National Security Archives (N.S.A.), was successful in achieving a classification which gave it access to public records at a discounted rate.[14] Federal law provides that access to public records be provided at the expense of those seeking the records, except for educational institutions and the media which shall be given the records at a discount. The court ruled that the N.S.A. was not an educational institution but fit the definition of news media.

Several cases involved access to the files and search committee deliberations in a presidential search. In Minnesota, the court ruled that a search committee formed by the faculty governance committee was not a committee of the regents subject to the open meeting provisions.[15] The court reasoned that while the regents approved the committee, no regents were members of the committee formed by another body. In Georgia, however, the applications, resumes, and vitae of presidential applicants would be opened to public view, but under the law, letters of recommendations were confidential evaluations exempt from view.[16]

A Maine university attempted to shield from public view the termination agreement executed between the institution and the women's basketball coach.[17] The court ruled that under the sunshine laws only the sentence regarding confidential medical information would be shielded from the public.

Several animal rights groups sought access to information. Through court action,[18] a New York group gained access to inspection reports generated by the "Laboratory Animal Users Commit-

13. *In re* Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542 (N.J. 1989); *see* The Yearbook of School Law 1989, at 201, *In re* Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 537 A.2d 713 (N.J. Super. Ct. App. Div. 1988).

14. National Security Archive v. United States Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989).

15. The Minnesota Daily v. University of Minn., 432 N.W.2d 189 (Minn. Ct. App. 1988).

16. Board of Regents v. The Atlanta Journal, 378 S.E.2d 305 (Ga. 1989).

17. Guy Gannett Publishing Co. v. University of Me., 555 A.2d 470 (Me. 1989).

18. ASPCA v. Board of Trustees, 541 N.Y.S.2d 183 (Sup. Ct. 1989).

tee" in compliance with the federal statute.[19] However, the court cautioned that the open meeting laws were not intended to be used as a soap box to promulgate certain views.[20] In Washington, an animal rights group sought and the court granted access to information similar to what the university had offered in prelitigation negotiations.[21] At issue on remand was whether the animal rights group actually prevailed at trial so as to be granted by the court an award of attorney fees. In another case where attorney fees were at issue and where the case was ruled moot because the requested information had been released,[22] the court ruled that the newspaper should be awarded attorney fees as the prevailing party.[23]

Sunshine or disclosure laws were at issue in a Georgia case, which was dismissed as moot. Also questioned was the authority of the attorney general to seek disclosure under the law without the authorization of the governor.[24] Cornell University was granted access to nonredacted information of a city police investigation of an alleged rape by one of the University's security guards.[25]

Finally, in a sunshine-related case, questions of academic freedom and access to research information were before the court. The American Tobacco Company requested access to research data on the hazards of smoking for its defense in a pending lawsuit.[26] The court ruled that the court monitored access would not violate any scholar's privilege and that the order protected the patient-physician privilege and research subject's confidentiality.

Zoning laws were at issue in a Florida case.[27] The relationship between a small town and a new private college for the disabled deteriorated when the college began to buy residential property throughout the community to use for college activities. The town refused to grant a zoning variance for one property and rewrote its zoning ordinance to exclude the college from primarily residential

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19. 7 U.S.C. §§ 2132(e), 2143(b).

20. ASPCA v. Board of Trustees of State Univ. of N.Y., 541 N.Y.S.2d 183, 185 (Sup. Ct. 1989).

21. Progressive Animal Welfare Soc'y v. University of Wash., 773 P.2d 114 (Wash. Ct. App. 1989).

22. *See* The Yearbook of School Law 1988 at 227, Nor'h Carolina Press Ass'n, Inc. v. Spangler, 360 S.E.2d 138 (N.C. Ct. App. 1987).

23. North Carolina Press Ass'n, Inc. v. Spangler, 38' S.E.2d 187 (N.C. Ct. App. 1989).

24. Bowers v. Board of Regents, 378 S.E.2d 460 (Ga. 1989).

25. Cornell Univ. v. City of N.Y. Police Dep't, 544 N.Y.S.2d 356 (App. Div. 1989).

26. Mount Sinai School of Medicine v. American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989).

27. DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479 (M.D. 1989).

areas. The court upheld the new ordinance and the zoning commission's definition of schools that excluded colleges. Furthermore, they ruled that the zoning ordinance did not violate the equal protection or due process clauses of the Constitution.

Zoning based on use and tax exempt status was also litigated. In another case, a Florida community college foundation purchased a building, part of which would be used as classroom space and part of which would be leased to a bank.[28] The court ruled that the building did not qualify for tax exemption that year because, during remodeling, it was not actually used for educational purposes. In Illinois a university tennis facility leased to a private club but used by the university for a limited number of hours was not exempt from real estate tax as a school property.[29] A Muslim student group, after prevailing on a challenge to a zoning ordinance, was awarded attorney fees but not at the usual rate. On appeal the case was reversed and remanded for the lower court to establish reasons for the award at the lower than normal rate.[30]

Several cases involved compliance with environmental impact issues. For example, a University of California case[31] was heard on appeal. The California Supreme Court found that the environmental impact statement was deficient only to the extent that it failed to discuss future research project use in the facility.[32] The court found the environmental impact statement regarding current uses to be adequate and would not stay present activities at the building pending prescribed revisions of the environmental impact statement. The University of California was also in court over plans to build a residence hall near an inactive portion of the Hayward Fault. The court ruled that the conclusion by two independent experts that the portion of the fault was inactive was valid and acceptable under the state statutes governing construction near active fault lines.[33]

A number of cases involve jurisdictional questions. In one case, a federal appellate court affirmed the lower court dismissal of all

28. Metropolitan Dade County v. Miami-Dade County Community College Found., 545 So. 2d 324 (Fla. Dist. Ct. App. 1989).

29. DePaul Univ., Inc. v. Rosewell, 531 N.E.2d 884 (Ill. App. Ct. 1988).

30. Islamic Center of Miss., Inc. v. City of Starkville, Miss., 876 F2d 465 (5th Cir. 1989).

31. *See* The Yearbook of School Law 1988 at 228, Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of San Francisco, 238 Cal. Rptr. 451 (Ct. App. 1987).

32. Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988).

33. Better Alternatives for Neighborhoods v. Heyman, 260 Cal. Rptr. 758 (Ct. App. 1989).

charges against a university.[34] While university police arrested the plaintiff, the constitutional charges of illegal detention involved the county facility he was transferred to immediately upon his arrest, not the university arresting officer.

Another case involving an arrest and alleged assault by campus police landed in the Supreme Court. The Court ruled that the statute of limitations to file a suit under section 1983 was the limitation period enumerated in the state personal injury statutes of three years rather than the more limiting one year provisions of intentional torts statutes.[35] In Pennsylvania, a court ruled that campus police had jurisdiction to make an arrest on commercial property adjacent to and owned by the university.[36]

A husband was unsuccessful in a claim of a violation of the Code of Government Ethics emanating from the affair the president of a college had with his administrative assistant, the husband's wife.[37] Furthermore, the court found no cause of action under a charge of alienation of his wife's affection.

Sovereign immunity was at issue in several cases. A Kansas university medical center possessed eleventh amendment immunity from a suit against it or its individual officers in their official capacity.[38] Suits against individual officers in their individual capacities are still pending. An Ohio case also established eleventh amendment immunity.[39]

A university requested declaratory judgment over an ownership issue; land deeded to the state for a state park reverted back to an estate held by the university when the state ceased that use of the land.[40] The court ruled that this was a "quiet title action" requiring that it be solved in the local jurisdiction where the land was located.

Cases involving university hospitals were again numerous. A federal court ruled that a hospital could expect reimbursement in the form of stipends and overhead costs of residents' work in an outpatient clinic as part of their residency training program.[41] In Iowa,

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34. Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989).
35. Owens v. Okure, 109 S. Ct. 573 (1989).
36. Commonwealth v. Mitchell, 554 A.2d 542 (Pa. Super. Ct. 1989).
37. Farrell v. Boyer, 541 So. 2d 398 (La. Ct. App. 1989).
38. Gray v. University of Kan. Medical Center, College of Health Sciences, School of Nursing, 715 F. Supp. 1041 (D. Kan. 1989).
39. Dillion v. University Hosp., 715 F. Supp. 1384 (S.D. Ohio 1989).
40. State Dep't of Natural Resources v. Antioch Univ., 533 So. 2d 869 (Fla. Dist. Ct. App. 1988).
41. University of Cincinnati v. Bowen, 875 F.2d 1207 (6th Cir. 1989).

the federal circuit court affirmed a lower court opinion[42] which allowed the calculation of patient fees paid under the state indigent care program in arriving at the amount necessary to discontinue the Hill-Burton Act free indigent care.[43] Similarly, a state department could calculate the payment of medical cost based on costs determined from an efficiently and economically operated hospital standard.[44]

Several hospital cases involved the collection of fees for patient services. In one case, the court ruled that the insured could sign over obligations for patient service holding the insured's Health Maintenance Organization responsible for payment.[45] In another case, an insurance company was obligated to assess and pay the hospital for its services prior to finalizing a settlement with the hospital's patient in a personal injury claim.[46]

A case involving a challenge to a Health Facilities Planning Board grant of a certificate of need to a university to establish a hospital was back on appeal.[47] The court ruled that administrative remedies need not have been finished before this action was commenced.

DISCRIMINATION IN EMPLOYMENT

Litigation resulting from discrimination covered issues involved in the enforcement of various federal statutes. Title VI cases dealt both with questions surrounding court ordered integration of state systems of higher education and with proper federal agency enforcement of the law. Cases claiming title VII and Equal Pay Act violations were common and involved hiring, pay, award of benefits, and retaliation disputes. Litigation under title IX continued to be sparse while the Rehabilitation Act and Age Discrimination Act litigation continued at a moderate pace.

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42. *See* The Yearbook of School Law 1989 at 200, Lile v. University of Iowa Hosps. and Clinics, 674 F. Supp. 288 (S.D. Iowa 1987).

43. Lile v. University of Iowa Hosps. and Clinics, 886 F.2d 157 (8th Cir. 1989).

44. Hahnemann Univ. v. Commonwealth Dep't of Pub. Welfare, 564 A.2d 521 (Pa. Commw. Ct. 1989); *See also* Presbyterian-Univ. of Pa. Medical Center v. Commonwealth, 553 A.2d 1027 (Pa. Commw. Ct. 1989).

45. Loyola Univ. Medical Center v. Med Care HMO, 535 N.E.2d 1125 (Ill. App. Ct. 1989).

46. State *ex rel.* Univ. of Iowa Hosps. and Clinics v. Hunter, 442 N.W.2d 94 (Iowa 1989).

47. Condell Hosp. v. Illinois Health Facilities Planning Bd., 530 N.E.2d 217 (Ill. 1988); *see* The Yearbook of School Law 1989 at 204, Condell Hosp. v. Health Facilities Planning Bd., 515 N.E.2d 750 (Ill. App. Ct. 1987).

Title VI

A number of title VI cases were litigated this year. The lead off case resulted from a previously reported court ruling that the state of Louisiana was operating a discriminatory dual system of higher education in violation of title VI.[48] The district court in the early summer, issued the specific court order to bring the state system of higher education into compliance with the law.[49] The extensive court order reduced the number of boards to one state board of higher education; stipulated the composition and selection of the board; merged the black law school with the previously all white law school; and ordered the development of a classification scheme for tiering the state institutions based on mission.

In a subsequent ruling noting pending appeal to the Supreme Court, the court refined the order to require the immediate desegregation of staff and students through the establishment of incentive programs to recruit the nonpredominant race at the racially predominant institutions.[50] The court also refused to stay its previous order. Later in the summer, the court-ordered remedies to eliminate discrimination in Louisiana were back in the court.[51] In this decision, the court rejected both Southern and Grambling Universities' challenges to the consolidation of their programs. The Universities alleged that the court-ordered actions should be reserved to the state for resolution.

In another important landmark case, a federal circuit court of appeals ruled that the intervenors in the *Adams* case[52] did have standing to litigate since they were the victims of the discrimination.[53] However, the question of whether the court exceeded its authority in seventeen years of court orders by assuming a federal

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48. *See* The Yearbook of School Law 1989 at 204; United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988).

49. United States v. Louisiana, 718 F. Supp. 499 (E.D. La. 1989).

50. United States v. Louisiana, 718 F. Supp. 521 (E.D. La. 1989).

51. United States v. Louisiana, 718 F. Supp. 525 (E.D. La. 1989).

52. Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972) *modified*, Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), *aff'd and modified*, 480 F.2d 1159 (D.C. Cir. 1973) (the modifications allowed the states time to submit plans for compliance rather than ordering immediate compliance). *See* Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983) (affirms the D.C. District Court authority to issue a court order monitoring agency sought compliance by North Carolina with title VI). *See also* Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (provided for the geographic expansion to all 50 states and the consolidation of court orders from Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976); and Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987), *remanded from*, Womens Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984).

53. Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989).

agency's constitutional prerogatives will be decided in the next term.

