DOCUMENT RESUME

ED 338 143 HE 024 984

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TITLE Dismissal and Non-Renewal of Higher Education Probationary Faculty.
PUB DATE 89
NOTE 22p.
PUB TYPE Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Case Studies; *College Faculty; *Court Litigation; Court Role; Elementary Secondary Education; *Employer Employee Relationship; *Employment Problems; Higher Education; Job Performance; Nontenured Faculty; *Teacher Employment; Tenured Faculty

ABSTRACT

This paper discusses the legal precedents and implications for non-renewal of elementary, secondary, and university and college probationary faculty. Selected federal and state cases are reviewed to show the evolution of case law from the early 1950s to the present day. Analysis of the court cases reveals that for the last 40 years the courts have been generally reluctant to interfere in personnel practices regarding probationary faculty, despite an evolution of state laws and court decisions requiring some forms of due process. Also, the courts have allowed institutions broad discretion in the application of these guidelines and the standards and criteria related to the granting of tenure or to non-renewal. Faculty, however, continue to file legal action on non-renewal or dismissal issues. It is recommended that school officials familiarize themselves with the rules and regulations pertaining to faculty employment contracts, that the terms of these contracts be written (avoiding oral agreements altogether), and that they be clearly explained to the faculty member at the beginning of employment. The suggestion is made that carefully documenting personnel procedures and factors relating to a faculty member's employment status will help avoid costly court litigation. (GLR)

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Walter H. Nolte, Ph.D.

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INTRODUCTION

The purpose of this paper is to discuss the legal precedents and implications for non-renewal of university and college probationary and non-tenure track faculty. This paper will deal with elementary and secondary teachers and tenured university teachers as these cases provide insight into dismissal and non-renewal of probationary faculty. This paper will attempt to discuss the legal implications of non-renewal for issues related to academic and teaching competencies and improper behavior. As the basis of the paper, selected federal and state cases will be reviewed in an attempt to show the evolution of case law from the early 1950's to present day. As shall be demonstrated, the old axiom that tenure may be denied for a good reason, a poor reason, an incorrect reason, or no reason may no longer be as viable as it was forty years ago.

CASE ANALYSIS

The legal status of probationary faculty varies per state and institution. The tenure process generally varies between three to seven years, with community colleges on the lower end of the time scale and major research universities on the higher end. Some schools and states have very formal tenure requirements and others may have an informal process or no process. The tenure process can be set by school tradition, board policy, collective bargaining or negotiated agreement, state statute or combinations of all of these. Of course, entirely different procedures usually exist for faculty appointments that are special in nature or truely intended to be of limited duration. Determining the legal recourse available to a faculty member or an institution requires an examination of the unique tenure process or other employment procedures for the individual situation. However, the common practice is that tenure is granted by formal action of a recognized governing board. In Trilling v. Board of Education of the City of New York, 67N.Y.S.2d572, despite the fact that the president of City College of New York (governed by the defendent board) had written that Louis Trilling had maintained his tenure when transferring from a high

school to a college, the courts ruled that the president had no rights to confer tenure.

Faculty of colleges and universities are employed under personal service contracts and as such the law of contracts has applicability, modified by formal or informal tenure processes which detail the contract conditions (Chambers, 1964). In Michigan, a college faculty member worked for two months with only a letter of acceptance from a department chair. After he was dismissed, he sued for the remaining years salary. The courts held that the board's authority to issue contracts could not be delegated and that the board had not ratified the employment agreement (Sittler v. Board of Control of Michigan College of Mining and Technology, 53N.W.2d681, 1952).

One of the most significant cases regarding non-renewal was Scott v. Joint Board, 258S.W.2d499 (1953). Most post-secondary institutions have written guidlines and standards regarding the award of tenure or non-renewal. However, in 1952, Kentucky Wesleyan College had neither a written policy nor tenure. Using the American Association of University Professors guidelines on tenure, plaintiff Scott argued that she had "defacto" tenure after the board refused to renew her contract. Scott also cited the usual and customary practices of schools accredited in the Southern Association. Judgement for the defendant was ordered by the Kentucky Supreme Court. Despite promises that Scott would be granted tenure if perfomance was satisfactory, the Kentucky Court of Appeals said that the promises were not specifically contractual. In the absense of procedures, the court ruled that Scott had no cause of action.

