DOCUMENT RESUME

ED 340 124 EA 023 557

AUTHOR Hendrickson, Robert M.
TITLE Higher Education.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 91
NOTE 50p.; In: Thomas, Stephen B., Ed. The Yearbook of Education Law, 1991, p189-237. (See EA 023 549).
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Collective Bargaining; Compliance (Legal); Constitutional Law; *Court Litigation; Dismissal (Personnel); Due Process; *Employer Employee Relationship; *Equal Opportunities (Jobs); *Faculty College Relationship; *Higher Education; Legal Problems; *Legal Responsibility; Postsecondary Education; School Law; Student Rights; Teacher Rights; Tenure; Torts

ABSTRACT

Higher education case law in 1990 is discussed in this chapter under nine major topics: (1) intergovernmental relations; (2) discrimination in employment; (3) faculty employment; (4) administrators and staff; (5) students; (6) liability; (7) antitrust; (8) patents; and (9) estates and wills. Questions of the authority of federal, state, and local agencies over higher education continue to be one of several dominant issues. Another is the relationship between institutions of higher education and students, alumni, and the public as particularly reflected in the definition of constitutional rights and tort litigation. Employment issues as defined by constitutional and federal and state regulations continue as another dominate theme. (MLF)

8

HIGHER EDUCATION

Robert M. Hendrickson*

**Gregory A. Moyer, a doctoral student and graduate assistant in the Higher Education Program, Pennsylvania State University, assisted in the preparation of this chapter.*

INTRODUCTION

In 1990 the case law reflects themes similar to other years. Questions of the authority of federal, state, and local agencies over higher education continues to be one of several dominant issues. Another is the relationship between institutions of higher education and students, alumni, and the public as particularly reflected in the definition of constitutional rights and tort litigation. Employment issues as defined by constitutional and federal and state regulations continue as another dominate theme. Business-university relationships are reflected in the case law on antitrust, copyright, contracts, and patents.

INTERGOVERNMENTAL RELATIONS

This section presents issues concerning the application of taxation, zoning, sunshine, environmental ethics, and jurisdictional laws as the definers of institution-government relationships. Related cases define the scope of authority federal, state, and city governments have over public and private post-secondary institutions. Relationships between federal, state, and municipal authorities are also at issue in litigation presented in this section.

A number of cases challenged the authority or scope of various regulations or policies based on federal constitutional issues. A Minnesota teachers' union and the president of the union as an individual taxpayer

challenged a state law allowing high school students to take courses at colleges which applied as credit toward high school graduation at school district expense. At issue is the question of whether the practice of using public money for courses at some private sectarian institutions violated the separation of church and state provisions of the first amendment. The policy called for the payment of the course cost by the school district, and the student had the opportunity to enroll in the college or university of his choice. The district court had granted a summary judgment to the state. On appeal the federal circuit court ruled that the union lacked standing since it was not an organization for the purpose of promoting taxpayer issues. However, the individual as a taxpayer had standing to litigate, and the case was remanded.[1] On remand the district court found the act to be constitutional. The court reviewed the application of the law to eight cases where students attended private sectarian institutions. In seven cases, the court found that the institution was not pervasively sectarian and issued a summary judgment, but in the eighth case, the court denied summary judgment.[2]

In California, a homeowners' association challenged the lease of surplus property owned by a public community college to a religious organization. The court found that the statutes governing the use of public facilities by religious groups did not govern long-term lease arrangements. Furthermore, neither the state constitution nor the Federal Constitution's separation of church and state provisions were violated when the surplus property was leased at fair market value to a religious organization.[3]

A first amendment free speech challenge surrounded federal appropriations legislation which required specific action by the District of Columbia. The appropriations bill required the District to pass a statute allowing religious affiliated institutions to deny benefits or recognition to individuals based on sexual preference. On appeal from a summary judgment, the federal circuit court ruled that the federal appropriations statute did not abridge the free speech rights of District of Columbia council members.[4] Subsequent legal maneuvering involved the tolling of the time to file an appeal for a *writ of certiorari* with the Supreme Court, after an *en banc* hearing on a motion to vacate as moot and other motions.[5]

In a case involving the denial of recognition to a minority alumni association, the court found no discriminatory action by the institution. The court found that the relationship between alumni and the institution was different than that between the institution and students. No first

---

1. Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989).
2. Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990).
3. Woodland Hills Homeowners Org. v. Los Angeles Community College Dist., 266 Cal. Rptr. 767 (Dist. Ct. App. 1990).
4. Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989).
5. Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990).

amendment violation had occurred. Denial of official recognition as a separate alumni group did not inhibit the freedom of association rights of these individuals nor was the institutional policy discriminatory.[6]

The scope of the authority of government units over higher education was at issue in a number of cases. In Nebraska, the issue was the constitutionality of the transfer by legislation of several institutions to the University of Nebraska System. The State Supreme Court acknowledged in its opinion that the legislation was clearly unconstitutional, but it lacked the concurrence of five state supreme court judges, a requisite to declaring legislation unconstitutional in Nebraska.[7] State jurisdiction over organizations was at issue in a Louisiana case.[8] The appellate court affirmed the decision that the state could gain access to a private foundation's financial records. The rationale for access was that the private foundation organized to raise money for a public institution had received public money derived from student fees donated by another private foundation organized to administer moneys received from student mandatory fees. The State Supreme Court reversed this decision finding that the state had the right only to audit public moneys, but did not have the right to review all assets of the private foundation.

Membership in various institutional offices was also at issue. A Kansas court found that provisions which prohibited employees of public educational institutions from serving on the State Board of Education did not violate any of the employees' constitutional rights.[9] A California court ruled on legislation which repealed a statute making the Chief Justice of the State Supreme Court the president of the board of directors of a public law school.[10] The court found that the statute did not interfere with institutional or board autonomy. A Wisconsin obscenity law, which exempted libraries, schools, and contract printers, did not violate either the equal protection clause or the first amendment.[11]

City authority was also challenged in the courts. A New York court ruled that a city had acted in an arbitrary and capricious manner in its decision about proprietary institutions.[12] The city had denied all profit-making institutions the right to participate in the Job Training Partnership Act.

The board of trustee's authority over the institution and its responsibilities were at issue. In New Jersey, a coalition of nurses charged that the state's medical university was prohibited by statute from offering

---

6. Ad Hoc. Comm'n of the Baruch Black and Hispanic Alumni Assoc. v. Bernard M. Baruch College, 569 A.2d 1330 (N.J. 1989).
7. State *ex rel.* Spire v. Beermann, 455 N.W.2d 749 (Neb.1990).
8. State *ex rel.* Guste v. Nicholls College Found., 558 So. 2d 1232 (La. Ct. App. 1990), *rev'd*, State v. Nicholls College Found., 564 So. 2d 682 (La. 1990).
9. State *ex rel.* Stephan v. Johnson, 795 P.2d 411 (Kan. Ct. App. 1990).
10. Coutin v. Lucas, 270 Cal Rptr. 93 (Ct. App. 1990).
11. Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990).
12. SCS Business & Technical Inst., Inc. v. Barrois-Paoli, 548 N.Y.S.2d 674 (App. Div. 1989).

undergraduate degrees.[13] The State Board of Higher Education had authorized the university to offer an associate degree in nursing jointly with a public community college. The court found that statute prohibited the medical university from offering undergraduate degrees on its own, but that it was specifically authorized to offer joint undergraduate degrees in medical related fields. A New York court issued summary judgment to the university in a suit over the adequacy of the faculty in a graduate communications degree program.[14] The institution had documented its compliance with state education law. Finally, access to the personal financial records of the chairmen of the board of trustees of an Alabama university could not be acquired in a suit against the chair in his official capacity.[15]

Agency authority and prerogative were litigated in the past year. The authority of the United States Labor Department regarding contractors' compliance with federal regulations was at issue.[16] The Secretary of Labor suspended all federal contracts in response to the refusal of three state institutions to complete compliance forms. Each of these institutions was a member of the state university system, but did not directly receive federal contracts. The court ruled that the individual institutions receiving federal contracts, not the state system, would be subject to compliance audits under the provisions of the Vietnam Era Veterans Readjustment Act. A North Dakota landowner's right may have been violated when the Board of University and School Lands foreclosed on his mortgage.[17]

Agency accreditation of institutional programs was also the subject of litigation. The Hair and Beauty Culture Academy brought suit when its accreditation was removed.[18] The court found the charges brought against the institution by the regional accrediting association to be vague. The court also found that the institution was wrongly accused of uncooperative behavior when it asked for clarification of the vague charges.