In Tennessee, the court awarded attorney fees to a private party when the state and the private party prevailed in a suit against the United States.[54] The United States failed in a challenge of that portion of the consent decree which set racial quotas for the admission of blacks to preprofessional programs as discriminatory to nonminority citizens.[55] The court reasoned that change of position and loss by the United States allowed the court to award costs to the prevailing parties.

In Georgia, private individuals were denied relief from a consent decree that enforced the integration of a predominantly black public institution of higher education.[56] Relief was sought because the parties complained that they were not informed of the impending resignation of the college president at the time the consent decree was negotiated. The court reasoned that the identity of the president of the institution was not pertinent to the content of the consent decree.

Title VII

Cases involving discrimination under title VII continued to be litigated although the volume has declined slightly. This section commences with cases dealing with the question of tolling. In California, a black teacher who failed to bring action in court within the ninety-day limit of the issuance by EEOC of a "Right to Sue" notice was time-barred from prosecuting the case.[57] In another California case, the court found it lacked jurisdiction because the alleged discrimination occurred more than 300 days prior to the filing of charges with EEOC.[58] The statute of limitations continues to be the deciding factor in a number of title VII cases.

In a case on appeal, a federal circuit court vacated and remanded a decision.[59] EEOC had issued right to sue notices on two of the plaintiff's three charges: discrimination in pay and promotion based on her gender, and retaliation against her husband, a faculty mem-

54. Geier v. Richardson, 871 F.2d 1310 (6th Cir. 1989).

55. *See* The Yearbook of School Law 1987 at 238, Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984). *aff'd*, Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986); *see also* Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

56. Hunnicutt v. Board of Regents of Univ. Sys. of Ga., 122 F.R.D. 605 (M.D. Ga. 1988).

57. Mitchell v. Los Angeles Community College Dist., 861 F.2d 198 (9th Cir. 1988).

58. Sosa v. Hiraoka, 714 F. Supp. 1100 (E.D. Cal. 1988).

59. Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989).

ber at the institution (a claim now joined by her husband). The court on appeal found that the lower court erred in finding that the plaintiff had not exhausted administrative remedies because a right to sue notice had not been issued on a third claim before EEOC. The court also found that the husband could "piggy-back" on the claim of the plaintiff since he was similarly situated. The husband charged retaliation in his removal as department head after his wife failed in her first EEOC claim.

Several cases involved the establishment of a *prima facie* case of discrimination under the disparate treatment theory. In Alabama, the court reversed a lower court decision finding that the discontinuation of an assistant to the president position gave rise to no inference of sex discrimination since the plaintiff could not show that she was treated differently than other applicants.[60] In New York a federal district court issued a summary judgment finding that the plaintiff was unable to establish a *prima facie* case of discrimination in her removal from an administrative position.[61]

Several cases previously litigated were before the courts on questions of the use of multiple regression in the establishment of a *prima facie* case. In Wisconsin, the federal circuit court affirmed a lower court opinion.[62] The court found that the lower court was correct in ruling that statistical evidence that showed significant difference in the salaries of Catholic and non-Catholic faculty was not dispositive if the number of scholarly publications, the basis of salary determinations, showed Catholics at the institution to be more productive than non-Catholics.[63] The circuit court noted that it was appropriate when the district court judge pointed out flaws in the design of the sample (i.e., the failure to control for rank).

In a New York case on appeal, the court, in affirming a lower court opinion,[64] refused to adopt the plaintiff's standard that two standard deviations from the mean in statistical evidence established a *prima facie* case of discrimination under a disparate treatment claim.[65] The court also ruled that neither allegations of pre-1972 discrimination without supporting evidence nor the statistical

60. Moore v. Alabama State Univ., 864 F.2d 103 (11th Cir. 1989).
61. Ritzie v. City Univ. of N.Y., 703 F. Supp. 271 (S.D.N.Y. 1989).
62. *See* The Yearbook of School Law 1989 at 206, Tagatz v. Marquette Univ., 681 F. Supp. 1344 (E.D. Wis. 1988).
63. Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988).
64. *See* The Yearbook of School Law 1989 at 208, Ottaviani v. State Univ. of N.Y. at New Paltz, 679 F. Supp. 288 (S.D.N.Y. 1988).
65. Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365 (2d Cir. 1989).

study's assumption that rank was a discriminatory factor were sufficient to require exclusion from the regression analysis.

Two cases where the institutions' reasons were found to be a pretext for discrimination were affirmed without a decision. An Alabama decision[66] affirmed that the reasons for the employment decision were a pretext for discrimination on national origin.[67] A circuit court also affirmed[68] that a Delaware institution's denial of tenure was a pretext for discrimination based on national origin.[69]

The termination of a consent decree was requested of the court. Brown University had entered into a consent decree in 1977 setting goals for the adequate representation of women on the university's tenured faculty. The women in this case requested that the decree be modified to set a goal for women faculty representation within the ranks of the tenured faculty based on urgent market availability figures. The University claimed that the decree should be terminated since the University had met the provisions of the decree for 1987 based on the adjusted figures that allow for the attrition of nontenured tenure track female faculty. The court did not lift the decree but lifted the hiring requirements for nontenured faculty.[70] However, the goals for tenured female faculty remained along with the University's burden of proof of nondiscrimination which under the decree is more onerous than the burden under title VII. However, through an appeal for a rehearing, another court found that the decree should be lifted since the University had come to within 90% of compliance with the goals without adjusting for the attrition of nontenured female faculty.[71]

In a case adjudicated earlier[72] in favor of the faculty member's retaliation claim, the court modified the lower court decision. The court affirmed the lower court finding that the institution had discriminated against the plaintiff in hiring based on her gender but the court had exceeded its judicial discretion in the award of the rank of full professor with tenure.[73] On appeal, the court reasoned

66. *See* The Yearbook of School Law 1988 at 232, Harrell v. University of Montevallo, 673 F. Supp. 430 (N.D. Ala. 1987).

67. Harrell v. University of Montevallo, 861 F.2d 725 (11th Cir. 1988).

68. Ohemeng v. Delaware State College, 862 F.2d 309 (3d Cir. 1988).

69. *See* The Yearbook of School Law 1989 at 215, Ohemeng v. Delaware State College, 676 F. Supp. 65 (D. Del. 1988).

70. Lamphere v. Brown Univ. in Providence, R.I. and Providence Plantations, 706 F. Supp. 131 (D.R.I. 1989).

71. Lamphere v. Brown Univ. in Providence, 712 F. Supp. 1053 (D.R.I. 1989).

72. *See* The Yearbook of School Law 1985 at 311, Ford v. Nicks, 741 F.2d 858 (6th Cir. 1984).

73. Ford v. Nicks, 703 F. Supp. 1296 (M.D. Tenn. 1988), *modified*, 866 F.2d 865 (6th Cir. 1989).

that since tenure was not automatic there was no reason to believe the board would have granted tenure and such matters should be left to the judgement of academic professionals.[74] In comparing the faculty member to other similarly situated male faculty, the court found an obvious difference in treatment and the application of standards which were clearly based on the factor of the plaintiff's gender.

In another case where a female faculty member had prevailed in a previous ruling,[75] the court refused to allow damages in the payment of an expert witness for testimony, a damage award not available under title VII.[76]

The Equal Pay Act

In a case filed under a state's equal pay provisions, the court applied proof strategies similar to those used under federal law.[77] The court found that the college's reason for salary inequity, that foreign nationals are willing to take lower salaries than other employees, was a pretext for discrimination in salary based on national origin. The court also awarded back pay under the law for the total time the discrimination existed rather than for a limited time period alleged by the defendant to be defined in the law.

In another case, an insurance company prevailed in a suit over its liability for the award of back pay to female employees discriminated against by a university in the award of salaries.[78] The court affirmed the jury finding that the insurance contract excluded back pay awards.

Title IX

In a Pennsylvania case, a female graduate student brought charges that a male faculty member, with whom she had broken off an affair, continued to harass her by staring at her in public.[79] The court found that the plaintiff failed to state a cause of action under title IX for the male faculty's action. Earlier alleged action of con-

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74. Ford v. Nicks, 866 F.2d 865, 877 (6th Cir. 1989).

75. *See* The Yearbook of School Law 1988 at 232, Denny v. Westfield State College, 669 F. Supp. 1146 (D. Mass. 1987).

76. Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989).

77. West Virginia Inst. of Technology v. West Virginia Human Rights Comm'n, 383 S.E.2d 490 (W. Va. 1989).

78. Continental Casualty Co. v. Anne Arundel Community College, 867 F.2d 800 (4th Cir. 1989).

79. Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

spiracy by the institution to cover-up her reports of sexual harassment by the faculty member were beyond the two year reach of the statute of limitations within the state.

Age Discrimination in Employment

In Illinois, the EEOC sought a summary judgment in a suit involving charges of retaliation by the state in ceasing any grievance procedures per the institution's policy when an employee commenced action in a state agency or court.[80] The court evaluated the policy established by the collective bargaining agreement and the institution's "good faith effort" of ignoring the policy by completing the grievance procedures for the employee. The court gave the EEOC twenty days to produce evidence to rebut the institution's rationale for the policy and its good faith effort or, otherwise, the court would award summary judgment to the institution.

In another case, the court found that the removal of an employee and his low salary were a result of discrimination based on age.[81] The court found that the actual report by an agent of EEOC contained conclusive findings which the court needed to reach on its own; therefore, the agent's report should be excluded as evidence. Finally, the court refused to grant the award of damages for loss of reputation, emotional distress, and pain and suffering.[82] Age discrimination laws only allow for quantifiable out-of-pocket losses.

Rehabilitation Act

A student with a handicap that affects motor skills failed to complete the clinical skills requirement of an optometry program due to his handicap. The lower court ruled that he was not an otherwise qualified handicapped individual under the law and admission to the program did not result in misrepresentation.[83] However, the jury had found that the institution had breached its contract with the student. A federal circuit court affirmed the lower court opinion but reversed on the breach of contract claim finding that the school, by admitting the student, had not entered into a contract obligating the receipt of the degree.[84]

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80. EEOC v. Board of Governors of State Colleges and Univ., 706 F. Supp. 1377 (N.D. Ill. 1989).

81. Smith v. Massachusetts Inst. of Technology, 877 F.2d 1106 (1st Cir. 1989).

82. McLaren v. Emory Univ., 705 F. Supp. 563 (N.D. Ga. 1988).

83. *See* The Yearbook of School Law 1988 at 235, Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987).

84. Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).

Hiring Discrimination

An Iowa veteran petitioned the court to order his appointment to a position with one of the state's universities because he was a veteran.[85] The court found that the law did not mandate the appointment of veterans but required the addition of extra points for veteran status in the job evaluation scheme. The law allowed the employer to hire from the top six candidates within the evaluation scheme. An Ohio court ruled that a change by the prospective employer in the starting date was a counteroffer not an acceptance binding the institution.[86]

FACULTY EMPLOYMENT

Faculty continue to litigate a variety of issues. Nontenured faculty litigation often involves the question of nonrenewal or denial of tenure. Claims range from violations of constitutional rights, federal and state civil rights regulations, and breach of contract claims. Termination of tenured faculty for cause continues as an area of active litigation. Denial of benefits such as the acquisition of rank, retirement, and tuition grants for family members was also litigated this past year.

Nontenured Faculty

First Amendment Freedom of Speech. Free speech issues involved nontenured faculty who were either denied tenure or experienced the nonrenewal of a tenure track contract because of protected speech. In the lead off case, a nontenured faculty member was forced by the dean of the college, a Nigerian, to change the grades in a class after complaints by a Nigerian student. The faculty member's class was disrupted by the dean, and his contract with the institution eventually was not renewed. The federal district court granted summary judgment to the institution on the first amendment claim and dismissed pendent state claims. The Sixth Circuit Court found that the first amendment rights of the faculty member were violated when he was forced to change the grades in this class against his

85. Vislisel v. University of Iowa, 445 N.W.2d 771 (Iowa 1989).
86. Foster v. Ohio State Univ., 534 N.E.2d 1220 (Ohio Ct. App. 1987).

will.[87] While the institution can insist that the professor conform to institutional policies regarding grading, the actual assignment of grades within the policy is protected speech. The violation of first amendment rights would not result if the institution changed the grade, but rather the violation was the action of forcing the professor to change his communication on student performance through the assignment of a specific grade. Furthermore, the court found that the actions of the dean in the classroom, while unprofessional,[88] did not violate the faculty member's academic freedom or first amendment rights. The case was remanded to determine damages.

In New Mexico, a faculty member sued the university alleging that he was not rehired because of first amendment pronouncements. The court found that the rehiring decision was based solely on the pronouncements which were matters of public concern, and therefore, were protected speech.[89] The court found that the trial court was correct in awarding damages for emotional distress since the rehiring decision impeded his ability to find another job, resulting in the dissolution of his family. The court ruled that proof of emotional distress did not require corroboration by a medical expert.[90]

In Wisconsin, a nontenured faculty member dismissed because of "whistle blowing" was awarded attorney fees with "enhancement" for the risk of the particular case. On appeal, the court ruled that "enhancement" based on the risk of losing the case was not intended by Congress and would encourage attorneys with marginal cases to the detriment of attorneys filing strong cases.[91]

Nonrenewal or Denial of Tenure. Nonrenewal or denial of tenure cases involve the question of obligations imposed on the institution emanating from the employment contract with probationary faculty. Cases involved the definition of the specific terms of the contract and obligations in the decision not to renew the contract. Denial of tenure cases involved questions of the appropriateness of reasons and access to review materials. Constitutional issues were also raised under both provisions.