Although the courts are loath to get involved in the reasons tenure is denied or contracts are not renewed, they are willing to lend judgements if the declared reason seems false. In the Application of Fallon, 192N.Y.S.2d239 (1952), a political science instructor at Queens College was denied a new contract for the following year because of low enrollment, despite a recommendation of tenure by the department. The court determined that the number of budgeted faculty was the same as the previous year and that enrollment was actually higher. Yet, the court felt powerless to provide redress and could only admonish the college administration at ". . . playing hide and seek with a man's livelihood."

Boards of Regents may delegate some of their authority to the administrative staff of colleges or universities, however, in most states, boards of public institutions have a statutory or constitutional authority to " . . . employ and dismiss all officers, instructors and employees at all institutions under its control" (Worzella v. Board of Regents, 93N.W.2d411[1958], at 412). This authority cannot be restricted,

surrendered or delegated away. Administrative officers usually have only limited delegated power, especially when dealing with dismissal. Keleher v. La Salle College, 147A.2d835(1959), provides a valuable insight into this situation. James Keleher, appellant, taught philosophy and religion at La Salle College in Philadelphia from 1948 to 1953. In June of 1951 he was issued a written contract for the 1951-52 academic year. The contract contained normal language regarding rank, salary, advising, teaching load and other college expectations. The following June, (1952) he signed the same contract, except dated for the 52-53 academic year. In March of 53, Keleher was informed in writing by the new college president that because of budgetary limitations he would not have a contract for the following year. Keleher responded to the president that the former college president had orally granted him tenure in June of 1951. The president responded " . . . please be advised that in as much as this tenure was extended to you by the authority of the President, it can likewise be revoked under the same authority . . . " (Id at 836) The president offered continued employment, but with reduced rank and salary. Keleher initiated action for a breach of an oral contract. The college denied that an oral contract existed. On appeal, the court confirmed the lower courts opinion that the written contract of June 15, 1952 is " . . . (c)lear and free of any ambiguity. It purports to encompass all the terms and conditions of the relationship between appellant and appellee . . ." (Id at 837). The court found that absent fraud or mistake, an oral agreement for tenure by the college President would not supersede the language of a clear and unambigious contract. The lesson for faculty in this case is to make sure that proper procedures are being followed. The lesson for administration to avoid costly and protracted litigation, put things in writting.

Failure to reappoint, although an action almost the same as dismissal, is subtly different. In Raney v. Board of Trustees, Coalmiga Junior College District, 48Cal.Rptr.555(1966), the court ruled that the Board of Trustees of a public junior college have an "absolute choice to either hire or fire." Joseph Raney was a probationary instructor. In his third year of teaching he was given written notice that his services would no longer be needed. Upon request for a reason, the Board responded in a formal hearing process that his grading philosophy was unsuitable, his sarcasm towards students unwarranted, his rapport with students ineffective and that he was generally thought of as a contentious person by students, faculty and the community. The California Education Code provided that judicial review of Boards' decisions shall be limited and that the cause of dismissal shall not be subject to judicial review. Boards are best able to determine the welfare of schools. Boards

must have conclusive evidence not to reemploy a probationary employee. The court ruled that:

> Ideally a teacher should be a little contentious, rather that stodgy and lethargic, but our theory of government gives to school trustees, for better or for worse, an almost absolute choice either to "hire or fire" teachers who have not yet attained tenure. It might well be argued that the legislature has created a mirage for probationary teachers by seeming to assure them that they may demand a hearing.... In practice, such an official inquiry does not result in a reinstatement of the teacher but only produces a possibly expanded assignment of reasons why the board does not wish to grant permanent status .... Teachers should clearly understand the way of the world insofar as their jobs are concerned (Id at 558).

One of the more important cases regarding constitutionally protected freedom of speech is Pickering v. Board of Education, 391U.S.563 (1968). Marvin Pickering was dismissed from his position for writing and publishing in a newspaper a letter criticizing the Board's allocation of funds between educational and athletic programs. At a hearing the Board charged that some of the points of Pickering's letter were false and that the letter was ". . . (d)etrimental to the efficient operation and administration of the schools . . . " (Id at 563). Despite the fact that no evidence was presented proving this statement, Illinois courts affirmed the dismissal, rejecting Pickering's claim that his letter was protected by the first and fourteenth amendments.