Sunshine laws and public access to information were again active in the courts. The issues of access to information about university researchers' treatment of animals was before several courts. In one case, the court found that an animal rights group lacked standing in its suit to seek access to files regarding a university's review and approval of a professor's grant.[19] In New York, the court granted access to materials reviewed in

---

13. Coalition of Concerned Nurses v. New Jersey Dep't of Higher Educ., 578 A.2d 882 (N.J. Super. Ct. App. Div. 1990).
14. Fogel v. Teachers College, Columbia Univ., 548 N.Y.S.2d 178 (App. Div. 1989).
15. *Ex parte* Alabama State Univ., 553 So. 2d 561 (Ala. 1989).
16. Board of Governors of Univ. of N.C. v. United States Dep't of Labor, 722 F. Supp. 1301 (E.D.N.C. 1989).
17. Lang v. Bank of N.D., 453 N.W.2d 118 (N.D. 1990).
18. Wilfred Academy of Hair and Beauty Culture, Houston, Tex. v. Southern Assoc. of Colleges and Schools, 738 F. Supp. 200 (S.D. Tex. 1990).
19. People for the Ethical Treatment of Animals v. Institutional Animal Care and Use, 794 P.2d 1224 (Or. Ct. App. 1990).

approval of grants by the university's animal care and use committee.[20] The court found that research methods and hypotheses were not trade secrets exempt from access, that nonapproved grants were not exempt from access, and that committee members' votes must be recorded and accessible. A Washington court ruled that under the Freedom of Information Act, an animal rights group was not obligated to negotiate with the institution over the release of information before it commenced court action.[21]

On other sunshine issues, a West Virginia court ruled that a private corporation created to raise money for a public university was not a "public body" accessible under the state's Freedom of Information Act.[22] The Pennsylvania State University was ruled to be a state-related institution, not a public institution, and therefore was ruled to be outside the purview of the state's sunshine law.[23] A New York court granted access to teaching materials under the state's Freedom of Information Act.[24] A private citizen had sued to gain access to materials used in a family life and human sexuality course offered at a community college. Finally, a suit over access to the financial records of an Oklahoma public college was rendered moot since the state attorney general no longer possessed the record.[25]

Taxation authority of political entities over college and university organizations was before the court in a number of states. In Pennsylvania, a court ruled that for taxation purposes, The Pennsylvania State University was a public institution exempt from taxation.[26] At issue was whether University property leased to banks for automatic bank tellers should be subject to local taxation. The court noted and dismissed any problems of inconsistency with a ruling on sunshine laws which found the institution to be a private institution for purposes of information access. In Minnesota, the court found that a private housing corporation, which constructed housing for students and faculty, was not tax exempt.[27] The court found that the organization was not purely a charitable organization. An Ohio court ruled that land owned by the state but leased to a private party was tax exempt because the retail receipts went into the public university's general operating fund.[28] Finally, a California court reviewed the tax exempt

---

20. ASPCA v. Board of Trustees of State Univ. of N.Y. at Stony Brook, 556 N.Y.S.2d 447 (Sup. Ct. 1990).
21. Progressive Animal Welfare Soc'y v. University of Wash., 790 P.2d 604 (Wash. 1990).
22. 4-H Road Community Ass'n v. West Virginia Univ. Found., Inc., 388 S.E.2d 308 (W. Va. 1989).
23. Roy v. Pennsylvania State Univ., 568 A.2d 751 (Pa. Commw. Ct. 1990).
24. Russo v. Nassau Community College, 554 N.Y.S.2d 774 (Sup. Ct. 1990).
25. Saxon v. Macy, 795 P.2d 101 (Okla. 1990).
26. County of Centre, Bd. of Assessment Appeals v. Pennsylvania State Univ., 565 A.2d 187 (Pa. Commw. Ct. 1989).
27. Chateau Community Housing Ass'n, Inc. v. County of Hennepin, 452 N.W.2d 240 (Minn. 1990).
28. State Univ. of Cincinnati v. Limbach, 553 N.E.2d 1056 (Ohio 1990).

status of a university faculty housing project.[29] In order to provide low cost housing, the university leased property on a long-term basis to university employees upon which homes owned by the faculty member were constructed. The lower court ruled that owner leasers could claim a property tax exemption. On appeal the court remanded for consideration of several county objections which were ruled to have merit.

Active litigation of zoning issues was pursued in a number of local courts. A court denied a municipality's request for an injunction to prevent the use of a remodeled building by a college until the institution complied with municipal site development requirements.[30] The definition of a "family unit" was before the court in a case involving nine male students and a house within the borough that was owned by several of the students and rented to others.[31] The borough had a law allowing the occupation of a living unit by more then one person where a family unit existed. The court found that the students met the zoning law's functional definition of a family unit when they had a common checking account and shared cooking, yard-work, and cleaning duties within the dwelling. A District of Columbia zoning board's procedure of deleting (without explanation) provisions of a development plan which defined the leasing of interim space downtown prior to the completion of a campus building project required the reversal and remand of the board's order.[32] A Massachusetts court found that local zoning and construction ordinances did not apply to a state college dormitory.[33]

Land use was before the court in Illinois.[34] The state, which held submerged Lake Michigan land in public trust, granted Loyola University (a private institution) the use of the land to construct a landfill into the lake upon which to expand its campus. This suit was an attempt to block the project which had received approval from all appropriate federal and state agencies. The federal district court ruled that land held by the state was in public trust for the purposes of navigation, commerce, and fishing free from private interference. Such a trust cannot be abdicated by deeding the land over to a private entity. The plaintiffs requested a rehearing based on the existence of a landfill at Northwestern University, a few miles up the Lake Michigan shoreline. The court noted that the construction of the Northwestern landfill was never challenged in court, and that "the law does not permit one entity to violate the law because another has successfully evaded the same law on another occasion."[35] In another case, the court

---

29. Connolly v. County of Orange, 272 Cal. Rptr. 186 (Ct. App. 1990).
30. Village of Cazenovia v. Cazenovia College, 557 N.Y.S.2d 557 (App. Ct. 1990).
31. Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990).
32. Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739 (D.C. 1990).
33. Inspector of Bldgs. of Salem v. Salem State College, 546 N.E.2d 388 (Mass. App. Ct. 1989).
34. Lake Mich. Fed'n v. United States Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990).
35. *Id.* at 449.

found that the general land office of the state lacked the power to grant a permit to prospect for minerals on public university and school owned property.[36]

Jurisdictional questions involved police powers and court orders. In one case, the court ruled that an individual could not be ordered to contribute to an institution's athletic scholarship fund after being convicted of *DUI* and manslaughter.[37] A Virginia court found that a campus police officer did not have authority off campus to arrest an individual suspected of burglary but, as a private citizen, could make a citizen's arrest.[38] In Georgia, the court ruled that the jurisdiction of campus police ended at the statutorily defined 500 yards beyond the campus.[39] A search warrant for student premises more than 500 yards from the campus boundaries was invalid. Tenants who argued that the property owner's removal of ten rental units was a violation of the municipal rent control ordinance were unsuccessful in showing harm to persons the rent control law was designed to protect.[40]

In a case involving ownership, a former property owner lacked standing as an aggrieved party to appeal a zoning board's decision after condemnation proceedings had been finalized.[41] The university was now the owner of the land.

Several cases involved university operated hospitals. The Secretary of Health, Education, and Welfare offset payments for indigent medical care because some funds were used for educational purposes.[42] The physicians had agreed to place a ceiling on income for these services and to place additional money over the ceiling in the academic department's research and education program account as a gift. The court found that the record did not support the Secretary's decision to offset the hospital's payment by the amount allocated to the research and education account and affirmed the lower court's summary judgment in favor of the university. Pennsylvania was found to have failed to have complied with the federal statutory state reimbursement for a university hospital's indigent care.[43] The state had not based its reimbursement scheme on empirical data, such as efficient and economical hospital operations and care costs, as mandated by the federal statute. The state was ordered to bring its reimbursement scheme into compliance with federal law.

In a dispute between a union representing interns, residents, and fellows in health care facilities and the state commissioner of health, the court found

---

36. State v. Hollingsworth, 784 S.W.2d 461 (Tex. Ct. App. 1989).
37. Eloshway v. State, 553 So. 2d 1258 (Fla. Dist. Ct. App. 1989).
38. Hall v. Commonwealth, 389 S.E.2d 921 (Va. Ct. App. 1990).
39. Hill v. State, 387 S.E.2d 582 (Ga. Ct. App. 1989).
40. Valentine v. Rent Control Bd. of Cambridge, 557 N.E.2d 63 (Mass. App. Ct. 1990).
41. Brown v. Board of Zoning Adjustment of Kan. City, 782 S.W.2d 655 (Mo. Ct. App. 1989).
42. Loyola Univ. of Chicago v. Bowen, 905 F.2d 1061 (7th Cir. 1990).
43. Temple Univ. v. White, 729 F. Supp. 1093 (E.D. Pa. 1990).

that the commissioner did not exceed his authority in setting limits to the hours health care workers could work.[44] The commissioner set the worker hour limit of 100 hours per week for interns, residents, and fellows of health care facilities.

DISCRIMINATION in EMPLOYMENT

The enforcement of various federal statutes continues to be the dominant issue in this section. Among the factors associated with an increase in litigation regarding age discrimination are the passage of the Civil Rights Restoration Act and changes in university policies regarding retirement age. Proof strategies and jurisdictional questions dominate the litigation of federal discrimination statutes. Faculty title VII litigation on promotion, tenure, and the award of benefits are presented in the faculty section.

Title VI

Questions of the enforcement of title VI of the Civil Rights Act of 1964 were before the courts again this year. One such case involved a 1972 court order which resulted in mandated enforcement of title VI by the Department of Education and disestablishment of dual systems of higher education in seventeen states.[45] In 1984, in a question of the extension of a consent decree, the government raised issues of standing and separation of powers.[46] On remand the original judge vacated the court order on standing and article III issues.[47] On appeal the circuit court found that the plaintiffs had standing, but delayed the separation of powers issue until the next term.[48] In the following term, the circuit court decided that Congress, while intending a private right of action, never intended to establish a "broad gauge" private right of action involved in a suit against a federal agency.[49] The court was quick to point out that Congress had the authority to establish such a private right of action but had failed to do so in this legislation. This decision ended twenty years of court monitored desegregation of seventeen state systems of higher education.

The battle ground for the desegregation of dual systems of higher

---

44. Hospital Ass'n of N.Y. State v. Axelrod, 546 N.Y.S.2d 531 (Sup. Ct. 1989).
45. *See* The Yearbook of Education Law 1990 at 203, Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), *modified*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd and modified*, 480 F.2d 1159 (D.C. Cir. 1973).
46. Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984).
47. *See* The Yearbook of Education Law 1988 at 229, Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987).
48. *See* The Yearbook of Education Law 1990 at 203, Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989).
49. Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990).

education was now focused on state litigation. In Mississippi, the district court had ruled that the state's higher education policies fostered an effort to disestablish the state's dual system of higher education.[50] On appeal the circuit court found continuing inequities in the allocation of resources and facilities, the quality and training of faculty, and the quality of programs between the state's predominantly white and black institutions.[51] The court reversed the lower court decision because these inequities maintained racially identifiable public institutions within the state in violation of title VI.