A New Jersey institution's decision not to renew probationary faculty contracts was back in court.[92] The plaintiffs claimed that

87. Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).
88. *Id.* at 831.
89. Jacobs v. Meister, 775 P.2d 254 (N.M. Ct. App. 1989).
90. *Id.* at 261.
91. Board of Regents v. Wisconsin Personnel Comm'n, 433 N.W.2d 273 (Wis. Ct. App. 1988).
92. *See* Kovats v. Rutgers, 633 F. Supp. 1469 (D.N.J. 1986), *remanded*, 822 F.2d 1303 (9th Cir. 1987).

there was an expectation of the award of tenure if they measured up to the record of past tenured faculty.[93] The court found that the plaintiffs had no more than a unilateral subjective expectation and that the university had not abdicated its ability to improve the quality of its permanent faculty through the raising of the standards applied in tenure decisions.

In Ohio, the court ruled that the award of tenure was not obligated because the faculty member was not evaluated until the seventh year.[94] The seventh year contract contained language stating that this was a terminal contract. However, the court found the institution was obligated to offer an eighth year terminal contract because of the failure to meet the timely notification requirements of the contract. A New York court found that *de facto* tenure cannot exist where formal procedures have been established for the award of tenure.[95] Similarly, the Third Circuit Court found that failure to give timely notice did not result in automatic reappointment with tenure.[96] However, in this case, the court found that the employee had been given adequate notice when it notified her that she would not be recommended for tenure and that her next contract would be a one-year term appointment.

In a case involving a collective bargaining agreement, the court found that an arbitrator could order the reappointment of a faculty member to another one-year probationary contract and another tenure review where the arbitrator found improprieties in the denial of tenure decision.[97] The arbitrator had this authority even though the appointment exceeded the five probationary contract provisions of the collective bargaining agreement. In another case, the court found that the contract was not breached because of the alleged misrepresentations by the dean in the nonrenewal of a probationary faculty member.[98]

Cases involving the denial of tenure were numerous. One case involved allegations that a faculty member was denied tenure because of discrimination based on national origin.[99] The court found that poor administration of a program and a poor publication record

93. Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988).
94. Omlor v. Cleveland State Univ., 543 N.E.2d 1238 (Ohio 1989).
95. Meer v. Bugliarello, 537 N.Y.S.2d 617 (App. Div. 1989).
96. Cohen v. Board of Trustees of Univ. of Medicine and Dentistry of N.J., 867 F.2d 1455 (3d Cir. 1989).
97. Bloomsburg Univ. of Pa. v. Association of Pa. State College and Univ. Faculties, 552 A.2d 1180 (Pa. Commw. Ct. 1989).
98. Werblood v. Columbia College of Chicago, 536 N.E.2d 750 (Ill. App. Ct. 1989).
99. De Wiest v. Tarleton State Univ., 704 F. Supp. 705 (N.D. Tex. 1987).

were valid reasons for the denial of tenure. In Ohio, the court found that the procedures and the reasons were adequate in a tenure review culminating in denial.[100] In a Puerto Rico case, the court found that the university's tenure review procedures did not create a property right for probationary faculty members requiring due process in the denial of tenure.[101] In this case the department and school committees evaluated the person's performance as satisfactory, while the institutional committee had the authority to make an independent judgment which could contradict the previous recommendations.[102] Similarly, a Mississippi court found that the president had the right to withhold tenure status even when the faculty member earlier had been mistakenly awarded the rank of professor without the proper qualifications.[103]

Access to review materials and committee deliberations were also before the court. The Supreme Court issued an important ruling on an appeal by the University of Pennsylvania.[104] The Court affirmed the lower court decision granting access by EEOC to tenure files and review materials of the plaintiff and other similarly situated males in an investigation of alleged discrimination under title VII in the denial of tenure.[105] The Court found that Congress did not intend academic freedom to insulate the tenure review process from scrutiny. However, the Court reaffirmed the concept of deference to academicians in the actual evaluation of the qualifications of an individual for tenure.

In another access case, a Massachusetts court ordered an institution to grant access to the tenure files in a case involving charges of race, sex, and ancestry discrimination.[106]

In a case involving a challenge to a university chancellor's authority to deny tenure, the court found that the sole authority lay with the board of trustees; therefore, the chancellor could not refuse to forward an application for tenure to the board of trustees.[107] In this case, the university's law faculty had recommended tenure.

Cases also involved allegations of civil rights violations, which this year focused primarily on charges of discrimination. On appeal

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100. Gogate v. Ohio State Univ., 537 N.E.2d 690 (Ohio Ct. App. 1987).
101. Chinea v. Benitez, 702 F. Supp. 29 (D.P.R. 1988).
102. *Id.* at 32.
103. Wicks v. Mississippi Valley State Univ., 536 So. 2d 20 (Miss. 1988).
104. *See* The Yearbook of School Law 1989 at 214, EEOC v. University of Pa., 850 F.2d 969 (3d Cir. 1988).
105. University of Pa. v. EEOC, 110 S. Ct. 577 (1990).
106. Morrison v. Brandeis Univ., 125 F.R.D. 14 (D. Mass. 1989).
107. Faculty of City Univ. of N.Y. Law School at Queens College v. Murphy, 539 N.Y.S.2d 367 (App. Div. 1989).

the Sixth Circuit Court reversed a district court decision[108] finding that the plaintiff's rights under the equal protection clause and title VII had been violated.[109] The procedures used to seek outside reviewers and the consistent negative reading by the department chair of what was perceived by others to be a substantively positive tenure review file were the bases for the court's decision that the female faculty member was a victim of discrimination. The case was remanded for a determination whether extenuating circumstances might require the award of tenure or simply another equitable tenure review.

In a New York case, the institution claimed that a faculty member had waived any right to file a claim under title VII when she entered into a consent decree which reinstated her with tenure.[110] The court found that the plaintiff did not knowingly waive her right to pursue a state civil rights claim or the claim under EEOC when she signed an agreement not to "initiate further court action."

In a unique case, a medical doctor claimed that he had acquired a faculty position at a university by attempting to create a position for himself.[111] The doctor, granted an appointment as a visiting lecturer giving him nothing more than library privileges, began to attend "grand rounds" and plan a workshop under the institution's name without its approval. The court ruled that title VII covers employees and that courtesy appointments without pay are not covered by the law. In another case a court granted the institution an injunction against relitigation after the court had dismissed the faculty member's title VII case.[112]

Two other cases dealt with liability questions in the denial of tenure decision. In Illinois, the court found that a faculty member was the prevailing party in an out-of-court settlement on the salary discrimination claim but not the tenure claim and, therefore, was entitled to reasonable attorney fees. In another case, a faculty member lost a claim of defamation and damage to his reputation in the recommendations denying tenure submitted by the dean.[113] As reported earlier, a federal court had upheld the procedural accuracy of the denial of tenure decision in this case.[114]

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108. *See* The Yearbook of School Law 1987 at 248, Gutzwiller v. Fenik, 645 F. Supp. 363 (S.D. Ohio 1986).

109. Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988).

110. Kawatra v. Medgar Evers College of the City Univ. of N.Y., 700 F. Supp. 648 (E.D.N.Y. 1988).

111. Tadros v. Coleman, 717 F. Supp. 996 (S.D.N.Y. 1989).

112. Zagano v. Fordham Univ., 720 F. Supp. 266 (S.D.N.Y. 1989).

113. Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).

114. *See* The Yearbook of School Law 1989 at 213, Staheli v. University of Miss., 1 F.2d 121 (5th Cir. 1988).

Part-time Faculty. In Louisiana, a part-time faculty member sued when the institution failed to pay him for two courses he was scheduled to teach simultaneously.[115] The court upheld the faculty member's allegation that the contract was based on compensation per course taught, not on hours spent in the classroom.

Tenured Faculty

Termination for Cause. The lead off case in this area involved a constitutional question. A faculty member who refused to pay union dues on religious grounds (the union supported and campaigned for a "pro-choice" stance on abortion) was dismissed from his faculty position.[116] In negotiations, the faculty member demanded that all his dues be paid to a charity while the union offered to donate the portion of his dues used for "pro-choice" issues to charity. The court found that denial of all dues payable to the union would be an undue hardship for the union, and inhibit union free speech. In Louisiana, a court found that a faculty member had abandoned his position when he failed to indicate whether he would return the next year after repeated requests for a commitment by the college's administration.[117]

A number of termination for cause cases dealt with procedural issues. In Puerto Rico, a federal court found that a professor achieved tenure while he maintained part-time employment with the institution and prior to commencing full-time employment.[118] The court also ruled that the professor was not given due process by appearing before a faculty committee evaluating the new program.

The Eleventh Circuit Court affirmed a lower court decision that an administrator who retained tenure status from his former faculty position was given due process in his termination for cause.[119] The court found that the procedures used provided adequate due process protection. The reason for termination, chemical dependence which affected work performance, was a valid basis for the decision. In Massachusetts, the court found that a faculty member's due process was not violated when he was terminated for harassing behavior toward students, faculty, and staff.[120] The court found that the appeals procedure which resulted in a review by a committee whose

115. Kethley v. Draughon Business College, Inc., 535 So. 2d 502 (La. Ct. App. 1988).
116. EEOC v. University of Detroit, 701 F. Supp. 1326 (E.D. Mich. 1988).
117. Osborne v. Stone, 536 So. 2d 473 (La. Ct. App. 1988).
118. Collins v. Martinez, 709 F. Supp. 311 (D.P.R. 1989).
119. Martin v. Guillot, 875 F.2d 839 (11th Cir. 1989).
120. Harris v. Board of Trustees of State Colleges, 542 N.E.2d 261 (Mass. 1989).

members were reviewing their own decision did not violate the rudiments of due process. In Alabama the court ruled that the termination of a tenured faculty at a public community college did not come under the judicial review requirements for agencies under the state civil procedure laws.[121] A Florida court ruled that the board's attorney, in assisting in the conduct of the termination hearing, did not by his actions bias the deliberations.[122] While in Tennessee, a court ruled that a judicial review of a college's termination decision should take place in the judicial jurisdiction the college is located and denied a change of venue.[123]

A California case dealt with the termination of a faculty member for "evident unfitness to serve." The court found that the lower court had only looked at the "remediability" test and should look at other criteria established in these types of "fitness" cases.[124] Finally, a professor who was investigated but not terminated for allegations surrounding embezzlement was unable to surmount immunity protections granted to the investigator and auditors.[125]

Termination for Financial Exigency. The termination of faculty resulting from a financial exigency was before the court. California community college faculty terminated because of a financial exigency were successful in establishing their right to part-time, temporary teaching positions offered in the evening by the college.[126] A Colorado court found that termination notices sent by the president but authorized by the board, based on appropriations reductions, were adequate under the state laws governing reduction in staff at community colleges.[127]

In another Colorado case, the plaintiff alleged that the faculty handbook provisions requiring the faculty senate and the curriculum committee to review all curriculum changes were part of the faculty member's contract mandating review by those committees prior to program elimination.[128] The president had recommended and the

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121. Klein v. State Bd. of Educ., 547 So. 2d 549 (Ala. Civ. App. 1988).

122. Cotter v. District Bd. of Trustees, 548 So. 2d 731 (Fla. Dist. Ct. App. 1989).

123. Phillips v. State Bd. of Regents of State Univ. and Community College Sys., 771 S.W.2d 410 (Tenn. 1989).

124. Bevli v. Brisco, 260 Cal. Rptr. 57 (Ct. App. 1989); see The Yearbook of School Law 1986 at 252, Bevli v. Brisco, 212 Cal. Rptr. 36 (Ct. App. 1985).

125. Rozek v. Topolnicki, 865 F.2d 1154 (10th Cir. 1989).

126. Daniels v. Shasta-Tehama-Trinity Joint Community College Dist., 260 Cal. Rptr. 867 (Ct. App. 1989).

127. Craddock v. State Bd. for Community Colleges and Occupational Educ., 768 P.2d 716 (Colo. Ct. App. 1988).

128. Ahmadieh v. State Bd. of Agriculture, 767 P.2d 746 (Colo. Ct. App. 1988).

board had approved program and course changes which resulted in the elimination of the plaintiff's job. The court found the section of the handbook neither obligated the board nor abdicated the board's ultimate authority over programs. The rudiments of due process in a financial exigency, timely notice, pretermination hearing, and the right to challenge the basis for the action, were provided in this case.[129] Finally, a professor waived any right to continued employment when he agreed to remain at the institution during the academic program phase-out period.[130]

Denial of Faculty Privileges. The courts have dealt with questions surrounding the denial of various faculty privileges. For example, the question of a faculty member's denial of promotion to full professor was again before the court.[131] The district court opinion was affirmed on the breach of contract claim,[132] but the case was remanded to determine whether the final review and denial by the personnel committee after a protracted grievance procedure was based on impermissible criteria (i.e., the number of refereed articles).