The Supreme Court, in deciding this case, stated "(T)he teacher's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of it's employee's public services" (d at 568). Pickering's letter, critical of the Board's action, was substantially correct in about half the statements but was received with "massive apathy" by the public. The Court determined that ". . . (w)a conclude that the interests of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similiar contribution by any member of the public" (Id at 573). The Court ruled that Pickering's employment was "tangentially and insubstantially" involved in the subject matter and that he must be regarded as a member of the general public speaking on an item of public concern amd importance and thus, cannot be dismissed" (Id at 574). This case resulted in the Pickering Test regarding free speech. Did the activity interfere with the employees work performance? Did the activity create disharmony among co-workers? Did the activity undercut the immediate supervisor's authority and disciplinary ability, and did

the activity destroy the relationship of loyalty and trust required by a confidential employee? The Pickering rule of balancing the ". . . (i)nterest of the teacher as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its
employees . . ." is used to protect teachers from the powerful threat of dismissal by "a potent means of inhibiting speech" (Id at 568 and 574).

The Jones v. Hopper case, 410F.2d1323(1969), deals with a probationer who claimed he had a right to expect continued employment. George Jones, an untenured professor, alleged that the college Board had deprived him of his right to be reappointed because he had objected to the disqualification of an Asian applicant for a position in his department, he had critized a textbook in the student newspaper, and had founded an independent faculty-student publication that was critical of the Vietnam War. The Tenth Circuit Court of Appeals asked "(W)hat guaranteed right, privilege or immunity was denied Jones which is protected under the Constitution?" (Id at 1327) The court held that "(T)here is nothing in the complaint to warrant an interference or conclusion that the Colorado statute nor its application herein went beyond what might be justified in its exercise of the state's legitimate inquiry into the fitness and competency of its teachers" (Id at 1328). Jones was claiming a civil rights violation, however the court held that the defendents were under the "color of law" and that the Board was ". . . (e)xercising a discretion given them by state statute and, therefore, exercise of such discretion could not, under the facts alleged, become unlawful conduct which would justify its falling within ambit of Civil Rights Act" (Id at 1324). The Supreme Court refused to review this case.

In 1969 five untenured faculty members of Howard University were dismissed after active involvement in serious disturbances at the University. They were terminated without a hearing of any kind. In Greene v. Howard University, 412F.2d1128(1969), the appellants were challenging the University's failure to give appropriate advance notice on the non-renewal, per their contracts, and the lack of an opportunity to be heard on the charges. The Faculty Handbook stated that normal University practice was that upon request, a dismissed person shall be given a hearing before a committee of the Board, the dismissed person shall be given reasonable notice of dismissal, and an opportunity to be heard by a committee of peers. The usual practice was to inform faculty of non-renewal either in January or April. The untenured faculty were relying not only on the personal assurances of the administration, but on written University practices, yet, during June, after

investigating the disturbances, the University abrubtly and without a hearing sent non-renewal letters. The District of Columbia Circuit Court of Appeals ruled that the University could not give with one hand and simultaneously take away with the other.

> Contracts are written... by reference to the norms of conduct and expectations founded upon them. The employment contracts of appellants here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs. Those provisions seem to us to contemplate a hearing before separation from the academic community for alleged misconduct one who, although a non-tenured employee, has acquired a different dimension of relationship because of the expectations inherent in the University's failure to give notice as contemplated by its own regulations (Id at 1136).

The court found that a hearing at this point would be superfluous ". . . (t)he legal injury done by the failure could not be now repaired . . ." (Id at 1136). The District Court was ordered to pursue the question of monetary damages.

The fundamental requisite to due process is the opportunity to be heard. Due process violations are the most litigated area in faculty employment issues regarding termination or non-renewal. Critical areas of examination are state tenure laws and regulations and local policies and procedures. The Ferguson v. Thomas case, 430F.2d852(1970), determined that minimum due process for a tenured teacher included the right to: 1) be advised of the cause for termination so as to show error; 2) be advised of the names and nature of testimony of the witnesses; 3) have a meaningful opportunity to defend a position; and 4) have a hearing before a tribunal that has impartiality and expertise (Id at 856). These are requirements for tenured professors, however. In 1972 the Roth and Perry v. Sindermann cases set the standards for the decisions on untenured instructors. These cases deal with property interests, liberty and due process. In both these cases the Supreme Court held that the fourteenth amendment guaranteed procedural due process, including a hearing and notice of charges or cause prior to non-renewal if the teacher had reasonable expectation or legitimate claim to reemployment. The Sindermann case deals with the issue of "de facto" tenure. These cases may have resulted from lack of definitive language at the respective institutions. The following is an examination of each case in detail.