A California case involving discrimination in federally funded programs continued to require a decision on the merits. In 1989 the circuit court reversed a district court order to dismiss the case, remanding for adjudication of the title VI claim.[52] The district court wrote the court stating that the plaintiff had failed prior to dismissal to amend the case to include the title VI complaint. However, the circuit court ordered the case remanded, and the appellee was given the right to include the title VI claim.[53]

Civil Rights Claims

Successful plaintiffs in a 42 U.S.C. section 1988 claim raised a question about the hourly rate of attorney's fees.[54] The court found that the special master had not erred in the establishment of the fee rate. Furthermore, while acknowledging the need for highly specialized attorneys in complex civil rights claims, the post-judgment adjudication did not require fee enhancement.

Title VII

Procedural issues were before the courts in several cases. For example, a chapter 7 debtor who had a cause of action pending under title VII, failed to list that action in her chapter 7 petition.[55] The court found that bankruptcy law requires that the chapter 7 trustee, not the plaintiff, has standing in this claim where the plaintiff failed to list the action as an equitable interest or property in her petition. A federal district court ruled that a Montana plaintiff's title VII claim was not barred by eleventh amendment immunity.[56] A federal court reached a similar result for a Ne...

50. *See* The Yearbook of Education Law 1989 at 205, Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).
51. Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990).
52. *See* The Yearbook of Education Law 1990 at 235, Radcliff v. Landau, 883 F.2d 1481 (9th Cir. 1989).
53. Radcliff v. Landau, 892 F.2d 51 (9th Cir. 1989).
54. Martin v. University of S. Ala., 911 F.2d 604 (11th Cir.1990).
55. Harris v. St. Louis Univ., 114 B.R. 647 (E.D. Mo. 1990).
56. Black v. Goodman, 736 F. Supp. 1042 (D. Mont. 1990).

York plaintiff.[57] The last procedural case involved a finding that genuine issues of material fact, as to the racial animus of the employer's termination action and the plaintiff's charge of retaliation, precluded the defendant's motion for summary judgment.[58]

Proof strategy in title VII litigation was also at issue. An instructor brought charges of discrimination in the denial of her promotion to an assistant professor.[59] The instructor was successful in establishing a *prima facia* case of discrimination. The defendant institution provided a valid nondiscriminatory reason, the instructor's failure to become involved in professional activities in her area of teaching, as the basis of its employment decision. The plaintiff failed in her burden to prove that the reason was a pretext for discrimination.

A class action suit involved a disparate treatment analysis at a Texas institution of higher education.[60] The federal circuit court had remanded the case for litigation of a professional employee's class action claim of discrimination.[61] The court, on remand, found that the institution had failed to provide valid reasons for the lack of uniform criteria for employment classifications, titles, pay, promotions, and other employment policies prior to 1977. Back pay and other equitable relief were awarded to the class of employees.

Damage awards were also litigated by the courts. The Fifth Circuit Court of Appeals, in a case previously adjudicated on the merits,[62] refused to award front pay as damages.[63] The court found that the plaintiff had failed to seek equivalent employment with "reasonable diligence" after termination of her community college position.

Age Discrimination in Employment Act

Procedural issues lead off the discussion of age discrimination cases. A West Virginia faculty claimed age discrimination because The Full Time Faculty Salary Act would allegedly favor young faculty.[64] The court found that legislative immunity barred the litigation. Tolling was before a federal district court which ruled that Puerto Rico was a "deferral" state making the tolling period 300 days in age discrimination actions.[65] A summary

---

57. Derechin v. State Univ. of N.Y., 731 F.2d 1160 (W.D.N.Y. 1990).
58. Cassells v. University Hosp. at Stony Brook, 740 F. Supp. 143 (E.D.N.Y. 1990).
59. Board of Regents for Regency Univs. v. Human Rights Comm'n, 552 N.E.2d 1373 (Ill. App. Ct. 1990).
60. Wilkins v. University of Houston, 725 F. Supp. 331 (S.D. Tex. 1989).
61. *See* The Yearbook of School Law 1983 at 298, Wilkins v. University of Houston, 662 F.2d 1156 (5th Cir. 1981).
62. *See* The Yearbook of School Law 1989 at 208, Sellers v. Delgado College, 839 F.2d 1132 (5th Cir. 1988).
63. Sellers v. Delgado College, 902 F.2d 1189 (5th Cir. 1990).
64. Nuchims v. West Virginia, 724 F. Supp. 1219 (S.D.W. Va. 1989).
65. Astacio-Sanchez v. Fundacion Educativa Ana G. Mendez, 724 F. Supp. 11 (D.P.R. 1989).

judgment award was reversed by the federal appeals court because the facts raised questions about the effect gender had in a hiring decision and defendant's response to plaintiff's interrogatories should have been weighed in the summary judgment decision.[66] A summary judgment for an institution was upheld because the court found a retired employee, who was applying for his previously held position, had no property right in acquiring that position.[67] A federal district court refused jurisdiction over pendent state claims because the comprehensive nature of the state age discrimination law would have a dominating effect over the federal age discrimination claim.[68]

The proof strategies in age discrimination cases were illuminated in a Kansas case.[69] The unsuccessful applicant for a position established a *prima facia* case for discrimination. The university had articulated valid nondiscriminatory reasons for the employment decision, but the trial court had erred in applying a "burden to persuade the court"[70] of the genuine validity of the reasons to the employer. The plaintiff failed to show that the reasons were a pretext for discrimination.

Age discrimination in employee benefits centered on an institution's early retirement program.[71] The plan allegedly penalized those who chose not to retire early because of the differential way sick pay and insurance benefits were structured for early retirees. The court found that the plan was not facially discriminatory, and the tolling period for this litigation had long since passed.

Retaliation was at issue in an Illinois case.[72] Based on a collective bargaining agreement, the institutional grievance procedures were suspended when the plaintiff pursued an age discrimination claim. The court found that the institution and the union had no intent to retaliate in adopting this procedure. Their intention of saving time, effort, and money by eliminating simultaneous litigation on the same issue was valid.

Insurance coverage when an institution is in violation of the age discrimination act was at issue in Massachusetts.[73] The federal circuit court of appeals ruled that reckless disregard for federal regulations was deliberate wrongdoing, negating the indemnification requirement of the insurance company under the state's public policy. The case was certified to the state supreme court.

---

66. Burns v. Gadsden State Community College, 908 F.2d 1512 (11th Cir. 1990).
67. Evans v. Pugh, 902 F.2d 689 (8th Cir. 1990).
68. Linares v. University of P.R., Rio Piedras Campus, 722 F. Supp. 910 (D.P.R. 1989).
69. Kansas State Univ. v. Kansas Comm'n on Civil Rights, 796 P.2d 1046 (Kan. Ct. App. 1990)
70. *Id.* at 1054.
71. EEOC v. City Colleges of Chicago, 740 F. Supp. 508 (N.D. Ill. 1990).
72. EEOC v. Board of Governors of State Colleges and Univs., 735 F. Supp. 888 (N.D. Ill. 1990).
73. Andover Newton Theological School v. Continental Casualty Co., 901 F.2d 1 (1st Cir. 1990).

The Rehabilitation Act

The scope of the Rehabilitation Act was involved in a case over hiring practices litigated prior to the enactment of the Civil Rights Restoration Act.[74] The Tenth Circuit Court of Appeals ruled that the expansion of the scope of the Rehabilitation Act to the whole institution by the Civil Rights Restoration Act was not retroactive. The security company, which refused to hire a one-eyed applicant as a security guard relying on Department of Energy hiring regulations, was a procurement contractor.[75] The court found that the Department's regulations which excluded procurement contractors from the definition of a program or activity receiving federal financial assistance under the Act were appropriate.

Procedural questions before the court involved issues similar to other federal acts reviewed. A New York handicapped plaintiff's claim against a state agency was barred by eleventh amendment immunity, but claims against state officials in their individual capacity could be litigated.[76] The court also found that a former student could sustain a claim over money paid by the office of vocational rehabilitation while he was a law student. The plaintiff challenged caps placed on the money he could receive during his law school education. In a case involving the failure of the institution to help the handicapped plaintiff move to a new location, the time to file a claim had lapsed.[77] In a Pennsylvania case, the court ruled that no form of reasonable accommodation could compensate for excessive absenteeism and that "being absent" did not qualify as a handicap under federal law.[78]

The interpretation of the Department of Education's regulations on the provision of auxiliary aid to handicapped individuals by universities was litigated.[79] The Eleventh Circuit Court of Appeals ruled that the Department was correct in ruling that an Alabama university could not base the award of auxiliary aid to handicapped individuals on financial need. Furthermore, the institution could not deny auxiliary aid to nondegree students enrolled in noncredit programs. Finally, the court found that the institution's transportation accommodations for handicapped individuals, which operated for only four hours a day, were inadequate under the regulations.

Hiring Discrimination

An Illinois court found that the university had failed to seek appropriate

---

74. The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d 4a.
75. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990).
76. McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990).
77. Eastman v. Virginia Polytechnic Inst. and State Univ., 732 F. Supp. 665 (W.D. Va. 1990).
78. Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990).
79. United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).

administrative remedies before pursuing the matter in court.[80] The court rejected the university's argument that the next step in the administrative remedy scheme, an appeal to the full commission, was futile.

FACULTY EMPLOYMENT

Faculty litigation continues to be extensive. Nontenured faculty raised questions surrounding nonrenewal, tenure review, and denial of tenure. Tenured faculty raised questions surrounding termination and denial of other faculty benefits. Allegations of violations of first amendment rights lead off both sections on faculty.

First Amendment Rights

A university professor filed suit after the institution ordered him not to discuss religious beliefs in the classroom or to hold out-of-class group discussions about the Christian perspective on scholarly topics.[81] The institution claimed a duty under the provisions of the state and federal constitutions' establishment clauses to restrict pronouncements about religion. The court, noting that the plaintiff always prefaced his comments as "personal bias," relied on the concepts of academic freedom. The court stated that:

> [t]he University has created a forum for students and their professors to engage in a free exchange of ideas. It may not exclude disfavored religious speech unless the exclusion is necessary to further a compelling governmental interest and narrowly tailored to further that interest.[82]

The court held that the university's placement of a restriction on expressions of personal religious views was too broad and vague to establish a compelling state interest. Furthermore, out of class meetings cannot be prohibited, just as the use of facilities cannot be prohibited, to religious groups once facilities are opened to public use.