A faculty member was unsuccessful in his suit to prevent a Jewish Theological Seminary from admitting women to its academic programs.[133] Finally, a district court granted qualified immunity to the institution in a dispute over the procedures used by an institution which censured a female faculty member for "seriously negligent scholarship."[134] However, the case was remanded on the question of whether plagiarism actually occurred and to determine the motivation for the department chair's actions.

ADMINISTRATOR AND STAFF TERMINATION

The dismissal of administrators and staff continues to be an area heavily litigated. The jurisdiction of the courts depends on a number of factors including questions of the statute of limitations. For example, an Illinois court found that a black employee had not filed

129. *Id.* at 750.
130. Benoit v. Emory Univ., 381 S.E.2d 394 (Ga. Ct. App. 1989).
131. Kyriakopoulos v. George Washington Univ., 866 F.2d 438 (D.C. Cir. 1989).
132. *See* The Yearbook of School Law 1988 at 246, Kyriakopoulos v. George Washington Univ., 657 F. Supp. 1525 (D.D.C. 1987).
133. Faur v. Jewish Theological Seminary, 536 N.Y.S.2d 516 (App. Div. 1989).
134. Newman v. Commonwealth of Mass., 884 F.2d 19 (1st Cir. 1989).

within the state's 180-day limit under the state human rights laws after his dismissal from a state university.[135]

A number of cases involved the issue of whether an administrator has a property right that mandates due process in a dismissal decision. The federal circuit court found that a faculty member and department chair who was demoted from the department chair position, was denied due process.[136] The faculty member's due process right was acquired from the college's willingness to give her a hearing that failed to meet the rudiments of due process. The court also ruled that a title VII claim does not preempt the filing of a section 1983 claim.[137] Furthermore, the circuit court found that the lower court could not reinstate a damage award it earlier found to be excessive.

In Mississippi, an institution's take-over of a day care center, while offering current employees the opportunity to compete for next year's available positions, did not establish a property right requiring due process in both the nonrenewal and nonhiring decisions.[138]

A federal circuit court found that a lower court was correct at trial in finding that the procedures at an institution mandated a hearing for a dean removed from that position.[139] The institution was estopped from litigating the property interest issue because previous litigation by another dean at the school had resulted in this plaintiff's summary judgment on the due process issue. While monetary damages were not available, the case was remanded to determine an appropriate injunctive remedy. The Eleventh Circuit Court remanded a case to determine whether a vice president was terminated during a contract period giving him a property right requiring due process.[140]

Several terminations involved allegation of violations of first amendment rights. A federal court in North Carolina denied a motion to dismiss a claim that employees and members of the institution's board were dismissed because they were members of the Democratic Party.[141] The suit of an employee alleging termination based on religious beliefs was dismissed because the public institution's

135. Whitaker v. Human Rights Comm'n, 540 N.E.2d 361 (Ill. App. Ct. 1989).
136. Roberts v. College of the Desert, 861 F.2d 1163 (9th Cir. 1988).
137. Roberts v. College of the Desert, 870 F.2d 1411 (9th Cir. 1989).
138. Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989).
139. Mangaroo v. Nelson, 864 F.2d 1202 (5th Cir. 1989).
140. Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1988).
141. McKinney v. Board of Trustees, 713 F. Supp. 185 (W.D.N.C. 1989).

board had immunity under the eleventh amendment; however, claims against individual defendants are still pending.[142]

The Tenth Circuit Court affirmed a lower court decision that the first amendment rights of an employee were not violated when his continuation of complaints resulted in his dismissal after the original complaints about safety violations had been investigated and settled.[143] The Eleventh Circuit Court affirmed in part and reversed in part[144] a lower court decision.[145] The court found that it was within the college board's right to control news programming at the college's radio station without inhibiting employees' constitutional rights. The court also affirmed the lower court finding that a property interest in continued employment did not exist. However, issues remain as to whether the employees were retaliated against by termination for the exercise of constitutional rights thereby reversing the lower court summary judgment for the institution. The case was remanded for a determination on the merits.

A federal court in New Mexico issued a summary judgment for the college's board in a case alleging dismissal of a counselor for financial reasons as a pretext for dismissal for political activity.[146]

Several cases involve allegations of discrimination in termination decisions. For example, a Michigan court found that the theft of university property was not a pretext for discrimination based on race.[147] The institution was able to show that over one hundred other whites and blacks were dismissed for theft of university property. On appeal from a federal district court,[148] the Eighth Circuit Court affirmed that a female athletic counselor's termination was made on the basis of gender.[149] Finally, a food service worker was not discriminated against for a physical disability when he was discharged for coming to work with head lice.[150]

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142. Muhammed v. Board of Supervisors, 715 F. Supp. 732 (M.D. La. 1989).

143. Seibert v. University of Okla. Health Sciences Center, 867 F.2d 591 (10th Cir. 1989).

144. Schneider v. Indian River Community College Found., 875 F.2d 1537 (11th Cir. 1989).

145. *See* The Yearbook of School Law 1989 at 223, Schneider v. Indian River Community College Found., Inc., 684 F. Supp. 283 (S.D. Fla. 1987).

146. Bates v. Board of Regents, 699 F. Supp. 1489 (D.N.M. 1988).

147. Sisson v. Board of Regents, 436 N.W.2d 747 (Mich. Ct. App. 1989).

148. *See* The Yearbook of School Law 1988 at 245, Gray v. University of Ark. at Fayetteville, 658 F. Supp. 709 (W.D. Ark. 1987).

149. Gray v. University of Ark. at Fayetteville, 883 F.2d 1394 (8th Cir. 1989).

150. Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989).

Other administrator termination cases involved questions of the terms of the contract. A Mississippi case was remanded to determine whether a fixed term contract existed and whether the administrator was defamed when the annual appointment was publicly announced by the president and later recanted based on pressure from various parties within the institution.[151] In Michigan, the court found that a dismissed employee could not seek action in court when he failed to follow the grievance procedures spelled out in the collective bargaining agreement.[152]

A Colorado court ruled that the rights to an appeal must be included in a notice to terminate.[153] In Idaho, a court ruled that the failure of a dismissed employee to exhaust administrative remedies precluded a claim in state court.[154]

The Sixth Circuit Court reviewed a lower court finding that two white male deans had been the victims of discrimination in their dismissal from the college.[155] The court found that issues existed requiring litigation on the plaintiffs' defamation claim against the president's executive secretary. The court also remanded the case for a determination of whether the damage awards were excessive or appropriate given the lack of instructions on municipal liability.

ALL EMPLOYEES

Sexual Harassment

The sole case in this area involved a damage award found to be excessive.[156] The award was made for mental anguish and humiliation resulting from sexual harassment and was modified to an appropriate amount.

Denial of Employee Benefits

Employee benefits continue to be litigated. The lead off case involves the question of whether tuition assistance grants to employees are taxable income.[157] The Second Circuit Court affirmed the tax

151. Holland v. Kennedy, 548 So. 2d 982 (Miss. 1989).
152. Dahlman v. Oakland Univ., 432 N.W.2d 304 (Mich. Ct. App. 1988).
153. Salas v. State Personnel Bd., 775 P.2d 57 (Colo. Ct. App. 1988).
154. Pounds v. Denison, 766 P.2d 1262 (Idaho Ct. App. 1988).
155. Chonich v. Wayne County Community College, 874 F.2d 359 (6th Cir. 1989).
156. SUNY College of Envtl. Science and Forestry v. State Div. of Human Rights, 534 N.Y.S.2d 270 (App. Div. 1988).
157. Knapp v. Commissioner, 867 F.2d 749 (2d Cir. 1989).

court ruling that tuition grants under the tax laws were taxable income.

In Louisiana, the seniority of a classified employee who resigned under duress and later was reinstated was in question.[158] Because of a compromise agreement which reinstated the employee, the time between the resignation and reinstatement should be viewed as leave without pay and time accrued toward seniority. Because of his seniority, he was not the proper candidate for subsequent layoff under the civil service code. In Washington, the court found that the subsequent collective bargaining agreement settled the question of wages accrued from professional improvement credits.[159]

Several cases address questions concerning retirement funds. In Montana, a court ruled that a retirement agreement waived all claims emanating from contract conversions occurring nineteen years earlier.[160] The Second Circuit Court ruled that a New York optional retirement program did not come under the Employee Retirement Income Act of 1974[161] entitling a widow to surviving spouse annuity under the Federal Act.[162] The court found that an annuity retirement plan constituted a "spendthrift trust" exempt in chapter 7 bankruptcy.[163] However, retirement income from an Ohio State Teachers Retirement System could be ordered to be paid to a chapter 13 trustee in a bankruptcy case.[164]

Unemployment compensation qualification questions were also before the courts. In Florida, the court found that a secretary had made a good faith effort to provide information about her illness and had not abandoned her job, and thus was qualified for unemployment compensation.[165] A nonprofit private corporation affiliated with the university was obligated to pay unemployment compensation to a student in its employ since it was not an educational institution.[166] A California court found that instructors were qualified for unemployment compensation between the fall and spring semesters when they had not received reasonable assurance that the positions

158. Maradiaga v. University of New Orleans, 546 So. 2d 579 (La. Ct. App. 1989).

159. Yates v. State Bd. for Community College Educ., 773 P.2d 89 (Wash. Ct. App. 1989).

160. Sperry v. Montana State Univ., 778 P.2d 895 (Mont. 1989).

161. 29 U.S.C. § 1001 *et seq.*

162. Roy v. Teachers Ins. and Annuity Ass'n, 878 F.2d 47 (2d Cir. 1989).

163. *In re* Montgomery, 104 Bankr. 112 (N.D. Iowa 1989).

164. *In re* Simmons, 94 Bankr. 74 (W.D. Pa. 1988).

165. Florida State Univ. v. Florida Unemployment Appeals Comm'n, 548 So. 2d 768 (Fla. Dist. Ct. App. 1989).

166. *In re* Organization of Ancillary Servs. of State Univ. College at Oneonta, N.Y., 543 N.Y.S.2d 558 (App. Div. 1989).

would continue in the spring term.[167] A Pennsylvania court found that a counselor was qualified for unemployment benefits during the summer since there was no assurance the contract would be renewed.[168] However, another Pennsylvania court found that an employee had voluntarily resigned from his position rather than being forced out by intolerable work conditions emanating from the school's opinion of his public protesting activities; therefore, he did not qualify for unemployment compensation.[169]

Collective Bargaining

Collective bargaining issues, such as the designation of the bargaining unit, unfair labor practices, and controversy surrounding the grievance procedures were before the court this year.

Classified employees of a California community college were joint employees of the college and the city. The labor relations board had ruled that they were sole employees of the city eligible to bargain collectively. The court remanded the case, finding that they were joint employees.[170]

In a case following the precedent of *Yeshiva,*[171] the court found that the faculty did have decision authority making them "managerial" and ineligible to bargain collectively.[172] A New Hampshire court found that university firemen could form a bargaining unit but it was error to include the fire captain, a "managerial employee," within the bargaining unit.[173]

Several cases involved the collection of union fees and the protection of first amendment rights. In Michigan, a nonmember objected to the payment of union dues because the union lobbied for and supported the "pro-choice" side of the abortion issue.[174] In another case a nonmember objected to union activities which included lobbying for public education appropriations. The court found that union fees ex-

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167. Cervisi v. Unemployment Ins. Appeals Bd., 256 Cal. Rptr. 142 (Ct. App. 1989).

168. Lock Haven Univ. of Pa. v. Commonwealth Unemployment Compensation Bd. of Review, 559 A.2d 1015 (Pa. Commw. Ct. 1989).

169. Rosenberg v. Commonwealth Unemployment Compensation Bd. of Review, 560 A.2d 292 (Pa. Commw. Ct. 1989).

170. United Pub. Employees, Local 790 v. Public Employment Relations Bd., 262 Cal. Rptr. 158 (Ct. App. 1989).

171. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

172. David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157 (6th Cir. 1989).

173. Appeal of Univ. Sys. of N.H., 553 A.2d 770 (N.H. 1988).

174. Lehnert v. Ferris Faculty Ass'n, 707 F. Supp. 1473 (W.D. Mich. 1988), *aff'd,* 881 F.2d 1388 (6th Cir. 1989); *see also* The Yearbook of School Law 1987 at 258, Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306 (W.D. Mich. 1986).

pended for political activity which could reasonably be attributed to the representation duties of the bargaining organization were assessable union charges free of constitutional prohibitions. The court also found that costs for the preparation of a strike and public relations were also chargeable fees. However, a Massachusetts court found that the failure of a union to explain how its service fee was distributed between the local, state, and national organizations was a violation of nonmember's constitutional rights.[175] The rebate procedures and the review procedures on challenging the rebate were also flawed.

A California case involved the question of whether a reorganization scheme violated the collective bargaining agreement.[176] The court found that a subsequent collective bargaining agreement and memorandum of understanding waived any liability for the reorganization scheme which moved some decisions from the department chair to the dean. In Illinois, a union charged that it was an unfair labor practice for the institution to sign a contract and pay money to a private security firm to provide security on campus.[177] The court found that the determination of this issue was solely under the jurisdiction of the state labor relations board.