The two major issues in Roth and Sindermann were whether the fourteenth amendment entitled teachers to due process and whether non-renewal resulted as a consequence of free speech activities. In Board of Regents of State Colleges v. Roth, 408U.S.564, David Roth was employed as an first year assistant professor in

1968-69 at Wisconsin State University. Roth was informed that he would not be rehired for the next year. Wisconsin law stated that a teacher received tenure after four years of employment. The law had no standards defining eligibility for reemployment and new untenured faculty were entitled to only one year appointments. The Board provided some procedural rules for a nontenured teacher dismissed during the contract year, but no real protection for non-renewal, except notification by Feburary 1st. No reason needed to be given. Roth was informed in January, 1969 that he would not have a contract for the 69-70 academic year. Roth's District Court action claimed that his fourteenth amendment rights had been violated. He alleged that the real reason he was not rehired was because of critical statements against the University administration, a violation of his free speech rights. He also contended that the University had failed to give notice and a hearing. The District Court and Court of Appeals ruled for Roth. The lower courts asserted that Roth had property and liberty interests. The Supreme Court, however, after an examination of Roth's employment contract, determined that he did not have a property interest, using the following rule: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" (Id at 577). The Court found that as property interests are created by independent sources of government, not the constitution, and that Roth's contract specifically terminated on June 30, and had no provision for renewal, nor were there any statutes or policies securing his renewal, Roth had no interests ". . . (s)ufficient to require the University authorities to give him a hearing. . ." (Id at 578).

On the issue of liberty, the Court stated that "(I)n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed," this was not such a case" (Id at 572). Roth's standing in his community was not stigmatized. He was not precluded from seeking other employment opportunties, even within the state university system. Although Roth was claiming that his non-renewal was based on protected free speech, this issue was not before the Court, nor had Roth yet proved those allegations in the lower court. The court stated:

> "...(o)n the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of his "liberty" when he simply is not rehired in one job but remains as free as before to seek another (Id at 575).

In summary, on reversal and remand, the Court found that Roth did not have

sufficient property interest for a hearing because of University practices and state statutes.

> Our analysis of the respondents' constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution (Id at 578-9).

The Roth decision dealt a blow to untenured faculty's claim of procedural rights. The Court ruled against Roth, despite the fact that he was a regular appointee, not a temporary replacement or specially funded faculty. The Court also knew that the criticism of the University's administration was made just prior to his non-retention and that non-renewal was fairly uncommon for first year faculty.

The Perry vs. Sindermann case, 408U.S.593, complicated the picture. Robert Sindermann had been a teacher in the state college system of Texas for 10 years, two at the University of Texas, four at San Antonio Junior College and four at Odessa Junior College, under a series of one-year contracts. As president of the Texas Junior College Teachers Association he left his teaching duties in 1968-69 to testify in the Texas Legislature. He also advocated, in opposition to the Board, that Odessa J.C. become a four year school. Giving no official reason, despite a press release claiming insubordination, the Board terminated Sindermann's one year contract in May of 1969. Sindermann was not allowed a hearing.

In District Court, Sindermann claimed that his public criticism of the Board was the real reason he was not rehired, violating his freedom of speech, and that the college's failure to provide a hearing violated the fourteenth amendment. The Board denied the accusation on criticism and, as there was no tenure system, claimed a hearing was not required. The District Court ruled for the Board. The Court of Appeals, arguing that the non-renewal of the contract was based on protected free speech, Sindermann's fourteenth amendment protection was violated and ordered a full hearing on the issues. They also ordered the District Court to examine the "expectancy" of reemployment issue. The Supreme Court agreed to review this decision.

The Court first held that the district court's summary judgement against Sindermann without exploring if the decision not to renew the contract was ". . . (m)ade in retaliation for his exercise of the constitutional right of free speech," was improper (Id at 598). On the issue of due process, (referencing the Roth case as one

where the respondent did not show a loss of property or liberty interest) the court indicated that Sindermann should have been given an opportunity to demonstrate a property interest.

> But the respondent's allegations - which we must construe most favorably - do raise a genuine issue as to his interest in continued employment ...He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. ...(t)he college had a "de facto" tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's Faculty Guide (Id at 599-601).

Although Odessa College did not have tenure, a statement in the Faculty Guide implied permanent tenure as long as teaching was satisfactory, the teacher was cooperative towards co-workers and superiors and was happy. Moreover, the Texas State College System provided that if a teacher had seven or more years of experience, some form of job security existed. Sindermann was never allowed to prove this interest.

> A persons interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing (Id at 601).

In other words, absence of a clearly written tenure provision does not always eliminate the possibility of a property interest. Odessa College may have created a "de facto" tenure system by a "common law." Although not ordering reinstatement, the court held that Sindermann must be given a hearing where " . . . (h)e could be informed of the grounds for his nonretention and challenge their sufficiency" (Id at 603).