Nontenured Probationary Faculty

The Nonrenewal Decision. A number of faculty litigated issues after their probationary contracts were not renewed. An Alaska faculty member was awarded another one-year contract by the court when the institution

---

80. Board of Trustees of S. Ill. Univ. v. Illinois Human Rights Comm'n, 553 N.E.2d 1108 (Ill. App. Ct. 1990).
81. Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990).
82. *Id.* at 1566.

failed to meet its deadline for notification that the contract would not be renewed.[83] Amending the regulation during the contract year to a later deadline did not change the institution's notification obligations for that year.

Questions of *de facto* tenure because of failure of an institutions' notification or review procedures were at issue in several cases. The Sixth Circuit Court ruled that a Kentucky public institution's policy and state statute clearly prevented the award of *de facto* tenure.[84] The authority to award tenure was delegated by statute to the Board of Regents through a recommendation from the institution's president. The award of one-year contracts beyond the probationary period resulting from previous litigation did not warrant a finding of *de facto* tenure where statutory authority is clear and a termination order had been issued.

A breach of contract claim was brought by a private college faculty member.[85] A New York court ruled that the denial of reappointment was not a breach of contract spelled out in either the contract or the faculty handbook. However, a North Dakota court found that the institution had violated its employee policies when it failed for seven months to supply reasons for the nonrenewal decision. The policy required a response within seven days after a written request.[86] The case was remanded to determine institutional liability and an appropriate damage was awarded.

Two community college instructors were successful in claiming violations of due process when they were terminated during the contract period.[87] The court found that an Alabama law entitled the Fair Dismissal Act[88] guaranteed these employees a hearing even when their contract had expired and was not renewed.

Denial of Tenure. A state court ruled that the institution had failed to follow its procedures during the tenure review of a probationary faculty member.[89] However, the court found that the appellate decision erroneously ordered the award of tenure and the rank of associate professor and then remanded the case for the Board of Trustees to determine whether tenure should be awarded.

The Second Circuit Court of Appeals ruled that an assistant professor at a New York public university lacked a property right in the renewal of his probationary contract and, therefore, could not claim due process rights.[90] The plaintiff, a black faculty member, also failed to substantiate a first amendment freedom of speech claim as the sole reason for the nonrenewal decision. Embroiled in this case was a course taught by the

---

83. Zuelsdorf v. University of Alaska, Fairbanks, 794 P.2d 932 (Alaska 1990).
84. Edinger v. Board of Regents of Morehead State Univ., 906 F.2d 1136 (6th Cir. 1990).
85. De Simone v. Skidmore College, 553 N.Y.S.2d 240 (App. Div. 1990).
86. Horn v. State, 459 N.W.2d 823 (N.D. 1990).
87. Clayton v. Board of School Comm'rs of Mobile County, 552 So. 2d 155 (Ala. Civ. App. 1989).
88. Alabama Code 1975 36-26-100 *et seq.*
89. Board of Trustees of Univ. of Ky. v. Hayse, 782 S.W.2d 609 (Ky. 1989).
90. Dube v. The State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990).

plaintiff in the African American Studies Department in which the plaintiff used Naziism, Apartheid, and Zionism as "the three main forms of racism." An Indiana faculty member also failed in a claim of a property right in the promotion and tenure decision.[91]

Access to review materials used in the tenure review process was before the court. In one case, a faculty member was unable to establish defamation or the falsity of a committee member's report of a phone conversation with an external reviewer.[92] The outside reviewer had recanted over the phone some of the positive things he had said in his letter supporting the plaintiff's candidacy for tenure.

Allegations of Civil Rights Violations in Tenure Denial. First amendment rights of probationary faculty have resulted in claims that probationary faculty were denied tenure or notified of nonrenewal because of protected speech. In a Massachusetts case, the court simply refused an institution's motion to dismiss the plaintiff's claim that denial of tenure was due to first amendment protected speech.[93] A biology professor's speech on grading and the inappropriate behavior of departmental faculty was protected speech involving matters of public concern, but the speech was not the reason for the denial of tenure. Tenure was denied because of failure to meet class, inadequate scholarship, and threats made to his wife in front of a class she was teaching. Indiana faculty, who were denied promotion and tenure, were unable to show that comments about a personnel committee internal to the sociology department were matters of public concern implicating first amendment protection.[94]

Title VII. Cases involving employment discrimination in the denial of tenure or nonrenewal decision were brought under various federal statutes covering discrimination. For example, a white law professor at a predominantly black public institution charged racial discrimination in a tenure denial decision.[95] On appeal the Fifth Circuit found that a jury could reasonably reach a verdict that the failure to grant tenure was for discriminatory purposes. The Eighth Circuit reversed and remanded a lower court decision finding that a clinical instructor was terminated for valid job performance reasons.[96] The clinical nursing instructor who had caused the loss of two clinical contracts with hospitals was not similarly situated with another clinical instructor who had positive reviews from the clinical settings where she supervised students. On remand, the lower court must decide whether the institution intended to discriminate against the instructor.

---

91. Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268 (S.D. Ind. 1990).
92. Gautschi v. Maisel, 565 A.2d 1009 (Me. 1989).
93. Karetnikova v. Trustees of Emerson College, 725 F. Supp. 73 (D. Mass. 1989).
94. Coats v. Pierre, 890 F.2d 728 (5th Cir. 1989).
95. Arenson v. Southern Univ. Law Center, 911 F.2d 1124 (5th Cir. 1990).
96. Hayes v. Invesco, Inc., 907 F.2d 853 (8th Cir. 1990).

A female probationary faculty member was unsuccessful in showing that sexual harassment was gender discrimination which served as the basis for a nonrenewal decision.[97] The Seventh Circuit affirmed the lower court decision that sexual harassment based on sexual desires was not harassment based on gender discrimination.

A district court found that a female faculty member was denied tenure for reason of gender discrimination in violation of title VII.[98] On appeal, the First Circuit ruled that the testimony of a professor comparing those who had been granted tenure with the plaintiff was admissible evidence.[99] The court also ruled that the court had jurisdiction over pendent state contract claims and that the award of tenure was a reasonable remedy in title VII cases. Another title VII case emanating from an earlier decision on procedural issues was litigated on the merits.[100] The district court found that the plaintiff, a female faculty member denied tenure, had established a *prima facia* case for tenure and that the institution had provided nondiscriminatory reasons for the decision. Furthermore, the plaintiff had failed to show pretext.[101] In this case where some reasons for the decision had the potential of being based on sex discrimination, the court had to determine whether the same outcome would have been achieved without the gender based reasons. On appeal, the First Circuit affirmed the lower court decision and found that statements made by the dean of the school regarding the need for gender quotas to increase the number of women faculty and the selection of a person the plaintiff objected to on the tenure review subcommittee did not prove discriminatory animus.[102] The final case in this section dealt with procedural maneuvering to have a title VII claim voluntarily dismissed. However, the plaintiff's refusal to proceed to trial resulted in the dismissal of the case.[103]

Tenured Faculty

Termination for Cause. Tenured faculty terminated for cause have challenged the action. Procedural matters resulted in one ruling. The Seventh Circuit acknowledged its error when it dismissed an appeal because it thought the district court judgment was still pending.[104]

The definition of contract provisions which allow institutions to

97. King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990)
98. *See* The Yearbook of Education Law 1989 at 214, Brown v. Trustees of Boston Univ., 674 F. Supp. 393 (D. Mass. 1987).
99. Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989).
100. *See* The Yearbook of School of Law 1987 at 248, Jackson v. Harvard Univ., 111 F.D.R. 472 (D. Mass. 1986).
101. Jackson v. Harvard Univ., 721 F. Supp. 1397 (D. Mass. 1989).
102. Jackson v. Harvard Univ., 900 F.2d 464 (1st Cir. 1990).
103. Zagano v. Fordham Univ., 900 F.2d 12 (2d Cir. 1990).
104. Patterson v. Crabb, 904 F.2d 1179 (7th Cir. 1990).

terminate tenured faculty was at issue. In a breach of contract claim, a Louisiana court found that the plaintiff had been afforded appropriate due process and appeals in the termination of the tenured contract for professional incompetence.[105] An Arizona case raised questions as to whether a faculty member had abandoned his job when he failed to sign a contract over a salary dispute.[106] The faculty member claimed the institution had classified him inaccurately for merit pay. In response to the faculty member's letter indicating his intent to continue employment and explaining his refusal to sign the contract for reasons of discrepancies in merit pay, the president of the institution agreed in writing to place his contract in abeyance until a hearing was held. The hearing was not held, but the faculty member was later given ten days to sign and return the contract or he would abandon his job. A state court, on appeal, affirmed the denial of summary judgment to the institution. The court noted that the state law the institution relied on did not require that the executed contract be returned by a certain date.

A North Dakota faculty member alleged that his termination was arbitrary and capricious.[107] The faculty member claimed that the first time he became aware that a departmental faculty meeting was for the purpose of reviewing his performance and deciding whether he should be terminated was at that meeting. The Eighth Circuit affirmed a district court decision to deny a motion for summary judgment because material issues existed as to the legality of the termination process and the decision. In the termination of a New Jersey faculty member, the court found that the institution's policies did not allow for the termination of a faculty member for a violation of professional ethical standards.[108] The institution in its termination decision could not link the statement on ethical standards, which was not a part of the termination policy, to the legitimate cause as stated in the policy of "failure to maintain standards of scholarship and teaching."[109] The court considered it a "disgrace" that the institution could not follow through with the employment action given the unethical behavior of the defendant.[110] The faculty member had been accused of threatening and exploiting graduate students.