Discharge for financial exigencies resulted in an Illinois community college board bringing an appeal to avoid submitting to binding arbitration.[178] The court ruled it lacked jurisdiction. A Pennsylvania court found that questions of retrenchment were issues over which the arbitrator possessed subject matter jurisdiction.[179]

A New York court found that once a party seeks arbitration it cannot contest the authority of the arbitrator to decide the issue.[180] In Vermont, the labor relations board upheld an institution's decision not to pay a faculty member for a sabbatical when he was on a leave without pay. The court affirmed the labor relation board's deci-

175. Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union, 537 N.E.2d 1237 (Mass. 1989).

176. Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., 258 Cal. Rptr. 302 (Ct. App. 1989).

177. Teamsters Local 525 v. Board of Trustees, 544 N.E.2d 47 (Ill. App. Ct. 1989).

178. Board of Trustees v. Prairie State College Fed'n of Teachers, Local 3816, 540 N.E.2d 794 (Ill. App. Ct. 1989).

179. State Sys. of Higher Educ. v. Association of Pa. State College and Univ. Faculties, 550 A.2d 1385 (Pa. Commw. Ct. 1988).

180. *In re* State (State Univ. of N.Y., Binghamton), 538 N.Y.S.2d 641 (App. Div. 1989).

sion.[181] Failure to file a grievance precluded a breach of contract claim in a New York court.[182]

STUDENTS

The litigation brought before the courts by students and by various administrative offices and agencies related to student exhibits, both continuity with ongoing issues and the emergence of new contentions. In the area of financial aid, the boundaries of federal authority were challenged in a variety of states, while student loan defaults and bankruptcies increasingly came before the court. Prospective college students challenged the award of merit scholarships based on an alleged gender-discriminatory standardized test. Student civil rights actions continue to be litigated but represent a limited number of contested constitutional freedoms. Academic and disciplinary dismissals were predominantly contested by graduate students while fewer cases involving undergraduates were litigated.

Admissions

In Kansas, after unsuccesfully applying to medical school in 1984, 1985, and 1986, a white male sought a preliminary injunction to direct the university to admit him as a first-year medical student, pending his civil rights action against university officials.[183] The court determined that a title VI action in this case would be time-barred due to the state's two-year statute of limitations. Additionally, the applicant failed to demonstrate that race was the prevailing factor in his rejection entitling him to injunctive relief.

Nonresident Tuition

In separate suits in separate states, two law students challenged their residency classification as nonresidents for tuition at two universities. After exhausting a university's administrative appeal system, a law student filed suit to determine his status as an in-state resident. On review, a state court reversed a previous decision grant-

181. Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 561 A.2d 417 (Vt. 1989).

182. Neiman v. Kingsborough Community College, 536 N.Y.S.2d 843 (App. Div. 1989).

183. Baker v. Board of Regents, 721 F. Supp. 270 (D. Kan. 1989).

ing in-state status.[184] The court determined that the student's voter registration, military domicile records, income tax records, and self-reported address on a law admissions examination application indicated out-of-state residence. The court further determined that the university residence committee was not obligated to state reasons for its rejection of a student's application for in-state resident status.

In a Wisconsin case, the court upheld both a lower court and the university residency committee's ruling that a law student remain classified as a nonresident for tuition purposes.[185] The university did not violate the student's right to due process nor to equal protection when it found that his move to the state and his subsequent activities were primarily associated with his educational objectives.

Financial Aid

Recent attempts to control spending in federal government programs and to reduce defaults in the student loan programs have broached a variety of new issues before the court. Four state guaranty agencies have resisted a statute[186] emanating from the United States Department of Education (DOE) that requires the agencies to reduce excess funds in their cash reserves by transfer to the Department. In Delaware, the state agency challenged the constitutionality of the statute.[187] Despite a motion for dismissal by DOE, the court determined that the issue was ripe for judicial review. A Wisconsin court denied a preliminary injunction to prevent the DOE from withholding reinsurance payments to the state guaranty agency,[188] and indicated that the agency had an available remedy in claims court through the Tucker Act.[189] The same agency challenged the constitutionality of the excess cash reserve amendments to the Higher Education Act, claiming that property rights had been violated without compensation. The court granted a summary judgment for DOE.[190] However, an Ohio state guaranty agency, proving that the majority of its cash reserves were state generated and that the agency held a

184. Wilson v. State Residence Comm., 374 S.E.2d 415 (N.C. Ct. App. 1988).

185. DeCecco v. Board of Regents, 442 N.W.2d 585 (Wis. Ct. App. 1989).

186. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. §§ 1330 *et seq.*

187. State v. Bennett, 697 F. Supp. 1366 (D. Del. 1988).

188. Great Lakes Higher Educ. Corp. v. Cavazos, 698 F. Supp. 1464 (W.D. Wis. 1988).

189. 28 U.S.C. § 1491(a).

190. Great Lakes Higher Educ. Corp. v. Cavazos, 711 F. Supp. 485 (W.D. Wis. 1989).

vested contractual right to reinsurance payments from the federal government, prevailed in the question of the validity of DOE's recovery of excess cash reserves. The court held the federal statute to be unconstitutional.[191] Similarly, a court in South Carolina held that DOE could not withhold reinsurance and administrative cost payments to the guaranty agency since a vested contractual property right existed.[192]

Several cases involved institutional eligibility rules for participation in and government recovery of funds in federal and state student assistance programs. The absence of due process in the termination of eligibility for two educational institutions provided controversy. Without an evidentiary hearing, DOE terminated the program eligibility of a for-profit correspondence and residential training institution for deficiencies in the length of the course. Since DOE deemed the institution eligible to participate since 1980, the court admonished DOE in creating "retrospective fiction" by declaring the institution ineligible and held that the school's property and liberty rights required due process.[193] In a second case, the court determined that DOE did not have the authority to take emergency action to terminate a university's participation in student financial assistance programs without reasonable notice and an evidentiary hearing prior to suspension.[194] In New York, two proprietary institutions lost eligibility for state student assistance programs when the state comptroller alleged that teachers at the institutions lacked proper credentials and improper certification of student eligibility had occurred. The operator of one private New York business school appealed its previously dismissed petition to annul the audit and to release escrow funds; the court reversed the lower court's dismissal.[195] In the second case involving the other New York proprietary school, the court upheld the state's recovery of overpayments to the school on the basis of inadequate teacher qualifications and of ineligible payments for students on a leave of absence.[196] Finally, a Fifth Circuit Court decided that DOE could recover payments on de-

191. Ohio Student Loan Comm'n v. Cavazos, 709 F. Supp. 1411 (S.D. Ohio 1988).
192. South Carolina State Educ. Assistance Auth. v. Cavazos, 716 F. Supp. 886 (D.S.C. 1989).
193. Continental Training Serv., Inc. v. Cavazos, 709 F. Supp. 1443 (S.D. Ind. 1989).
194. Ross Univ. School of Medicine v. Cavazos, 716 F. Supp. 638 (D.D.C. 1989).
195. N.J. Koss, Inc. v. Regan, 539 N.Y.S.2d 579 (App. Div. 1989).
196. Royal Business School, Inc. v. New York State Dep't of Educ., 534 N.Y.S.2d 89 (App. Div. 1988).

faulted loans made to a proprietary institution based on alleged violations of "points and premiums" regulations.[197]

In Rhode Island, the court ruled that the nature of the services of a student loan service corporation is proprietary, not governmental, and that a fifteen year contract between the corporation and the state guaranty agency that extends beyond the terms of the state guaranty agency's directors is valid.[198]

Alleged fraudulent behavior was involved in a number of cases brought before the court. Former students of a recently bankrupt college sought rescission of student loans.[199] The court held that students did not have private rights of action under the Higher Education Acts so that rescission was not a permissible remedy for alleged fraudulent misrepresentation to students. A Texas court denied a motion by an unaccredited institution to dismiss a claim alleging racketeering.[200] The court held that the student had standing to bring the action and had demonstrated an alleged pattern of mail fraud that included student financial aid activity. Another student, a prison inmate, alleged fraudulent receipt of federal Pell Grant funds by his college, based on his full-time enrollment. The court determined that since the inmate did not suffer actual or threatened injury, he did not have standing as an individual or as a taxpayer, and dismissed the action.[201] In Illinois, the state appealed a lower court dismissal of fraud charges against an individual who allegedly falsified federal student loan information.[202] The appellate court reversed and remanded the case, holding that the state had a concurrent interest in punishing fraud and that federal statutes establishing the National Direct Student Loan program prohibit state administrative involvement, but not recovery of state funds fraudulently obtained.

Questions concerning individual eligibility in student financial assistance loans were brought to court in four separate cases. In Missouri, a graduate student appealed a decision that she had received an overpayment through the Aid to Families with Dependent Children (AFDC) program.[203] The court remanded the case so that her educational expenses, books, fees, equipment, and child care expenses

197. LTV Educ. Sys., Inc. v. Bell, 862 F.2d 1168 (5th Cir. 1989).
198. Rhode Island Student Loan Auth. v. Nels, Inc., 550 A.2d 624 (R.I. 1988).
199. Graham v. Security Savings and Loan, 125 F.R.D. 687 (N.D. Ind. 1989).
200. Gonzalez v. North American College of La., Inc., 700 F. Supp. 362 (S.D. Tex. 1988).
201. Abraham v. Marist College, 706 F. Supp. 294 (S.D.N.Y. 1989).
202. People v. Brom, 541 N.E.2d 745 (Ill. App. Ct. 1989).
203. Danner v. Division of Family Serv., 772 S.W.2d 868 (Mo. Ct. App. 1989).

necessary for school attendance, would be deducted from her student loan prior to calculations of AFDC benefits. The Secretary of Agriculture appealed a summary judgment that decided the effective date of the Food Security Act amendment[204] and excluded student loan origination fees in the calculation of a food stamp recipient's income.[205] Affirming the lower court's decision, the Eighth Circuit Court held that the amendment, which expressly excluded lender-retained student loan fees, was effective on enactment, not on the issuance of implementing rules determined by the Secretary. In Wisconsin, the court upheld a state guaranty agency's rejection of a previously bankrupt debtor's application for a second state guaranteed student loan.[206] Since a student loan is not a grant, state eligibility rules that allow the denial of future extension of credit to a debtor whose original student was discharged in bankruptcy proceedings did not violate federal rules prohibiting discrimination in the issuance of licenses, permits, charters, franchises, or similar grants.[207]

Student eligibility for loans and grants to enroll in religious educational programs were also at issue. A visually handicapped student appealed the denial of state financial vocational assistance for the purpose of attending a private Bible college and pursuing a religious education degree.[208] The Supreme Court of Washington affirmed that the state constitution prohibited the application of public monies to religious instruction and that the denial of aid was not a violation of the free exercise or the equal protection clauses.

In a suit against the state department of education, class certification was granted to ten New York state high school students, two organizations, and extended to all female high school seniors in New York State.[209] The students alleged that the state's exclusive reliance on Scholastic Aptitude Test scores to award state merit scholarships discriminated against female students in violation of the equal protection clause of the fourteenth amendment.

Bankruptcy cases under both chapter seven and chapter thirteen were brought before the court. With regard to a resolved bankruptcy case, a former client sued his bankruptcy attorney for negligent representation in failing to distinguish the ramifications for a

204. Food Stamp Act of 1977, §§ 2 *et seq.*, as amended 7 U.S.C.A. §§ 2011 *et seq.*
205. Metzer v. Lyng, 864 F.2d 75 (8th Cir. 1988).
206. Elter v. Great Lakes Higher Educ. Corp., 95 Bankr. 618 (E.D. Wis. 1989).
207. 11 U.S.C. § 525(a).
208. Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).
209. Sharif v. New York State Educ. Dep't, 127 F.R.D. 84 (S.D.N.Y. 1989).

student loan between chapter seven and chapter thirteen bankruptcy proceedings.[210] The court remanded the case to the trial court to determine and impose sanctions against the attorney in addition to the previously determined plaintiff compensation.

Student loans were not discharged in a variety of cases: the debtor had the present and/or future ability to meet financial obligations without undue hardship,[211] an ex-spouse or parent as primary debtor was responsible for the student loan while not receiving benefits from the loan,[212] and the bankruptcy petition was filed prior to the five year rule for filing chapter seven bankruptcy.[213] In several cases, educational loans were discharged: the debts would impose undue hardship on the debtor,[214] and the added expense of repayment of the student loan would violate the fresh start policy of the bankruptcy code.[215]

A variety of chapter thirteen cases were brought before the court. A motion to reopen their chapter thirteen case was brought by debtors in an attempt to include a state guaranty agency that had been omitted in their original list.[216] The motion was denied, leaving the debtors in jeopardy of a future lawsuit with the agency. Four chapter thirteen plans were not confirmed: one plan that proposed full payment of the student loan and only 10% of other remaining loans was deemed discriminatory,[217] another plan did not include the debtor's nursing school, a claimant in the education loans,[218] and two plans included nondischargeable Health Education Assistance

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210. Swanson v. Sheppard, 445 N.W.2d 654 (N.D. 1989).