The Sindermann decision, therefore, provides only limited procedural due process for the untenured. The teacher must be given the opportunity to relate charges at a hearing. Nothing in the Court's decision mandates reappointment. The Roth case is a blow to faculty rights because it failed to recognize the difference between a special appointment and a one year regular appointment and the stigma associated with non-renewal. To avoid suits, colleges should say nothing about the reason for non-renewal, likewise, colleges should clearly enunciate their policies concerning tenure track and temporary and special appointments to avoid creating an expectancy of renewable contracts. Although it is clear that not all speech is protected by the first amendment, the Roth and Sindermann cases indicate that

violations of free speech rights would require due process hearings. Institutions that are cognizant of the Roth and Sindermann results and apply the appropriate policy will be able to manage their employment practices without costly litigation.

What was the result of the Roth and Sindermann case? As one "sage" suggested:

> Thus, the only party obviously not entitled to a hearing prior to non-renewal is the teacher who has no tenure, no continuing contract, no property interest assertable, no warranted fear of professional detriment, and who fails or refuses to assert that his non-renewal is based on his exercise of constitutional rights or otherwise constitutes some actionable wrong (Slepin, 1973, p 31).

The result was a plethora of cases claiming violation of freedom of speech and/or due process. Roth and Sindermann were signs of the time, the cultural upheaval of the late 60s and early 70s. Most of the cases in the future regarding faculty termination, dismissal or non-renewal cited Roth or Sindermann or both. Faculty perception of these cases may be different than the "sage" cited above. From their viewpoint, relief was hard to get, needing either proof that first amendment rights were violated or a property interests existed or due process was impinged. Due process violation often only required the college or university to provide an opportunity for a hearing, not reinstatement.

At least in one case, a faculty member was able to demonstrate a property interest because of departmental voting and retirement privileges and oral commitments to tenure. In Soni v. Board of Trustees, 513F.2d347(1975), the plaintiff was a member of the TIAA/CREF retirement system, that at the time was restricted to permanent employees of the University of Tennessee. The court held that the " . . . (u)niversity acted towards the professor in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency and that, although not granted tenure, had acquired a property interest . . . " (Id at 348). The lower court ordered back pay from termination until a proper due process hearing. The record in the Soni case was confused by a lack of citizenship, however, he was told on several occasions that he would be treated " . . . (l)ike any other tenured professor" (Id at 350). He purchased a home, became a naturalized citizen, was permitted to participate in departmental meetings and voted on the tenure of other teachers. He was terminated for competency after six years. No hearing was provided. The Appeals Court affirmed that Soni had a reasonable expectation of tenure. The court held that it was unclear whether the University was a state entity

and thus immune under the eleventh amendment and affirmed the lower courts award of back pay.

However, in Megill v. Board of Regents, 541F.2d1073(1976), The Court of Appeals from the Fifth Circuit delivered language that anticipated the Mt. Healthy case (see below.) The Fifth Circuit stated that the court ". . . (d)oes not sit as a reviewing body of the correctness or incorrectness of State Board of Regents' decision in granting or withholding tenure; although a nontenured teacher is entitled to due process considerations of First Amendment claims, mere assertion of such a claim does not convert the federal procedure into a plenary administration review" (Id at 1071). Again, the court held that the University could deny tenure for no reason or erroneous facts as long as constitutional rights were not violated and due process was followed. The Board had reviewed six incidents of misbehavior before confirming Megill's dismissal. Although feeling that the courtroom was not the appropriate place for reviewing personnel decisions, the Appeals Court reviewed all six incidents because the Circuit Court had reviewed two of the incidents. They found that Megill lacked ability to make accurate public statements, including making statements he knew to be false or could have easily investigated. This was not an indication of high standards the Board could reasonably expect. None of Megill's speech related activity was constitutionally protected, nor had he an expectation of continued employment under the terms of his contract or Florida law. Megill argued bias on the part of the Board, however the court pointed out that the Board was ". . . (l)egally authorized to be the decision- maker" (Id at 1079). Again, the court stated that the federal court's only function was to decide on constitutional issues and that due process does not guarantee correct personnel decisions.

Decker v. North Idaho College, 552F.2d872(1977) set another standard for non-reinstatement due process, despite the fact that the instructor was dismissed without a hearing. Although damages were awarded, the Circuit Court ruled that the trial conducted at district court level resolved the due process question. Decker, who was dismissed after six years for a lack of a Masters Degree in the field he was teaching, was arguing for reinstatement. Citing Sindermann on "de facto" tenure, the court stated ". . .(t)he District Court more than adequately compensated for the fact that the appellant did not receive a pretermination hearing . . ." (Id at 873). Yet, the court held that individual Board members were not liable for damages and that reinstatement was proper only in cases of racial discrimination and first amendment violations.