The institution's coverage under a liability insurance policy for litigation costs resulting from the termination of a tenured faculty member was at issue in California.[111] The private university was found to have

105. Olivier v. Xavier Univ., 553 So. 2d 1004 (La. Ct. App. 1989).
106. Bowman v. Board of Regents of Univs. and State Colleges of Ariz., 785 P.2d 71 (Ariz. Ct. App. 1989).
107. Morris v. Clifford, 903 F.2d 574 (8th Cir. 1990).
108. San Filippo v. Bongiovanni, 743 F. Supp. 327 (D.N.J. 1990).
109. *Id.* at 334.
110. *Id.* at 328.
111. Loyola Marymount Univ. v. Hartford Accident and Indem. Co., 271 Cal. Rptr. 528 (Ct. App. 1990).

intentionally discriminated under title VII in the discharge of a professor. The discharge was not consistent with the policy's definition of an "accidental occurrence" resulting in coverage.

Termination for Financial Exigency. Community college faculty laid off for a financial exigency sued claiming they were denied due process.[112] The Sixth Circuit found that genuine issues necessitated the reversal of the district court's grant of summary judgment to the institution. In another case, a tenured faculty member's position was eliminated when the board approved a reorganization plan.[113] A Colorado court found that the professor lacked standing to challenge the board's plan given the board's authority over books, courses, and instruction.

Denial of Employee Privileges. Denials of promotion to full professor were before several courts. A California faculty member claimed gender discrimination in the denial of her promotion to full professor.[114] The court, noting that the plaintiff and a male colleague were both denied promotion, found that the decision was based on scholarship, service, and teaching. An Hispanic New Jersey faculty member was successful in his claim that he was denied promotion to full professor because of his national origin and in retaliation for a previous title VII claim.[115] In this disparate treatment case under title VII, the plaintiff relied on a comparative analysis of other similarly situated faculty who were promoted. The comparative data were used to show that the institution's reason for denial lacked credence.

The termination of a department chair during the contract period resulted in the reversal of an administrative hearing decision.[116] The court found that a property interest and an implied liberty interest (damage to his reputation) required an administrative hearing in order to meet due process requirements. The court ordered his reinstatement. Finally, a court found that a medical professor had no property interest in a transfer from one department to another which was not preceded by due process.[117]

A faculty member was unable to show that the use of a standardized teacher evaluation form violated her academic freedom because it was inconsistent with her education theory.[118] Underlying this claim was controversy over the award of merit pay. Another faculty member who voluntarily resigned his position was denied unemployment compensation.[119] The state agency had denied unemployment compensation when the resignation was voluntary. Finally, a faculty member who transferred

---

112. Johnston Taylor v. Gannon, 907 F.2d 1577 (6th Cir. 1990).
113. Bennett v. Board of Trustees for Univ. of N. Colo., 782 P.2d 1214 (Colo. Ct. App. 1989).
114. University of S. Cal. v. Superior Ct., 272 Cal. Rptr. 264 (Ct. App. 1990).
115. State *ex. rel.* Guste v. Nicholls College Found., 558 So. 2d 1232 (La. Ct. App. 1990).
116. Spiegel v. University of S. Fla., 555 So. 2d 428 (Fla. Dist. Ct. App. 1989).
117. Farkas v. Ross Lee, 727 F. Supp. 1098 (W.D. Mich. 1989).
118. Wirsing v. Board of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990).
119. Prescott v. Moorhead State Univ., 457 N.W.2d 270 (Minn. Ct. App. 1990).

to another department without loss of rank or pay was unable to show that a due process right existed or that first amendment rights had been violated.[120]

ADMINISTRATORS and STAFF

Termination of administrators and staff continues to be heavily litigated. Issues include the jurisdiction and procedures of the court, the nature of the contractual obligations, and federal regulations which prohibit discrimination. Of particular importance are the constitutional questions of whether these employees possess a property right or a liberty interest requiring due process, or whether there has been a violation of their first amendment rights.

Questions of the court's jurisdiction or the scope of state laws involved in this type of litigation come into play. For example, a Montana court found that the state's public universities and colleges were not local government entities with legislative authority qualifying for immunity.[121] Plaintiff's wrongful discharge was not barred from litigation. In a case involving a New York plaintiff, the court ruled that limiting redress for employment discrimination to title VII was harmonious with other courts and the basis for dismissing a 1981 claim.[122] Under the Federal Rules of Procedure, a Maryland case was dismissed when the plaintiffs failed to provide a "short and plain statement of . . . [their] claim."[123] A North Carolina court found that the plaintiff, a dismissed research associate, failed to state a viable claim when he alleged that he was dismissed for associating with an unpopular faculty member.[124]

Tolling was at issue in a number of cases. A District of Columbia university hospital employee who had been dismissed for poor work performance, while grieving the dismissal, waited eighteen months to file a discrimination claim under the District of Columbia's Human Rights Act.[125] The court dismissed the claim as time-barred. The tolling period ran out for a plaintiff who failed to file a claim within thirty days after the hearing officer of the state personnel board had mailed his decision.[126] A federal court found that the action of state officials which were alleged to violate the constitutional rights of a dismissed library director did not come under eleventh amendment immunity provisions barring a

120. Huang v. Board of Governors of the Univ. of N.C., 902 F.2d 1135 (4th Cir. 1990).
121. Mitchell v. University of Mont., 783 P.2d 1337 (Mont. 1989).
122. Alexander v. New York Medical College, 721 F. Supp. 587 (S.D.N.Y. 1989).
123. Anderson v. University of Md. School of Law, 130 F.R.D. 616, 617 (D. Md. 1989).
124. Privette v. University of N.C. at Chapel Hill, 385 S.E.2d 185 (N.C. Ct. App. 1989).
125. Jones v. Howard Univ., 574 A.2d 1343 (D.C. App. 1990).
126. Vendetti v. University S. Colo., 793 P.2d 657 (Colo. Ct. App. 1990).

suit.[127] On a defense motion for a summary judgment based on tolling in the same case, the court found that each of the claims (illegal search, interrogation without council, and issuing a libelous report) were separate, discrete claims and not part of a continuous claim.[128] Defendant's motion was granted.

Property rights and requisite due process were before the courts in several cases. A West Virginia administrator dismissed from his position, on appeal, failed to sustain the premise that he held tenure at the institution as a faculty member.[129] The fact that he taught courses and was given a courtesy title of associate professor did not, under the terms of his appointment, give him tenure and a property right to a termination hearing. A community college administrator claimed a property right in both the administrative position and his previously held faculty position.[130] The district court granted summary judgment in favor of the defendant institution and the federal circuit court affirmed the decision.[131] The Fourth Circuit Court of Appeals found that pre- and post-deprivation procedures met due process requirements as mandated by the employee's property right or employment contract.[132] Furthermore, the court noted that it typically had been reluctant to recognize multiple property interests with the same employer.[133] In Louisiana, an administrator employed as an "at will employee" could not claim wrongful discharge or invoke an alleged contractual right to a grievance procedure.[134] The administrator, dismissed for poor job performance and differences with his superior, had been employed in his present position for thirty years. A Texas court reached a similar result finding that, based on the institution's handbook, an at-will employee was without a property right.[135] In Ohio, a court found that the institution was not obligated to provide a stenographic or taped record of the pretermination hearing.[136]

First amendment claims involving the termination of administrators were also litigated. A summary judgment was denied to an institution in the case of the termination of the "internal grains program" director.[137] Material issues of fact remained as to whether the statements made by the director were the sole or motivating factor for the dismissal decision.

---

127. Detro v. Roemer, 732 F. Supp. 673 (E.D. La. 1990).
128. Detro v. Roemer, 739 F. Supp. 303 (E.D. La. 1990).
129. State *ex. rel.* Tuck v. Cole, 386 S.E.2d 835 (W. Va. '89).
130. Fields v. Durham, 909 F.2d 94 (4th Cir. 1990).
131. *See* The Yearbook of Education Law 1989 at 222, Fields v. Durham, 856 F.2d 655 (4th Cir. 1988), *vacated and remanded*, 110 S. Ct. 1313 (1990).
132. Fields v. Durham, 909 F.2d 94 (4th Cir. 1990).
133. *Id.* at 98.
134. Gilbert v. Tulane Univ., 909 F.2d 124 (5th Cir. 1990).
135. Hicks v. Baylor Univ. Medical Center, 789 S.W.2d 299 (Tex. Ct. App. 1990).
136. Local 4501, Communications Workers of Am. v. Ohio State Univ., 550 N.E.2d 164 (Ohio 1990).
137. Konijnendijk v. Deyoe, 727 F. Supp. 1392 (D. Kan. 1989).