211. Bey v. Dollar Savings Bank, 95 Bankr. 376 (W.D. Pa. 1989); Cahill v. Norstar Bank of Upstate N.Y., 93 Bankr. 8 (N.D.N.Y. 1988); Cardwell v. Higher Educ. Assistance Found., 95 Bankr. 121 (W.D. Mo. 1989); Coleman v. Higher Educ. Assistance Found., 98 Bankr. 443 (S.D. Ind. 1989); Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 310 (W.D. Pa. 1989); Gearhart v. Clearfield Bank & Trust Co., 94 Bankr. 392 (W.D. Pa. 1989).

212. Education Resources Inst., Inc. v. Hammarstrom, 95 Bankr. 160 (N.D. Cal. 1989); Education Resources Inst., Inc. v. Selmonosky, 93 Bankr. 785 (N.D. Ga. 1988); Taylor v. Tennessee Student Assistance Corp., 95 Bankr. 550 (E.D. Tenn. 1989).

213. Avila College v. Bunger, 99 Bankr. 453 (D. Kan. 1989); Rahlf v. Illinois State Scholarship Comm'n, 95 Bankr. 572 (N.D. Ill. 1988); Shryock v. Pittsburg State Univ., 102 Bankr. 217 (D. Kan. 1989).

214. Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 308, 309 (W.D. Pa. 1989); Harris v. Pennsylvania Higher Educ. Assistance Agency, 103 Bankr. 79 (W.D.N.Y. 1989).

215. Correll v. Union Nat'l Bank of Pittsburgh, 105 Bankr. 302, 306, 309 (W.D. Pa. 1989).

216. *In re* Simonis, 92 Bankr. 807 (E.D. Wis. 1988).

217. *In re* Lawson, 93 Bankr. 979 (N.D. Ill. 1988).

218. *In re* Joiner, 93 Bankr. 130 (N.D. Ohio 1988).

Loans.[219] Finally, two chapter thirteen plans were confirmed that were proposed in "good faith."[220]

The United States brought suit against a number of National Health Service Corporation Scholarship recipients who defaulted on their service obligation.[221] In another default case, the physician failed to substantiate his claim that his medical incompetence prevented completion of his service contract.[222]

The repayment of student loans produced a variety of controversies. A district court affirmed the right of the United States to collect a student loan even though a state statute of limitations expired before a national defense student loan was assigned to the DOE.[223] The Third Circuit Court affirmed a lower court decision that a former student's suit against various court judges alleging erroneous rulings in his dispute over his student loan obligation was frivolous but remanded the case to clarify the court order to restrict further litigation in this matter only.[224] A state employee with student loan obligations brought a class action suit against the state for failure to provide due process before withholding income for repayment. An appeals court rendered the case moot since the state had changed its procedures for collecting past-due student loans. The case was remanded though for redetermination of the certifying class; some plaintiffs might have student loan debts to lending institutions other than the state guaranty agency covered in the suit.[225] The court upheld the Department of Education's action to offset a defaulted educational loan against the plaintiff's income tax return even though the six-year statute of limitations would have barred collection by other means.[226] In Colorado, the Supreme Court reversed and remanded a student loan garnishment case. The court held that a creditor could not garnish the proceeds of a guaranteed student loan in order to collect a debt previously owed by the stu-

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219. *In re* Battrell, 105 Bankr. 65 (D. Ore. 1989); United States v. Quinn, 102 Bankr. 865 (M.D. Fla. 1989).

220. *In re* Dornon, 103 Bankr. 61 (N.D.N.Y. 1989); *In re* Winthurst, 97 Bankr. 457 (C.D. Ill. 1989).

221. United States v. Barry, 719 F. Supp. 1047 (M.D. Ala. 1989); United States v. Cooper, 699 F. Supp. 69 (W.D. Pa. 1988); United States v. Dillingham, 104 Bankr. 505 (N.D. Ga. 1989); United States v. Duffy, 879 F.2d 192 (6th Cir. 1989); United States v. Hatcher, 716 F. Supp. 447 (S.D. Cal. 1989); Rendleman v. Bowen, 860 F.2d 1537 (9th Cir. 1988).

222. United States v. Martin, 710 F. Supp. 271 (C.D. Cal. 1989).

223. United States v. Hunter, 700 F. Supp. 26 (M.D. Fla. 1988).

224. Chipps v. United States Dist. Court for the M.D. of Pa., 882 F.2d 72 (3d Cir. 1989).

225. Toney v. Burris, 881 F.2d 450 (7th Cir. 1989).

226. Roberts v. Bennett, 709 F. Supp. 222 (N.D. Ga. 1989).

dent.[227] A veteran appealed a lower court determination of overpayment of veterans' educational benefits.[228] The case was reversed and remanded due to judicial procedural error: the decision was written in the margin of the government's motion and not filed as a separate document.

Child support in the form of assistance for college expenses required in divorce decrees was the subject of four cases. Modifications were ordered in two decrees: a mother was required to increase her financial support of two sons until they are twenty-two years of age as long as they remain full-time students,[229] and a father received credit for the money he spent in sending his child to college against his child support arrearage and had his child support payment to his ex-wife reduced while he supported their child in college.[230] In another case, a mother petitioned the court to hold a father in contempt for failure to pay their child's tuition and book expenses.[231] The court held that an alleged agreement between the daughter and father that the father's provision of a car and related expenses in lieu of college expenses did not satisfy the requirements of the divorce decree since it was not approved by a trial court. Finally, in Pennsylvania, the court considered whether an adult child's willful estrangement from a noncustodial parent excused the parent from contributing to the child's college education.[232] The child's original plea for support from his mother was upheld by a lower court; the mother appealed and the court, holding the emancipated, post majority child responsible for his actions toward his mother, vacated the support decision.

First Amendment

Freedom of Speech. A case that has been before the court since 1986 finally reached the Supreme Court only to be reversed and remanded to the court of appeals.[233] *Certiorari* was granted in a case concerning commercial free speech. Originally denied the right to hear sales activities in their dormitory rooms, the students ap-

227. Schaerrer v. Westman Comm'n Co., 769 P.2d 1058 (Colo. 1989).
228. United States v. Woods, 885 F.2d 352 (6th Cir. 1989).
229. *In re* Marriage of Hasley, 433 N.W.2d 40 (Iowa Ct. App. 1988).
230. Grisham v. Johnson, 532 So. 2d 1260 (Ala. Civ. App. 1988).
231. Holliman v. Holliman, 539 So. 2d 310 (Ala. Civ. App. 1988).
232. Milne v. Milne, 556 A.2d 854 (Pa. Super. Ct. 1989).
233. *See* The Yearbook of Education Law 1989 at 233, Fox v. Board of Trustees, 841 F.2d 1207 (2d Cir. 1988); *see also* The Yearbook of Education Law 1988 at 254, Fox v. Board of Trustees, 649 F. Supp. 1393 (N.D.N.Y. 1986).

pealed. The appellate court upheld the students' constitutional right to receive information in their rooms. The Supreme Court remanded the case and held that governmental restrictions upon commercial speech do not have to be the least restrictive to achieve the desired end.[234] The distinction between speech for profit (job counseling or legal advice) and speech that proposes a profit (promotion of a product) must be delineated in an as-applied analysis which neither lower court considered.

Students at a state university brought suit challenging the trustees' termination of a legal services office.[235] On appeal, the court affirmed that the office was not a forum, that the student activity fees do not belong to the students but are part of the general funds over which the trustees have authority to disperse, and that the termination of the subsidy for the legal services office did not violate the students' first amendment rights.[236]

In Alabama, on appeal, students interested in running for office challenged their public university student government regulations restricting the time and place for the distribution of campaign literature and the exercise of open debate.[237] The Court of Appeals affirmed that the regulations were reasonably related to the university's legitimate interest in minimizing the disruptive effect of campus elections and did not violate students' first amendment rights.

Two cases involved student newspapers and allegations of libel. On appeal from a summary judgment, a professor at a private college in New York brought action to recover damages for libel when the student newspaper printed letters to the editor that were allegedly defamatory of his abilities as a teacher.[238] The court affirmed that the letters were opinion and not actionable since the Constitution protects the free expression of ideas even if false and libelous. In a second case, a college administrator sought recovery from an alleged defamation in a "spoof" edition of the college newspaper.[239] In a summary judgment for the defendants, the court determined that a parody that no reasonable person would read as a factual statement

234. Board of Trustees v. Fox, 109 S. Ct. 3028 (1989).

235. *See* The Yearbook of Education Law 1989 at 232, Student Gov't Ass'n v. Board of Trustees, 676 F. Supp. 384 (D. Mass. 1987).

236. Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473 (1st Cir. 1989).

237. Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).

238. Epstein v. Board of Trustees, 543 N.Y.S.2d 691 (App. Div. 1989).

239. Walko v. Kean College of N.J., 561 A.2d 680 (N.J. Super. Ct. Law Div. 1988).

cannot be actionable as defamation, and that the action was protected expression of opinion absolutely privileged under the first amendment and the state constitution.

Dismissal

Disciplinary Dismissal. Five cases brought distinct questions involving disciplinary dismissal before the court during this reporting period. Two cases pertained to behavior related to professional expectations. In Louisiana, a licensed dental hygienist appealed a denied injunction to lift his expulsion from a public university dental school for violating its Professional Conduct Code.[240] The court held that he had been afforded appropriate due process. An expelled law student, convicted of false use of a credit card, appealed his breach of contract action against the university.[241] In the lower court action, the student had elected to have a jury decide if the university had not followed its published procedures for reinstatement. The appeals court affirmed that state law precluded review of the jury's finding that the contract had not been breached.

In a media-celebrated case of alleged harassment and counter-harassment involving a black professor and white college students, members of a noncollege student newspaper staff brought a civil rights action against a private college and its administrators, alleging that their suspension from the college deprived them of their contractual rights under title VI.[242] The court granted the college's dismissal motion ruling that the students' allegations of racial animus connected with their suspension were insufficient to sustain the claim.

A former student at a public university who had been prohibited from the campus, appealed a criminal trespass conviction.[243] Since the prohibition became void according to its own criteria, when, through administrative oversight, the student was readmitted, the court reversed the criminal conviction. The court additionally remanded the case to inspect alleged jury misconduct.

240. Barletta v. State, 533 So. 2d 1037 (La. Ct. App. 1988).
241. Warren v. Drake Univ., 886 F.2d 200 (8th Cir. 1989).
242. Dartmouth Review v. Dartmouth College, 709 F. Supp. 32 (D.N.H. 1989).
243. Bader v. State, 777 S.W.2d 178 (Tex. Ct. App. 1989).

In a previous case involving plagiarism,[244] a dismissed law student requested documents allegedly relevant to his case from the public university under the Freedom of Information Act.[245] The appeals court, affirming the lower court's dismissal of the action, determined that there was insufficient evidence to show that the university was in possession of the memo and that the court could not order its production under the Freedom of Information Act if it could not be found.

Academic Dismissal. Of the fifteen cases reported here concerning academic dismissal brought before the courts, only two of the actions have been raised by undergraduate students. The remaining thirteen cases involve graduate and professional students in conflict with their universities. The issues entail charges of breach of contract, due process challenges, racial discrimination, and sexual harassment.

A student, terminated from a community college nuclear medicine technology program, appealed her breach of contract and negligence suit against the community college district.[246] The court affirmed that the community college's alleged violation of immediate supervision was not a basis for recovery in negligence and that the plaintiff had no claim against the district for failing to provide an education to her. In Connecticut, a first year law student who failed to maintain a minimum grade point average, appealed his reinstatement on the grounds of fraud and breach of contract.[247] The appellate court found no error in the lower court's ruling that no fraud existed when the university advertised student representation on committees and friendly student-faculty relations and that no contract was breached in the housing of students.

Five students challenged their academic dismissals on the grounds of lack of due process. In New York, a law student appealed her dismissal for deficiency in grade point average.[248] The appellate court, reversing the lower court's dismissal, but refusing to intervene in a controversy over academic standards, remanded the case

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244. *See* The Yearbook of School Law 1989 at 235, Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988); *see also* The Yearbook of School Law 1987 at 266, Easley v. University of Mich. Bd. of Regents, 632 F. Supp. 1539 (E.D. Mich. 1986); 627 F. Supp. 580 (E.D. Mich. 1986); The Yearbook of School Law 1986 at 272, 619 F. Supp. 418 (E.D. Mich. 1985).

245. Easley v. University of Mich., 444 N.W.2d 820 (Mich. Ct. App. 1989).

246. Chevlin v. Los Angeles Community College Dist., 260 Cal. Rptr. 628 (Ct. App. 1989).

247. Gold v. University of Bridgeport School of Law, 562 A.2d 570 (Conn. Ct. App. 1989).

248. Susan M. v. New York Law School, 544 N.Y.S.2d 829 (App. Div. 1989).

back to the university to reconsider if one course grade was a rational exercise of discretion by the course professor.