In 1977, the Supreme Court decided one of the more important cases regarding free speech of teachers. In MT. Healthy City School District v. Doyel, 429U.S.274,

the court determined that an untenured teacher may be able to claim reinstatement if exercise of free speech was the bases for non-renewal. In this case the District Court ruled that the teacher's exercise of free speech was a substantial reason for the Board's decision not to rehire. The Supreme Court, however, stated that a teacher who claims a first amendment violation must prove that the issue was constitutional and in fact, was a substantial or motivating factor in the decision not to rehire.

Fred Doyle was an untenured teacher who had been involved in several incidents with school personnel and students. He was advised that he would not be rehired because lack of tact after calling a radio station with information on a school dress code. The District and Appeals Courts ruled that the call was protected by the first amendment. The District Court also granted damages. (On this issue, the Supreme Court ruled that the District was not a political subdivision of Ohio, thus was not immune from suit under the Eleventh Amendment.) Citing Roth, and Sindermann, the Court stated Doyle's claims were not defeated because he didn't have tenure.

> (E)ven though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms (Id at 574).

Using the Pickering balance rule, the Court accepted the findings that the radio station communication was protected by the first and fourteenth amendment. However, they disagreed with the lower court rulings on reinstatement and back pay. The District Court felt that a nonpermissable reason played a substantial part in the non-renewal, yet this court also stated that there were other reasons for the Board to make a decision. The Supreme Court stated that since there was no state law requiring cause or reason for non-renewal:

> (C)learly the Board legally could have dismissed respondent had the radio incident never come to it's attention. We are thus brought to the issue whether even if that were the cause, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to constitutional violation justifying remedial action. We think that it would not. A rule of causation which focuses solely on whether protected conduct played a part "substantial" or otherwise, the decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing (Id at 575).

The Court ruled that the employee should be placed in no worse a position, "(B)ut

that same candidate ought not to be able . . . to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision" (Id at 575). The case was remanded to the District Court to determine if the School Board, "by a preponerance of evidence" would have reached the same conclusion.

The effect of MT Healthy was to limit public employees from shielding their activities behind the first amendment. MT Healthy resulted in a three part test regarding first amendment issues. 1) Was the activity related to first amendment rights? 2) If so, was the activity a substantial or motivating factor in an adverse decision? 3) If so, would the adverse decision have been the same in absence of the protected activity?

Very quickly, the MT Healthy rule was used in several cases. Franklin, a dismissed Stanford University professor (the Stanford Hearing Board concluded that he had incited to disrupt the universities operation) claimed that he was not hired in Colorado because of his Marxist political view (Franklin v. Atkins, 562F.2d1188). The court found that the Board's refusal to hire Franklin was not substantially based on protected activities. Using the same argument, the Fifth Circuit invalidated a claim of violation of free speech where a community college instructor used alcohol on campus, harassed a female instructor and did not abide by the rules of the college (Stewart v. Bailey, 556F.2d281). In Johnson v. Cain, 430F.Supp518, an untenured instructor claimed that his votes on a grievance committee were the cause of non-renewal. Consistent series of student complaints; according to the court, provided sufficient cause for not rehiring. A further refinement of the MT Healthy rule occurred in Givhan v. Western Line Consolidated School District, 439U.S.410. The Court ruled that despite a protected free speech activity, that was a substantial element in dismissal, if school board could prove that dismissal would have occurred anyway, no relief is necessary. In Hickingbottom v. Easley, 494F.Sup980, using the Pickering, MT Healthy, and Givhan reasoning, the court held that an instructor could not be dismissed for exercising the free speech right of reporting illegal activity on the part of the college. Back pay and damages were awarded.