Additionally, the court found that statements made in his official capacity were not exempt from first amendment protection. In another reassignment case, the dean's comments about the fiscal management of the institution were matters of public concern and, therefore, protected speech.[138] Furthermore, the institution had not established that speech was the motivating factor for its employment decision. However, on a motion to reconsider, the court granted defendant summary judgment finding that statements on fiscal management were made after the meeting to reassign was called.[139] Finally, an institution found itself in court over the termination of an administrator's grievance proceedings on alleged sex and race discrimination after she wrote to her senator seeking redress. The institution's grievance manual requirement for the maintenance of exclusivity and confidentiality during the grievance procedure did not violate the plaintiff's first amendment rights when it served as the basis for the termination of the grievance process.[140]

Discrimination was also at issue in the termination of administrators and staff. A Minnesota court upheld an administrative law judge's determination that a female grounds keeper had been discriminated against when she was terminated.[141] The court also affirmed the award of punitive damages finding the institution had [illegible]d student testimony and covered up sex discrimination. In another ca[illegible] court found that only the university president had the authority to approve a co[illegible]tract, and that he had failed to do so.[142]

The terms and conditions of the employment contract are an important aspect of administrator and staff terminations. A Pennsylvania court found that the renewal of a contract at the beginning of the fiscal year, even after informing the employee she should look for other employment, constituted an oral one year contract.[143] In another case, summary judgment was denied to an institution because the court found that an implied contract may have existed between the school and a basketball coach.[144] Origins for the possible implied contract came from longevity of service and communications which reflected assurance of continued employment. These factors created a reasonable expectation that the coach would be terminated only for cause.[145] An Oklahoma court found that the contract may have been breached if the employee's dismissal was the result of his violating the chain of command by going over his supervisor's

138. Hullman v. Board of Trustees of Pratt Community College, 725 F. Supp. 1536 (D. Kan. 1989
139. Hullman v. Board of Trustees of Pratt Community College, 732 F. Supp. 91 (D. Kan. 1990).
140. Kemp v. State Bd. of Agric., 790 P. 2d 870 (Colo. Ct. App. 1989).
141. State *ex rel.* Cooper v. Moorhead State Univ., 455 N.W. 2d 79 (Minn. Ct. App. 1990).
142. Campbell v. State, 551 N.Y.S.2d 100 (App. Div. 1990).
143. Burge v. Western Pa. Higher Educ. Council, Inc., 570 A.2d 536 (Pa. Super. Ct. 1990).
144. Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230 (Dist. Ct. App. 1990).
145. *Id.* at 231.

head to report illegal disposition of state property.[146] An Illinois court affirmed that the institution's termination based on poor performance was not an arbitrary or unreasonable employment action.[147] Another case upheld an institution's finding of gross insubordination as the basis for termination.[148] However, a California court found error when the state personnel board allowed an institution to amend the charges against a dismissed employee after the termination hearing.[149] A terminated coach was unable to show that he had a contractual right to be reassigned to another position.[150] However, a New York employee, citing a policy stating that administrators could only be terminated for cause, successfully stopped a motion to dismiss his breach of contract claim emanating from his termination.[151]

State laws were used to challenge the termination of administrators and staff of colleges and universities. A West Virginia employee, terminated after being injured on the job, used the state's Human Rights Act to claim the right to reemployment.[152] Following the injury, the institution attempted to accommodate the job to compensate for the disability. Since the employee was still unable to perform requisite tasks, she was not an "otherwise qualified handicapped individual" under the Act and the Act did not obligate the institution to assign the employee to a new job. A black employee, on appeal, was able to show that he had a legitimate cause of action for intentional infliction of emotional distress, but not intentional interference with an economic relationship.[153] Interference with an economic relationship was not viable because the court said that a loss of sick days was not enough to support this claim. However, discriminatory harassment in the form of racial slurs and abusive language and behavior supported the other claim. In Alabama, under the state's Fair Dismissal Act, waiting eighteen months to file a claim resulted in the claim being barred by laches.[154]

Defamation was at issue in a North Carolina case.[155] While the court granted the defending institution summary judgment on the claim of breach of contract when it terminated the employment of a research assistant, the court found that material issues existed in the claim of defamation for statements made in the termination letter impeaching the researcher's professional skills. Questions of false imprisonment also required litigation

---

146. Vanneman v. Board of Regents of Univ. of Okla., 784 P.2d 1053 (Okla. 1989).
147. Kelly v. Board of Trustees of the Univ. of Ill., 559 N.E.2d 196 (Ill. App. Ct. 1990).
148. Sexton v. Marshall Univ., 387 S.E.2d 529 (W. Va. 1989).
149. Brooks v. California State Personnel Bd., 272 Cal. Rptr. 292 (Ct. App. 1990).
150. Frazier v. University of D.C., 742 F. Supp. 28 (D.D.C. 1990).
151. Aharanwa v. Trustees of Columbia Univ. in City of N.Y., 557 N.Y.S.2d 76 (App. Div. 1990).
152. Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1 (W. Va. 1988).
153. Franklin v. Portland Community College, 787 P.2d 489 (Or. Ct. App. 1990).
154. Hughes v. Britnell, 554 So. 2d 1041 (Ala. Civ. App. 1989).
155. Kwan-Sa You v. Roe, 387 S.E.2d 188 (N.C. Ct. App. 1990).

stemming from the university's action of detaining the researcher and requiring a psychiatric examination.

Damages for termination or dismissal resulted in different rulings in various states. For example, in Louisiana, the State Civil Service Commission awarded a former employee back pay and reinstatement but denied interest on the back-pay and attorney fees.[156] The Fifth Circuit upheld a lower court decision dismissing a demoted black administrator's claim and assigning damages in the form of attorney fees to the plaintiff's attorney based on misconduct during prosecution of the claim.[157]

Several dismissal cases involved criminal prosecution. In one case, the court found evidence sufficient to support an embezzlement conviction of two administrators in the bursar's office of a professional school of a university.[158] In another case, a business manager could not be forced to make a donation to a university's charitable foundation as part of his criminal sentence.[159]

Finally, a case involving mandatory drug testing for Department of Education staff was before the courts.[160] The court ruled that testing of motor vehicle operators was constitutionally permissible, but the Department failed to show a compelling interest in testing data processors. The court also ruled that testing could be required if reasonable suspicion existed as opposed to actual proof of job impairment.

All Employees

Sexual Harassment. In one case reported previously,[161] the court ruled that the designation of two witnesses classified as experts on sexual harassment as "expert witnesses" prejudices the fact-finding capabilities of the jury.[162] The court noted that the knowledge of the witnesses "fails to rise to the level of specialized knowledge necessary to qualify them as experts."[163] In Michigan, an assaulted student and a rape crisis center counselor were charged by the accused graduate assistant with interference with contract, slander, and intent to inflict emotional distress.[164] Both the counselor and the victim contacted the department where the graduate

156. Johnson v. Southern Univ., 551 So. 2d 1348 (La. Ct. App. 1988).
157. John v. Louisiana, 899 F.2d 1441 (5th Cir. 1990).
158. People v. McCorgray, 558 N.Y.S.2d 545 (App. T. v.1990).
159. Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990)
160. American Fed'n of Gov't Employees, AFL-CIO v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989).
161. *See* The Yearbook of School Law 1987 at 268, Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986); *aff'd*, See The Yearbook of Education Law 1990 at 236, Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).
162. Lipsett v. University of P.R., 740 F. Supp. 921 (D.P.R. 1990).
163. *Id.* at 924
164. Rosenboom v. Vanek, 451 N.W.2d 520 (Mich. Ct. App. 1989).

assistant held a position to inquire about what the department would do about this situation. The court found that the institution's policy of promoting the reporting of sexual harassment incidents precluded the slander charge after criminal charges were dismissed.

Denial of Employee Benefits. A Michigan professor sought access to letters of recommendation from department heads and deans regarding recommendations for salary increases.[165] The court found that salary recommendations were exempt from the Employee Right To Know Act. An Oregon court affirmed the eligibility for unemployment compensation of a part-time instructor laid off at the end of the 1988 winter term.[166] However, a New York court reversed a lower court award of unemployment benefits to a faculty member not employed for summer school.[167] A student who resigned his position to attend law school was not qualified for unemployment benefits.[168] On appeal, a fired president was able to reverse a summary judgment favoring the institution.[169] At issue was the salary for the remainder of the terminated contract agreement and retirement benefits.

Other benefits besides salary were also litigated. In a bankruptcy proceeding, the court found that The College Retirement Equity Fund (CREF) annuity was a spendthrift trust excluded from the bankruptcy estate, while Teachers Insurance and Annuity Association (TIAA) retirement annuity, as an annuity was part of the bankruptcy estate.[170] In another case, a printer was allowed to purchase service credits toward retirement for previous service performed out of state.[171] The award of disability benefits to a terminated employee was appropriate where a good faith effort to search for alternate positions was attempted; however, further payments should have ceased when medical evidence indicated that the plaintiff had the ability to work but had not attempted in good faith to find a job.[172] An Alabama court certified a class of community and technical college employees in a suit against a self-funded insurance plan.[173]

Collective Bargaining. Collective bargaining issues reached the courts again this year. Membership in the bargaining unit was before the court in one case. The Supreme Court of Vermont ruled that adjunct, part-time faculty with reasonable expectations of reemployment were state employees eligible for protection under the state labor laws.[174] However, the court ruled that different interests from full-time faculty negated their claim for membership in the full-time faculty bargaining unit.

---

165. Muskovitz v. Lubbers, 452 N.W.2d 854 (Mich. Ct. App. 1990).
166. Mt. Hood Community College v. Employment Div., 790 P.2d 1164 (Or. Ct. App. 1990).
167. *In re* Abramowitz, 550 N.Y.S.2d 75 (App. Div. 1989).
168. Sonneman v. Knight, 790 P.2d 702 (Alaska 1990).
169. Lovett v. Mt. Senario College, Inc., 454 N.W.2d 356 (Wis. Ct. App. 1990).
170. Morter v. Farm Credit Servs., 110 B.R. 390 (N.D. Ind. 1990).
171. Barckley v. State Employees' Retirement Bd., 566 A.2d 343 (Pa. Commw. Ct. 1989).
172. University of Fla. v. Stone, 553 So. 2d 359 (Fla. Dist. Ct. App. 1989).
173. Harbor Ins. Co. v. Blackwelder, 554 So. 2d 329 (Ala. 1989).
174. Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 566 A.2d 955 (Vt. 1989).

In Michigan, union dues for nonmembers were challenged on religious grounds. A federal district court had upheld the discharge of an employee of a university for refusal to pay nonmember union dues.[175] The Sixth Circuit Court reversed and remanded the decision.[176] The court found that the scheme to refund the plaintiff's challenged union dues did not take into account religious beliefs which prevented any association with unions. An Illinois court found that nonmembers should be given a hearing prior to the collection of "fair share" dues.[177] The court found that the establishment of an escrow account for the deposit of challenged fees would be necessary to prevent the use of funds for improper purposes.