A dental resident, appealing his termination from a university's general practice residency program, claimed that his dismissal was retaliation for his exercise of first amendment rights and that the dismissal procedures violated his fourteenth amendment rights to procedural due process since he maintained a protected property interest in his contractual employment with the university.[249] The lower court dismissed the due process claim while the fourteenth amendment claim remained alive. The appeals court affirmed that the dismissal did not violate due process and that the resident did not suffer damages since his contracted stipend was paid in full. In a similar case in Minnesota, a resident in a university's psychiatric residency program appealed his dismissal on the grounds of breach of contract, substantive and procedural due process, and defamation.[250] The court held that the resident, in this particular context, was a student rather than an employee; therefore, no breach of contract occurred in his dismissal and academic due process was afforded. The letter of dismissal communicating advice for remediation sent only to the student was not defamatory. Officials of a public university medical school appealed a permanent injunction against the wrongful dismissal of a medical student.[251] The court of appeals reversed the lower court's decision after reviewing and finding neither a violation in the procedural due process afforded the student nor substantially different treatment from other students. Finding error with the lower court's breach of authority in overriding the academic judgment of the school officials, the court determined that the express disclaimers of "subject to change" and "do not constitute an irrevocable contract" placed in the catalogue prohibit the conclusion of an enforceable contract between the student and the university. The Seventh Circuit Court on remand from the Supreme Court reconsidered a case in which nursing students alleged that they were deprived of substantive due process in their dismissal from a nursing school.[252] On a technical error, the appeals of all of the nursing students in a class action, except for the student named in the notice of appeal, were dismissed. With respect to the named student,

249. Davis v. Mann, 882 F.2d 967 (5th Cir. 1989).
250. Ross v. University of Minn., 439 N.W.2d 28 (Minn. Ct. App. 1989).
251. Eiland v. Wolf, 764 S.W.2d 827 (Tex. Ct. App. 1989).
252. Akins v. Board of Governors, 867 F.2d 972 (7th Cir. 1988); *see also* The Yearbook of Education Law 1989 at 236, Akins v. Board of Governors of State Colleges and Univs., 840 F.2d 1371 (7th Cir. 1988).

the district court decision of qualified immunity to the school officials was reinstated.

A black law student appealed, *pro se,* his civil rights action against the law school and a professor, alleging racial discrimination in his dismissal.[253] Permitting his *pro se* complaint to be amended, the appellate court remanded the case with the instruction that the defendant might state a claim for relief under title VI.[254] In a similar case, a black medical student, also *pro se,* alleged racial animus motivated his dismissal from medical school.[255] The court dismissed his title VII claim since the action did not involve employment, denied the college's motion for pretrial disposition, and granted the student's motion for appointment of counsel. A Copt Egyptian medical resident, terminated from a state university residency program, sued the university for injunctive relief and damages under the claim that her dismissal was without cause and based on her race.[256] Since within the process of her dismissal, the student willingly accepted mediation which included her resignation, the destruction of her termination letter, and the receipt of a certificate of residency training, the court dismissed the case. Applicants who failed the bar examination in Tennessee brought civil rights action against the law school and the Board of Law Examiners alleging a racial quota for passing applicants.[257] The law school was deemed by the appellate court to be immune from civil rights action and the Board of Law Examiners, performing judicial acts, were protected by judicial immunity.

Two civil rights cases were dismissed as time-barred. In Louisiana, a graduate student expelled from her program alleged various civil rights claims.[258] The student exceeded the state statute of limitations of one year for a civil rights action. Additionally, the court would not allow the plaintiff to claim that the university's action of dismissal was a continuing tort. In a second time-barred case, a doctoral candidate claimed discrimination in the administration of his doctoral qualifying examination.[259] The appellate court affirmed the

253. Radcliff v. Landau, 883 F.2d 1481 (9th Cir. 1989).

254. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988); 42 U.S.C. § 2000d-4a.

255. Lewis v. Russe, 713 F. Supp. 1227 (N.D. Ill. 1989).

256. Assaad-Faltas v. University of Ark. for Medical Sciences, 708 F. Supp. 1026 (E.D. Ark. 1989).

257. Hampton v. Tennessee Bd. of Law Examiners, 770 S.W.2d 755 (Tenn. Ct. App. 1988).

258. Davis v. Louisiana State Univ., 876 F.2d 412 (5th Cir. 1989).

259. Maduakolam v. Columbia Univ., 866 F.2d 53 (2d Cir. 1989).

lower court denial of the student's claim but reversed the sanctions imposed on him awarding attorney fees to the defendant since the student was acting *pro se.*

Sexual harassment was the claim of female medical residents in two different continuing cases. In the first case, a female medical resident, having received an unsatisfactory academic evaluation, alleged sex discrimination and violation of due process in a suit against the hospital and a number of doctors.[260] On appeal, the court determined that the student alleged sufficient facts to sustain a cause of action under human rights law and the judgment was modified.[261] A determination on the merits is pending. In the second case, a female medical resident appealed her claim of sexual harassment during her residency program.[262] The court of appeals reversed and remanded the case finding that the resident had made *prima facie* cases of hostile work environment and *quid pro quo* sexual harassment.

Other Constitutional Issues

In South Carolina, a black cadet at a military college alleged that his civil rights had been violated by the college officials and by a group of white cadets who allegedly entered his room dressed in sheets resembling Ku Klux Klan outfits.[263] The district court held that the college officials were entitled to immunity from a claim and that the punishment that they imposed on the cadets would have reasonably been expected to protect the constitutional rights of all other cadets at the school. The court dismissed a motion from the white cadets questioning jurisdiction; the court will exercise jurisdiction over tort claims of trespass, assault, and outrage alleged against the white cadets.

A public university police officer detained a university medical student found in a university storeroom located several blocks from the medical school. The student, who appeared to be living in the room, claimed to have permission to use the room for studying and was in possession of keys to the room. The student alleged false arrest and imprisonment and violations of his fourth and fourteenth

260. *See* The Yearbook of Education Law 1989 at 236, Samper v. University of Rochester Strong Memorial Hosp., 528 N.Y.S.2d 958 (Sup. Ct. 1987).

261. Samper v. University of Rochester, 535 N.Y.S.2d 281 (App. Div. 1988).

262. Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988); *see also* The Yearbook of Education Law 1987 at 268, Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986).

263. Nesmith v. Grimsley, 702 F. Supp. 122 (D.S.C. 1988).

amendments.[264] The appeals court found that the use of peremptory challenges by the defendant's counsel to strike black jurors was not a violation of equal protection, that attorney fees should have been awarded along with the award for damages, that the student's civil rights complaint was adequate, and that the police officer was not immune from suit when negligence results in personal injuries to another.

In New York, a former handicapped student requiring a wheelchair alleged that the public university overcharged him as the single occupant of a double dormitory room during his undergraduate and graduate years in violation of section 504.[265] The student's master's degree was withheld pending the payment of his outstanding bill for housing. The court granted a summary judgment for the university, holding the claims based on his undergraduate years were time-barred; the student additionally failed to state a claim for his year of graduate study because he never applied for different accommodations.[266] The appellate court affirmed the lower court decisions.

Having been party to the occupation of the president's office at a public university, a graduate student was found guilty in a trial court of misdemeanor disruptive activity on a university campus. The student appealed on the grounds of "necessity" defense.[267] The court affirmed the lower court's decision. The student could not prove that his occupation of the president's office was necessary to avoid imminent harm in South Africa due to apartheid, or that international law authorizes his actions because apartheid violates international law. Furthermore, the appeals court held that the lower court did not err in refusing to charge the jury on the legal definition of "willfulness."

LIABILITY

Personal Injury

Liability for personal injury covers a variety of liabilities. The lead case, while directly related to liability, involved the consump-

264. Parker v. Downing, 547 So. 2d 1180 (Ala. Civ. App. 1988).
265. Rehabilitation Act of 1973, as amended 29 U.S.C. § 794.
266. Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989).
267. Wilson v. State, 777 S.W.2d 823 (Tex. Ct. App. 1989).

tion of alcohol by minors. Eleven fraternities were convicted of furnishing beer to minors.[268] The city police used a scheme where a plainclothes female officer would enter the fraternity, observe what she thought were minors purchasing beer, and notify other officers outside to apprehend the individuals as they left the party. If the apprehended individuals were minors they were prosecuted for consumption and the fraternity was prosecuted for furnishing. The trial court found and it was affirmed on appeal that the entry by the officer was consensual and did not violate a fraternity's expectation of privacy.

Cases involving liability for products or materials were litigated. One case involved state scaffolding law. The owner and contractor who erected the scaffolding was liable for the injury received by a worker who fell through a skylight when safety devices protecting the skylight required under the law were not installed.[269] In a product liability suit in Illinois against an Indiana university, the court ruled that the Illinois court must recognize an Indiana immunity statute based on the concept of judicial comity.[270] In a suit involving strict liability for asbestos installed in university buildings, the court ruled that the institution filed suit after the expiration of the four year statute of limitations.[271]

A number of cases involved suits arising out of professional treatment. A plaintiff failed in a suit to prove the infliction of emotional distress in the unsolicited showing of a pornographic video. The defendants showed through expert testimony that the plaintiff was emotionally disturbed before that incident.[272] In Illinois, a student failed to show that the university had a duty of care equal to what he alleged.[273] The plaintiff volunteered and was injured in a lab experiment requiring him to run one mile. The court refused to adopt the duty of care standard: a physical exam should have been taken before the run; blood pressure, pulse monitoring, and supervision during the run; and the availability of oxygen and water after the run equal reasonable care in these types of experiments.

The university was not held liable for failing to meet a duty of reasonable care when a window a student attempted to close fell, in-

268. Commonwealth v. Tau Kappa Epsilon, 560 A.2d 786 (Pa. Super. Ct. 1989).
269. Wieszchowski v. Skidmore College, 537 N.Y.S.2d 911 (App. Div. 1989).
270. Schoeberlein v. Purdue Univ., 544 N.E.2d 283 (Ill. 1989).
271. Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989).
272. Young v. St. Louis Univ., 773 S.W.2d 143 (Mo. Ct. App. 1989).
273. Turner v. Rush Medical College, 537 N.E 2d 890 (Ill. App. Ct. 1989).

juring the student.[274] In New York, a court found that the institution had taken reasonable care during a touch football game held as part of orientation when a freshman injured his knee.[275] An Illinois university was not held liable for the abduction and rape of a female who used a university parking lot when bringing her child to a privately owned day care center adjacent to the parking lot.[276] An AIDS patient alleged that the clinic and doctors breached the patient-client privilege when they allowed news media in the waiting room.[277] The court affirmed a lower court finding of no breach.[278]

A professor was found guilty of "tort battery" when he came up behind a woman student in her home without intent to injure and moved his fingers on her shoulders in a motion simulating fingers striking the keyboard of a piano.[279] Finally, a court found that an Oklahoma woman was entitled to the uninsured motorist provisions of her husband's insurance policy when she was injured riding in an under-insured university owned vehicle.[280]

Workers' Compensation

Compensation cases involve questions of the location of the injury, work as the proximate cause of the injury, and retaliation resulting from the filing of a workers' compensation claim. Retaliation was at issue in a case where the university failed to make the appropriate accommodations in plaintiff's job, imposed excessive physical exertion on the plaintiff as part of her duties, and eventually dismissed her.[281] The court found that the plaintiff's contract was not renewed and no violation of law occurred in that action. In another case where the unemployment insurance agency failed to adequately monitor the treatment of an employee, its retroactive cessation of medical benefits was limited to thirty days prior to the notice.[282]

A university employee was eligible for compensation for an injury incurred while on a paid mid-morning break at a location on

274. Siegel v. Hosftra Univ., 545 N.Y.S.2d 935 (App. Div. 1989).
275. Drew v. State, 536 N.Y.S.2d 252 (App. Div. 1989).
276. Figueroa v. Evangelical Covenant Church, 698 F. Supp. 1408 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1427 (7th Cir. 1989).
277. Anderson v. Strong Memorial Hosp., 542 N.Y.S.2d 96 (App. Div. 1989).
278. *See* The Yearbook of School Law 1989 at 241, Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735 (Sup. Ct. 1988).
279. White v. University of Idaho, 768 P.2d 827 (Idaho Ct. App. 1989).
280. State Farm Auto. Ins. Co. v. Greer, 777 P.2d 941 (Okla. 1989).
281. Krasney v. Curators of Univ. of Mo., 765 S.W.2d 646 (Mo. Ct. App. 1989).
282. University of Ariz. v. Industrial Comm'n, 770 P.2d 1177 (Ariz. Ct. App. 1988).

campus but away from the actual workplace.[283] Unemployment compensation was awarded to a worker whose unit was performing a task as part of a unit charitable donation to the college's foundation.[284]

Several cases involve workplace stress resulting in injury. In Oklahoma, a court found that a man who claimed his heart attack was induced by workplace stress was found eligible for workers' compensation.[285] A Colorado court found that a woman who sought treatment for workplace stress-induced emotional problems was awarded the appropriate medical benefits.[286] The selection of a physician willing to treat the patient was also at issue in this case.