Johnson v. Christian Brothers College, 565S.W.2d872(1978), sheds light on the dismissal/non-renewal situation in private colleges. The college had a seven year formal tenure process. Tenure was granted by the President but was automatic with the eighth annual contract, absent formal presidential action. Johnson was not granted tenure and was notified that he would not receive an eighth contract. In

Johnson's action, he claimed "de facto" tenure and that he was entitled to formal notice and a hearing. Although his seventh contract contained a letter from the President indicating that he had been recommended for tenure the following year, Johnson was orally informed that his status had changed and that he would not be reemployed. Although he was informally appraised of the reasons, none of which violated constitutional rights, Johnson did not request a formal hearing. The Supreme Court of Tennessee affirmed that neither the published tenure documents, college practices nor written contract required due process notice and hearing. Citing Roth, Sindermann, Ferguson v. Thomas, and Greene v. Howard University, the Court stated:

> (W)e have examined the authorities cited and relied upon the petitioner. Some of these hold non-tenured faculty members in public institutions may not be terminated contrary to applicable state or local statutory and administrative provisions. Other cases hold that faculty members may not be denied reemployment simply because of their lawful exercise First Amendment or other constitutional rights. Further, in private colleges, custom, wage, estoppel or the wording of institutional policies may require written notice or other formal procedures... (n)one of the foregoing authorities has application to the facts of the present case. There is no evidence of any departure from this private institution's written policies and it's hiring practices (Id at 875-6).

The opinion in Dennis v. S&S Consolidated Rural High School District, 577F.2d338(1978), made extensive use of the Roth case regarding a stigma issue. John Dennis asserted that his liberty and property interests were denied without due process when his contract was not renewed because of an alleged drinking problem. Several school board members, with other people present, stated that Dennis' contract had not been renewed because of his drinking problem. Dennis was not given advanced notice of the Board's action, nor was he provided a list of charges. The district court ruled that Dennis had been subjected to ". . . (a) badge of infamy, which violated his liberty interests and entitled him to due process." (Id at 340) The Appeals Court found that the stigma to reputation alone did not violate the fourteenth amendment, but that stigma to reputation and failure to rehire ". . . (s)tates a claim under § 1983 for deprivation. . ." (Id at 342).

> (w)hen the government employs an individual, it may not terminate the relationship in a manner which seriously damages his standing and association in his community, or foreclose his freedom to take advantage of other employment opportunities without affording him a due process hearing at which he can make a fair fight to clear his name (Id at 342-3).

So if the Board had kept the reason private, even if the allegations of drinking were

false, the issue of defamation would not have surfaced. Despite this, the only recourse ordered by the court was a hearing to provide Dennis an opportunity to refute the charge and to clear his name.

In Allard v. Board of Regents of University, 606P.2d280, Francis Allard was attempting to recover damages of back pay, lost income and credit rating, and injury to his reputation. He also sought reinstatement with tenure and promotion. Allard alleged a civil conspiracy and defective tenure process at the University of Washington. During the administrative appeals process, the tenure committee assumed that Allard's claims of a conspiracy within his department were true. Both the president and the Board rejected these claims. However, Allard did not file legal action within a thirty day time period as required by Washington State law. The court rejected all of Allard's claims. Although there was some evidence of "discussion" regarding Allard's teaching abilities, the court ruled that absent a proven agreement on the issue, conspiracy could not be established.

Mayberry v. Dees, 663F.2d502(1981), was another case where the faculty member is claimed that denial of tenure was retaliatory because of protected free expression activities. Although the court determined that Dr. Mayberry's remarks on the administration were protected under the first amendment, they concluded that his department chair may not have been aware of these remarks prior to a negative tenure recommendation. The court also found that the record indicated there was considerable question if tenure would have been granted despite the remarks. "(T)o extent that professor's remarks may tend to diminish collegiality of the department, one may, without offending the constitution , base decision not to recommend tenure on the context of the remarks, although they enjoy First Amendment protection" (Id at 503). The court ruled that it was irrelevant that Mayberry's department chair had on several occasions labeled the plaintiff a "troublemaker" and that some candidates without Ph.d. degrees had been recommended for tenure. Relying on Megill v. Board of Regents, the court stated that the evidence must be substantial that the "...(s)enior faculty member participating in the evaluation process . . . has so lost his objectivity that he is no longer able to look on the task from the university's perspective, but instead has personalized it and converted it to something approaching a personal vendetta" (Id at 511). Commenting on the importance of tenure, the court indicated that just because Mayberry had received five one-year contracts, he had no expectation of tenure, nor was non-renewal the same as dismissal, thus "(I)t was not a criticism to be denied tenure" (Id at 515). Citing Mt. Healthy, the court held that the University was free to determine tenure or nontenure

based on the entire record, despite the protected free speech activity. This was especially true because of the University's need to reduce costs.