Unfair labor practices were brought to the courts. A California court found that it was not an unfair labor practice to contract with another organization to teach evening courses which had previously been covered by its full-time faculty. Key to resolving the case was the fact that the courses were not being taught by the full-time faculty at the time the contract was signed.[178] However, expanding the contract with the external agency to courses currently taught by the college's part-time instructors was an unfair labor practice. In New Jersey, employees who challenged a public university's calculation of their biweekly pay were not state employees under state statutes, and jurisdiction was transferred to the appropriate tribunal.[179] A California court held that a state university must pay the prevailing wage required by law for public works which do not involve the institution's internal affairs.[180]

As previously reported, the Supreme Court ruled that a university mail service did not deliver "letters of the carrier" nor was it a "private without compensation carrier," both exceptions to the United States Postal Service monopoly.[181] On remand to the state labor relations board, the board found that the institution had committed an unfair labor practice by refusing to deliver union mail through its campus mail system. On appeal the court found that it was an error to rely on previously vacated rulings to reach a decision, and the board had not properly determined whether the union using university mail services was a violation of the monopoly protection of the Postal Service.[182] A Washington university was accused

175. *See* The Yearbook of Education Law 1990 at 214, EEOC v. University of Detroit, 701 F. Supp. 1326 (E.D. Mich. 1988).
176. EEOC v. University of Detroit, 904 F.2d 331 (6th Cir. 1990).
177. Antry v. Illinois Educ. Labor Relations Bd., 552 N.E.2d 313 (Ill. App. Ct. 1990).
178. San Diego Adult Educators, Local 4289, Am. Fed'n of Teachers v. Public Employment Relations Bd., 273 Cal. Rptr. 53 (Dist. Ct. App. 1990).
179. Meehan v. Nassau Community College, 548 N.Y.S.2d 741 (App. Div. 1989).
180. Division of Labor Standards Enforcement v. Ericsson Information Sys., Inc., 270 Cal. Rptr. 75 (Ct. App. 1990).
181. *See* The Yearbook of Education Law 1989 at 219, Regents of the Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589 (1988).
182. Regents of the Univ. of Cal. v. Public Employment Relations Bd., 269 Cal. Rptr. 563 (Ct. App. 1990).

of an unfair labor practice by entering into a contract with a local city to provide police protection.[183] The court found that the state law granting universities the power to form police departments, or to contract for services with local government, did not supersede the higher education personnel law. Accordingly, it was illegal to lay off police officers employed by the university and to execute a contract with the city police.

A number of collective bargaining cases involved grievance procedures. A court upheld a hearing officer's decision in favor of the union and the award of attorney fees to the union in a grievance over the lengthening of summer school.[184] Nurses requesting steady assignment to the evening shift grieved the issue with the university. The court found that the university violated the State Labor Relations Act by refusing to go to arbitration.[185] A Louisiana court upheld the surveillance and suspension for five working days without pay of an employee who violated the institution's sick leave provisions.[186]

Issues regarding the wages of employees used to staff a university public works project under state contract were before a California court.[187] The court found that the university must conform to the wage laws governing public works projects which do not involve the university's internal affairs.

STUDENTS

Admissions

A Fifth Circuit held that an applicant who was rejected from a graduate school, but was permitted to audit a class at the university, was not classified as a "student" in accordance with the Family Educational Rights and Privacy Act.[188] The rejected applicant did not have access to admission information as would an enrolled student. In a Florida case, at issue was whether an applicant who was denied admission to a public law school was entitled to a hearing under the state's Administrative Procedures Act.[189] After notification of denial of admission, a letter was sent to the plaintiff which provided an explanation of the process and reasons for the denial. The court determined that a student, who was also an applicant,

183. Western Wash. Univ. v. Washington Fed'n of State Employees, 793 P.2d 989 (Wash. Ct. App. 1990).
184. Board of Trustees of Hillsborough Community College v. Hillsborough Community College Chapter of Faculty United Serv. Ass'n, 563 So. 2d 1102 (Fla. Dist. Ct. App. 1990).
185. University of Pittsburgh, W. Psychiatric Inst. & Clinic v. Pennsylvania Labor Relations Bd., 578 A.2d 66 (Pa. Commw. Ct. 1990).
186. Claverie v. L.S.U. Medical Center in New Orleans, 553 So. 2d 482 (La. Ct. App. 1989).
187. Division of Labor Standards Enforcement v. Ericsson Information Sys., 270 Cal. Rptr. 75 (Ct. App. 1990).
188. Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989).
189. Metsch v. University of Fla., 550 So. 2d 1149 (Fla. Dist. Ct. App. 1989).

was not entitled to a formal administrative hearing, and that his "sincere interest in the study of law" did not qualify him for a hearing under the provisions of the Act.

A disgruntled father filed suit against the National Collegiate Athletic Association (NCAA) when his son was denied admission at a state university.[190] The court found no cognizable claim against the NCAA and dismissed the case.

In other action, a college student failed to prove extreme and outrageous conduct by college administrators.[191] The student, dismissed from a program in rude and insulting terms, failed to establish cause of intentional infliction of emotional distress.

In New York, admissions tests involving the Educational Testing Service (ETS) were before the courts again. In one case, a student's test was pulled during the testing period by a proctor investigating irregularities suspected by another student.[192] The student demanded a retake of the test at an unscheduled time. The court, finding testing irregularities in procedures, awarded the plaintiff the requested injunctive relief. In another decision, the court found the testing service, within the confines of the contract between the examinee and the testing service, could cancel the scores due to irregularities in the administration of the test.[193] A due process claim could not be asserted due to an absence of evidence of state action.

Nonresident Tuition

A New Hampshire case raised the issue of whether, for tuition purposes, the son of a foreign services employee was a resident of the state.[194] New Hampshire law required that one must be domiciled in the state for twelve consecutive months before establishing residency for tuition purposes. The father, after graduating from college in New Hampshire, had worked in the foreign service and had legally been a resident of Virginia. In the year his son was to attend college, an attempt to establish residency was made by purchasing a home, registering to vote, and meeting other requirements. The father went back into the foreign service, was assigned to another country but listed his domicile as New Hampshire. The state supreme court affirmed the trial court's finding that the father had failed to be domiciled in the state for the required period of twelve months in order to establish residency for his son. The length of time of the parents' residency in the state was pivotal since the son was listed as a dependent.

---

190. Peebles v. National Collegiate Athletic Ass'n, 723 F. Supp. 1155 (D.S.C. 1989).
191. Rudis v. National College of Educ., 548 N.E.2d 474 (Ill. App. Ct. 1989).
192. Mindel v. Educational Testing Serv., 559 N.Y.S.2d 95 (Sup. Ct. 1990).
193. Yaeger v. Educational Testing Serv., 551 N.Y.S.2d 574 (App. Div. 1990).
194. Bisson v. University of N.H., 578 A.2d 320 (N.H. 1990).

Financial Aid

With increasing college expenses and further constraints on federal and state budgets, financial aid issues once again were prevalent in the courts. Several bankruptcy cases centered around educational loan debts. In a California case, a university was found to have violated automatic stay provisions of bankruptcy law by withholding a debtor's transcripts unless he would reaffirm his educational loan debt.[195] "Compensable injury" was also determined and attorney fees were awarded to the debtor. Automatic stay violations were denied in a Pennsylvania bankruptcy case.[196] The debtor failed to state a claim for a civil rights violation, and the higher education assistance agency did not discriminate against a debtor when it refused to award a grant. In order to determine the dischargeability of a student loan, the burden of proof is split between the creditor, who must prove a debt exists, and the debtor, who must prove undue hardship. A Pennsylvania court determined that health problems and unemployment did not qualify in the present case as an "undue hardship" resulting in a discharge of his debt.[197] An Alabama court found that a pending divorce, lose of spouse's income, and size of the loan payment were not undue hardship.[198] However, a Maryland divorced mother of three children, whose exhusband was incurably ill, proved hardship, and the loans of two other former students also were discharged.[199]

Under chapter thirteen plans, bankruptcy cases were brought before the courts. In Kansas, a district court remanded a case to the bankruptcy court where the debtor filed her repayment plan in good faith as required by law.[200] The court failed to make specific findings regarding the debtor's primary purpose in filing a chapter thirteen plan before claiming that the plan was filed in bad faith. A bankruptcy court in Ohio denied the confirmation of a chapter thirteen plan after it determined that the debtor's partial repayment of loans was not sufficient sacrifice as required for granting debt relief under chapter thirteen.[201]

Three separate plaintiffs who held defaulted student loans brought action seeking judgment to recover tax refunds intercepted by the Internal Revenue Service (IRS). The United States Court of Appeals, reversing a district court decision, found that tax refunds collected by the IRS to offset defaulted student loans were time barred.[202] Ten years had passed since the loans

---

195. Gustafson v. California State Univ., Fresno, 11 B.R. 282 (Bankr. 9th Cir. 1990).
196. *In re* Saunders, 105 B.R. 781 (Bankr. E.D. Pa. 1989).
197. *In re* Burton, 117 B.R. 167 (Bankr. W.D. Pa. 1990).
198. *In re* Doyle, 106 B.R. 272 (Bankr. N.D. Ala. 1989).
199. *In re* Clemmons, 107 B.R. 488 (Bankr. D. Del. 1989); *In re* Griffin, 108 B.R. 717 (Bankr. W.D. Mo. 1989); *In re* Reilly, 118 B.R. 38 (Bankr. D. Md. 1990).
200. *In re* Stewart, 109 B.R. 998 (D. Kan. 1990).
201. *In re* Carpico, 117 B.R. 335 (Bankr. S.D. Ohio 1990).
202. Grider v. Cavazos, 911 F.2d 1158 (5th Cir. 1990).

had been declared delinquent barring collection by tax refund offset. A similar case occurred in Kansas where the Tenth Circuit Court of Appeals ruled that the attorney general had a six year statute of limitations to bring suit on a defaulted student loan, making collection by tax refund offset time barred.[203] In Delaware, a student borrower was also entitled to his tax refund after the court found that private, not-for-profit cooperations could not act as debt collectors under the Federal Debt Collection Practices Act.[204] However, a former student in Alabama failed to reclaim her tax refund which was used to offset a defaulted student loan.[205] The court of appeals affirmed an earlier decision that the statute of limitations commenced when the loan was assigned to the Department of Education for collection.