Several plaintiffs, however, were not successful in their claims. For example, a plaintiff's illness in one case was found to be the result of excessive alcohol consumption and not work-related.[287] In Virginia, the court found that the institution was not liable for the employee's educational program since it went beyond the provisions of necessary vocational rehabilitation training services required under the law.[288]

Contract

Contract litigation included issues such as questions about the existence of a contract, breach of contract, bidding procedures, and jurisdiction ending with the expiration of the statute of limitations to file a claim. In Mississippi, a court ruled that a contract did not exist when an administrator at a public institution without authority entered into a contract with a bank.[289] The locus of contracting authority at public institutions is public information accessible to the vendor.

The Supreme Court ruled that a fraud and breach of contract claim could proceed in state court over the provisions of the Federal Arbitration Act in a contract containing stipulations which provide that the contract would be controlled by the laws of "the place where the project is located."[290] In New York, a breach of warranty or fraud

283. Lemming v. University of Cincinnati, 534 N.E.2d 1226 (Ohio Ct. App. 1987).
284. Kim v. Mt. Hood Community College, 769 P.2d 239 (Or. Ct. App. 1989).
285. Decker v. Oklahoma State Univ., 766 P.2d 1371 (Okla. 1988).
286. Ruybal v. University of Colo. Health Sciences Center, 768 P.2d 1259 (Colo. Ct. App. 1988).
287. Bird v. Southeast Mo. State Univ., 761 S.W.2d 746 (Mo. Ct. App. 1988).
288. Yeargain v. Daniel Int'l, 384 S.E.2d 114 (Va. Ct. App. 1989).
289. Board of Trustees of State Inst. of Higher Learning v. Peoples Bank of Miss., 538 So. 2d 361 (Miss. 1989).
290. Volt Information Sciences, Inc. v. Board of Trustees, 109 S. Ct. 1248 (1989).

claim involving asbestos in an institution's building is pending resolution.[291]

In a case involving faulty construction, the court ruled that the four year statute of limitations had tolled prohibiting the university from litigating this case.[292] The university either knew in 1982 or should have known that the faulty design and construction of the floor of a pharmacy building was the cause of cracking of the exterior walls. Another complaint by the same institution against the architects reached a similar result.[293] Finally, a contractor brought action, barred by sovereign immunity, that acts and omissions of the state caused its untimely completion of a construction contract.[294]

In Virginia, the court denied preliminary motions on a breach of contract claim awaiting a decision on the merits.[295] The Virginia couple is attempting to get possession of a cryo-preserved human prezygote held by a Virginia clinic and have it moved for implantation in a clinic near their new home in California. In another breach of contract case, a student sued alleging that the institution was obligated to award him a degree.[296] The student had failed to meet the degree requirements when he failed to take an exam as part of a required course. Furthermore, the institution had not treated him unfairly by failing to transfer credits from another institution.

An Alabama court ruled that the Board of Adjustments had sole jurisdiction over contract disputes with a public university.[297] In Florida, the court ruled that a university was entitled to attorney fees accrued both during litigation and arbitration of the contract dispute with a building contractor.[298] A subcontractor was successful in obtaining the costs for the repair of window wall panels which were damaged in a university building due to faulty construction.[299]

In a divorce settlement, a wife's teaching certificate awarded at about the time of the marriage was not part of the settlement but

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291. Brooklyn Law School v. Raybon, Inc., 540 N.Y.S.2d 404 (Sup. Ct. 1989).
292. Board of Regents v. Lueder Constr. Co., 433 N.W.2d 485 (Neb. 1988).
293. Board of Regents v. Wilscam Mullins Birge, Inc., 433 N.W.2d 478 (Neb. 1988).
294. Bolton Corp. v. State, 383 S.E.2d 671 (N.C. Ct. App. 1989).
295. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).
296. Bindrim v. University of Mont., 766 P.2d 861 (Mont. 1988).
297. Alabama State Univ. v. State Bd. of Adjustment, 541 So. 2d 567 (Ala. Civ. App. 1989).
298. B&H Constr. & Supply Co. v. District Bd. of Trustees, 542 So. 2d 382 (Fla. Dist. Ct. App. 1989).
299. Northeastern Plate Glass Corp. v. Murray Walter, Inc., 537 N.Y.S.2d 657 (App. Div. 1989).

the master's degree in teaching acquired during the marriage became marital property and a part of the divorce settlement.[300]

A number of contract cases involved the award of bids and bidding procedures. One case involved a private television broadcast corporation's contract to provide for the telecast of a school's athletic events. The court, ruling that the broadcast of athletic events was not a public function, found that the bids submitted by private television companies to become part of the network were not subject to the Freedom of Information Act.[301] In Washington, a court found that a university must provide competitive bidding procedures in its effort to purchase coal for the institution.[302] The court declared the provision requiring only the consumption of coal produced in the state to be unconstitutional. In California, the court vacated a contract because the bidder awarded the contract failed to conform to the bidding specifications.[303]

Deceptive Practices

In one case, a student alleged that a professor intercepted a student's evaluation of his teaching performance in which some candid and critical comments were made. He claimed that subsequent action by the professor served to breach the contract the student had with the institution, and was retaliation through the assignment of grades. He also alleged that the Federal Educational Rights and Privacy Act[304] was violated when the professor was given access to the student's records. The court found that the review of a student's records by a professor was not an invasion of privacy under the law, nor had other rights been violated. However, the trial court's sanction of the plaintiff for outrageous comments made in court was set aside. In another case, a student was successful in sustaining a charge that a proprietary school had used false information to induce her to enroll in a training program.[305]

300. McGowan v. McGowan, 535 N.Y.S.2d 990 (App. Div. 1988).
301. KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382 (Iowa 1989).
302. Lynden Transport, Inc. v. State, 768 P.2d 475 (Wash. 1989).
303. Konica Business Mach. U.S.A. v. Regents of Univ. of Cal., 253 Cal. Rptr. 591 (Ct. App. 1988).
304. 20 U.S.C. § 1232g (1986).
305. Delta School of Commerce, Inc. v. Wood, 766 S.W.2d 424 (Ark. 1989).

Negligence

Cases involving charges of negligence which was the proximate cause of injury or death were before the courts. A university charged that a bank was negligent in the authorization of the payment of large checks made out to the university's account when the checks were manually signed instead of the usual machine signed method.[306] The court denied motions finding that triable issues were yet to be resolved.

A number of cases involved charges of negligence on the part of the university which were alleged to have caused injury. A Montana court found that a university was not negligent in the supervision of a minor high school student who was injured on a motorcycle after consuming alcohol at a party on campus.[307] A prisoner, on furlough to the college campus, was found guilty of contributory negligence when he was injured using a masonry saw while the instructor was not in the shop.[308] A student failed to surmount a public institution's sovereign immunity in a claim of negligence when she slipped on ice in a parking lot.[309] A bicyclist who was injured when he ran into the cross beam of the bleachers when he left the bike path failed to show that the accident was foreseeable, requiring the institution to post warning signs.[310]

Several cases surround the death of an individual. In a case involving a Grenada medical school road race, the court refused to grant a summary judgment.[311] Later the court, on the merits, ruled that the institution had taken reasonable steps to provide medical attention and other precautions for race participants.[312] The deceased student, who knew of his poor health, assumed complete risk when he voluntarily entered the road race that resulted in his death. A state supreme court ruled that a university owned indoor swimming pool did not come under the recreation land use exemption from liability.[313] The case involved the death of a scuba diver in the

306. Fordham Univ. v. Manufacturers Hanover Trust, 534 N.Y.S.2d 993 (App. Div. 1988).
307. Graham v. Montana State Univ., 767 P.2d 301 (Mont. 1988).
308. Clements v. Moncrief, 549 So. 2d 479 (Ala. 1989).
309. Abrams v. Schoolcraft Community College, 444 N.W.2d 533 (Mich. Ct. App. 1989).
310. Poerio v. State, 534 N.Y.S.2d 459 (App. Div. 1988).
311. Gehling v. St. George Univ. School of Medicine, 698 F. Supp. 419 (E.D.N.Y. 1988).
312. Gehling v. St. George's Univ. School of Medicine, 705 F. Supp. 761 (E.D.N.Y. 1989).
313. Cassio v. Creighton Univ., 446 N.W.2d 704 (Neb. 1989).

university's indoor pool. Finally, a Michigan court found that the institution could be found negligent under defective public buildings exceptions to immunity.[314] The institution failed to have a proper type of cell for intoxicated arrestees. The intoxicated individual hung himself with a belt from a vent in the cell.

A state supreme court ruled that a female who was raped by an intoxicated nonstudent in a women's restroom, raised significant issues about the university's responsibility in serving nonstudents at a university facility that dispenses alcoholic beverages.[315]

Finally, in a related case, an AIDS patient, filing a negligence claim, sought the identification of a blood donor whose infected blood resulted in his illness.[316] The court denied the motion since this action was not brought against the donor.

Medical Malpractice

In Tennessee, a university was not held liable when doctors employed by the university, but performing surgery as private physicians at a city hospital, were sued for malpractice.[317] In another case, a doctor's action of contacting a patient after several years when the patient failed to come back as instructed was not defined as falling under the continuous treatment doctrine.[318]

In Kentucky, a court ruled that physicians practicing at the university hospital had no protection from medical malpractice emanating from the state's sovereign immunity statutes.[319] Similarly, a Michigan court denied that a university hospital had governmental immunity.[320] A New York court found a private college's dental clinic would not be immune from charges of negligence.[321] In Texas, a federal court found that a physician employed by a state university was not entitled to quasi-judicial immunity.[322]

Finally, an attorney was disqualified from representing the pa-

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314. Hickey v. Zezulka, 443 N.W.2d 180 (Mich. Ct. App. 1989).
315. Humiston v. Grose, 534 N.Y.S.2d 604 (App. Div. 1988).
316. Doe v. University of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988).
317. Parker v. Vanderbilt Univ., 767 S.W.2d 412 (Tenn. Ct. App. 1988).
318. Rizk v. Cohen, 538 N.Y.S.2d 229 (1989).
319. Gould v. O'Bannon, 770 S.W.2d 220 (Ky. 1989).
320. Stein v. Southeastern Mich. Family Planning Project, 438 N.W.2d 76 (Mich. 1989).
321. DeVito v. New York Univ. College of Dentistry, 544 N.Y.S.2d 109 (Sup. Ct. 1989).
322. Gleason v. Beesinger, 708 F. Supp. 157 (S.D. Tex. 1989).

tient against the university in one case and the university in another malpractice case.[323]

Antitrust

An Illinois case is pending since a motion to dismiss was denied.[324] At issue is whether the sale of academic supplies to nonprofit private corporations (educational institutions) violated the price discrimination provisions of the Robinson-Patman Act,[325] the monopolization provisions of the Sherman Act,[326] and the deceptive trade practices provisions of the Illinois Antitrust Act.[327] In another case, a law student brought restraint of trade and violation of first amendment rights in the action of a bar association to deny accreditation to a law school.[328] The court dismissed the complaint.

A university brought action to stop the sale of merchandise bearing the university's name, symbols, and insignia claiming it was a trademark infringement and an unfair and deceptive practice under the Sherman Act.[329] The court denied the university's motion for summary judgment, noting that the university had not abandoned its trade mark by allowing uncontrolled use in the past; issues of the origin of goods bearing the mark remained to be resolved.

Patents

A copyright case reported previously was back in court on appeal.[330] The University of Minnesota claimed a copyright violation in a computer software corporation's development of software to administer and score a psychological test. The Eighth Circuit Court affirmed the lower court decision regarding the university's standing and the original nature of the test questions justifying copyright.[331]

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323. Crawford W. Long Memorial Hosp. v. Yerby, 373 S.E.2d 749 (Ga. 1988).
324. American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 699 F. Supp. 152 (N.D. Ill. 1988).
325. 15 U.S.C. § 13.
326. 15 U.S.C. § 2.
327. Ill. Rev. Stat., ch. 38 para. 60-3(3), ch. 121 1/2 para. 262, 311 *et seq.* (1987).
328. Zavaletta v. American Bar Ass'n, 721 F. Supp. 96 (E.D. Va. 1989).
329. Board of Governors v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989).
330. *See* The Yearbook of School Law 1989 at 247, Regents of Univ. of Minn. v. Applied Innovations, Inc., 685 F. Supp. 698 (D. Minn. 1987).
331. Applied Innovations, Inc. v. Regents of Univ. of Minn., 876 F.2d 626 (8th Cir. 1989).

Estates and Wills

Several cases involve donations to the university. In one case, the donor sought to have the money returned because allegedly the university was not awarding the scholarship as prescribed in the endowment.[332] The court found that there was a lack of evidence that the university had not disbursed funds as prescribed and, furthermore, there was no record of a specific "promise" to use the gift in a certain way.

In another case involving the bequest of two sisters, the university attempted to hold the second sister's estate responsible for the failed bequest of the first sister.[333] The court found that no contract to execute mutual wills of the sisters existed.

332. Hawes v. Emory Univ., 374 S.E.2d 328 (Ga. Ct. App. 1988).
333. *In re* Estate of Thwaites, 434 N.W.2d 214 (Mich. Ct. App. 1988).