The Weinstein v. University of Illinois, 811F.2d1091(1987), provides an interesting cautionary note for faculty. Marvin Weinstein, squabbling with his co-workers on the order of authors names on a co-written article, was not rehired in his probationary faculty position. Weinstein put forth the usual arguments on property interests and due process, however, the Seventh Circuit Court of Appeals stated "(I)f war is the extension of diplomacy by other means, this suit . . . is the extension of academic politics by other means" (Id at 1096). The plaintiff's claims were denied and the court ruled the case ". . . (f)rivolous, and parties opposing that claim were entitled to attorney's fees on appeal" (Id at 1091-2.).

Although not a minority or member of a protected class, the plaintiff in Levi v. University of Texas at San Antonio, 840F.2d277(1988), filed suit claiming a violation of equal protection rights. Kenneth Levi was denied tenure because of an unusual and lenient grading system. Grading was not typically an issue in tenure deliberations. Levi contended that he was better qualified than another candidate who had received tenure. In the original trial a jury had found in favor of Levi, however the lower court granted a directed verdict for the University. On appeal, the Circuit Court stated that Levi must show that he was treated differently and that this treatment ". . . (l)acked a rational relation to legimate state interest . . ." (Id at 279). As in most cases of this nature, the court was unwilling to second-guess the University, implying that the decision may have been unwise but was not irrational. The court also said that juries and judges ". . . (l)acked the credentials and knowledge to determine whether a group of scholars should be required to accept into their midst for life a member of the academic community" (id at 282).

CONCLUSION

It would appear based on case history for the last forty years that the courts are generally reluctant to interfere in the personnel practices regarding probationary faculty, despite an evolution of state laws and court decisions requiring some forms of due process. Most colleges and universities have written guidelines, state statutes , collective bargaining agreements, or other published material regarding faculty appointments, contract renewals and tenure. The courts have allowed institutions broad discretion in the application of these guidelines and the standards and criteria related to the granting tenure or non-renewal. However, faculty continue to file legal

action on non-renewal or dismissal issues. Their claims usually involve due process procedures, discrimination, property rights, oral agreements, stigma or reputation, unwritten tradition, or liberty interests, especially related to freedom of speech rights. Why, despite the overwhelming precedent of failure in these claims, do faculty continue to file claims? The most probable answer is that no one actually sees himself or herself as being less than competent.

What can college and university boards and administrative staff do to avoid legal action? Although faculty rarely "win" in these cases, the human and financial costs of litigation make this a viable question. A publics institution's denial of tenure or non-renewal is often a deprivation of a property interest, and should trigger the minimum due process that the institution promises in employment contracts, state or local laws or other published documents. College officials should be eminently familiar with these rules and regulations, especially when contemplating non-renewal. Faculty members work under contracts. The requirements and expectations of these contracts should be clearly and unambiguously stated, especially in view of the progression of case law related to due process. Although case history has generally demonstrated that oral agreements do not suffice if a written contract is enforceable, the use of oral understandings should be avoided. Also, college officials need to know who the official appointing authority is to avoid "unofficial" employment promises to faculty.

It is also clear that college officials need to document as much as possible. I f a teacher is missing classes, ignoring departmental curriculum standards or misleading students on college policies, a proper written record of incidents and actions taken to address or correct problems could be critical in a courtroom. However, it is also clear that the best recourse prior to legal action is to give no reason for non-renewal or denial of tenure, unless required by policies, laws or collective bargaining agreements. If the institution must give reasons (and notice and a hearing) careful thought needs to be given to such communication to avoid treading on constitutional protected rights. Statements of cause should be confidential to avoid issues of stigma or reputation. Perhaps the best course to take with faculty, especially at the start of an appointment, is to clearly communicate the institution's tenure policy. Most new faculty are inadequately informed on the tenure process. Many think that after so many years, they will receive tenure automatically. If the goal of the institution is to have the best teachers, the best research, and/or the best publications, new faculty need to know the standards and criteria necessary to achieve excellence, not be surprised at the end of seven years of hard work.

Expectancy of reemployment as an issue can be avoided by a careful delineation of policies. If appointments are truly temporary in nature, this should be loudly and clearly stated.

Personnel procedures may be burdensome. Clearly written and understood policies and contracts and due process hearings may be significant work, however they will help the institution avoid costly litigation, protect the academic freedom of the faculty and encourage positive relations between faculty and administration. As a final note, college and university officials need to be cognizant of other factors that may effect denial of tenure or non-renewal. They should anticipate the consequences of low enrollment, budget cutbacks, or a change of tenure policies and procedures. In the last few years, collective bargaining has had a dramatic effect on the contract rights of faculty, often requiring prior notification of non-renewal, and formal and complicated due process and grievance procedures. Hopefully, collective bargaining agreements will reduce the number of legal actions in favor of internal resolution of disputes.

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