Both federal and state officials filed suits against individuals who defaulted on student loans. In Louisiana, the federal government's motion to collect on a defaulted National Health Service Corps (NHSC) Scholarship Program Loan was granted.[206] The physician failed to begin his service at the assigned Health Manpower Shortage Area or to pay the debt when his service option was terminated. In similar action, the government filed suit to recover the full amount of the scholarship provided to a participant in the Public Health and National Health Service Corps Scholarship Training Program.[207] The defaulting participant claimed that his debt should be prorated for that portion of the required four years of service he actually completed before termination. The United States Court of Appeals affirmed an earlier decision that the statute governing the repayment obligation to the government did not provide for proration if the service was partially completed. In Florida, the government was again granted a motion to collect on a defaulted student loan where the student's contract breach stopped a claim that the lending agency had not acted in good faith.[208] In New York, the statute of limitations barred collection on a student loan.[209]

Divorce and child support were at issue in a number of cases. A divorced Indiana father, whose twenty-one year old daughter was a college graduate with a baccalaureate degree, was no longer responsible to pay half of her college expenses.[210] The New Jersey Supreme Court ruled that the divorced father's contribution to the daughter's college education

---

203. Hurst v. United States Dep't of Educ., 901 F.2d 836 (10th Cir. 1990).
204. Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990).
205. Jones v. Cavazos, 889 F.2d 1043 (11th Cir. 1989).
206. United States v. Gross, 725 F. Supp. 892 (W.D. La. 1989).
207. United States v. Barry, 904 F.2d 29 (11th Cir. 1990); *see* Yearbook of Education Law 1990 at 229, United States v. Barry, 719 F. Supp. 1047 (M.D. Ala. 1989).
208. United States v. McGill, 734 F. Supp. 1014 (S.D. Fla. 1990).
209. State v. Cohen, 551 N.Y.S.2d 688 (App. Div. 1990).
210. Shriver v. Kobold, 553 N.E.2d 867 (Ind. Ct. App. 1990).

should be based on an evaluation of his ability to pay.[211] In South Dakota, the Supreme Court affirmed a lower court decision which substantiated the existence of a divorce decree providing that the husband would pay all of the regular costs of their child obtaining a college education (undergraduate degree).[212] A student in Pennsylvania sued her adoptive father to recover financial support for college.[213] The court found no willful estrangement relieving the father of his responsibilities for providing financial support. The court of appeals in Indiana also awarded judgment for financial support to a student and denied a petition for modification of child support by the father.[214] In this instance, the student was working but was unable to support herself completely.

Fraud was at issue in a South Dakota case.[215] A North Dakota student filed for a student loan in South Dakota, and obtained the loan by use of a false statement. Her convictions were affirmed in the circuit court. In Kansas, a college filed a motion seeking declaratory judgment and injunctive relief in claiming that the guaranty agency violated provisions of the Higher Education Amendments of 1986.[216] The college was an eligible participant in various title IV federal financial assistance programs and could not have student loan applications filed by eligible students denied by the guaranty agency. An institution offering correspondence and residential training courses in truck driving and heavy equipment operation sought an injunction preventing implementation of a decision suspending government student financial aid programs.[217] The Seventh Circuit Court of Appeals found the institution had legitimate liberty and property interests requiring due process which was given by the Department of Education. A business school was ordered to refund Tuition Assistance Program (TAP) awards to students during academic terms when the institution failed to meet the full-time attendance requirement for purposes of TAP eligibility.[218] Similarly, Tuition Assistance Programs were also at issue in New York.[219] Funds were cut off to a corporation operating four private business schools after they ceased operations in mid-term. The court found that the requirements for award eligibility were not satisfied because minimum hours of instruction were not met.

The collection of costs of educational programs were before the courts and involved several types of disputes. The New York Supreme Court

---

211. Enrico v. Goldsmith, 568 A.2d 576 (N.J. Super. Ct. App. Div. 1990).
212. Kier v. Kier, 454 N.W.2d 544 (S.D. 1990).
213. Fager v. Fatta, 576 A.2d 1089 (Pa. Super. Ct. 1990).
214. Brancheau v. Weddle, 555 N.E.2d 1315 (Ind. Ct. App. 1990).
215. United States v. Redfearn, 906 F.2d 352 (8th Cir. 1990).
216. St. Mary of the Plains College v. Higher Educ. Loan Program of Kan., Inc., 724 F. Supp. 803 (D. Kan. 1989).
217. Continental Training Servs., Inc. v. Cavazos, 893 F.2d 877 (7th Cir. 1990).
218. Drake Business Schools Corp. v. New York State Higher Educ. Servs. Corp., 550 N.Y.S.2d 188 (App. Div. 1990).
219. Oliver Schools, Inc. v. Sobol, 558 N.Y.S.2d 828 (Sup. Ct. 1990).

dismissed the petition of a doctor who had been denied access to a student loan forgiveness program.[220] The court found neither arbitrary action nor violation of due process. In South Carolina, a former Air Force Academy Cadet was ordered to pay educational costs to the government after he resigned while facing drug charges.[221] The statute and statement of understanding signed by all Air Force Cadets authorizes the government to recover all costs if the educational requirements or active-duty service commitments are not fulfilled. The amount of attorney fees that may be recovered from a borrower who defaults on a Perkin's student loan was brought to the attention of the Appeals Court of Massachusetts.[222] The state court determined that the borrower was liable for attorney fees where they are expressly provided in the note, but that the fee is limited to what is considered fair and reasonable. Recovery of promissory notes by the university also came up in the courts. In two cases, the university succeeded in the recovery of funds from the student after default was declared.[223]

A number of cases saw state agencies, which were established to guarantee student loans, challenge the constitutionality of federal laws requiring agencies to transfer excess revenues to the Secretary of Education and permitting the Secretary to withhold reimbursements. In South Carolina, the federal court of appeals denied a rehearing and affirmed all earlier decisions[224] that excess reserve funds held by the agencies were not "private property" and the transfer of funds back to the government could be required.[225] Similarly, in Wisconsin, another case in the courts for the past few years[226] was decided in favor of the government, supporting the stipulations of the amendments to the Higher Education Act allowing the recovery of excess cash in the reserves of state guarantee agencies.[227] This constitutional issue of withholding reimbursement in order to recapture excess reserve funds was also challenged in South Dakota, Ohio, Georgia, Delaware, and North Carolina.[228] In each instance, judgment was rendered in favor of the Secretary. The courts found no viola-

---

220. Van Bellingham v. Department of Educ., 555 N.Y.S.2d 571 (Sup. Ct. 1990).
221. United States v. McCrackin, 736 F. Supp. 107 (D.S.C. 1990).
222. Trustees of Tufts College v. Ramsdell, 554 N.E.2d 34 (Mass. App. Ct. 1990).
223. Yale Univ. Adjustment Serv. v. Gallichon, 572 A.2d 388 (Conn. Ct. App. 1990); Board of Regents of S.W. Mo. State Univ. v. Harriman, 792 S.W.2d 388 (Mo. Ct. App. 1990).
224. *See* The Yearbook of Education Law 1990 at 225, South Carolina State Educ. Assistance Auth. v. Cavazos, 716 F. Supp. 886 (D.S.C. 1989).
225. South Carolina State Educ. Assistance Auth. v. Cavazos, 897 F.2d 1272 (4th Cir. 1990).
226. *See* The Yearbook of Education Law 1990 at 224, Great Lakes Higher Educ. Corp. v. Cavazos, 698 F. Supp. 1464 (W.D. Wis. 1988), *rehearing*, 711 F. Supp. 475 (W.D. 1989).
227. Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10 (7th Cir. 1990).
228. Ohio Student Loan Comm'r v. Cavazos, 900 F.2d 894 (6th Cir. 1990); Education Assistance Corp. v. Cavazos, 902 F.2d 617 (8th Cir. 1990); Delaware v. Cavazos, 723 F. Supp. 234 (D. Del. 1989); North Carolina v. United States, 725 F. Supp. 874 (E.D.N.C. 1989); Georgia Student Finance Comm'n v. Cavazos, 741 F. Supp. 899 (N.D. Ga. 1990).

tion of property rights under the fifth amendment of the Constitution in the provisions of the 1987 amendments to the Higher Education Act implementing specific levels of reserve funds at the various state agencies.

Student Organizations

Income set aside for charitable purposes was at issue in a case involving a college fraternity.[229] Income derived from a special endowment may not be tax exempt if the organization utilizes it for nonexempt purposes. The Sixth Circuit Court of Appeals affirmed a decision from the United States Tax Court that income used by a fraternity to pay for publication costs of its quarterly periodical was not exempt income. The fraternity used money in the fund to pay for the periodical as well as necessary expenses incurred in the administration of the trustees and for the payment of other necessary expenses of the fraternity in general.

First Amendment

Freedom of Speech. A case brought against college administrators by a community college teacher and a student was reversed and remanded by a state court of appeals.[230] The administrators at the college summarily canceled a dance class in which a controversial play containing vulgar language was to be performed. The court found that the community college teacher and former student had standing to challenge violations of their rights of free speech under both the United States and California Constitutions. The action claim was not moot since the student and the teacher were both still at the community college. The institution failed to support a summary judgment by providing valid reasons for canceling the class.

A former editor in chief of a student-run newspaper at a community college challenged the conduct of the college in prohibiting publication of an advertisement in the newspaper.[231] An advertisement for a Canadian nude dancing club was prohibited from publication by the college newspaper since it promoted both underage drinking and degradation of women, alleged to be contrary to Michigan law and school policy. Summary judgment was granted to the plaintiff because the community college had violated the first amendment rights of the editor in chief. The college's regulation on advertising, tailored to discourage the degradation of women and underage drinking, was not narrow enough to identify a state or institutional interest.

---

229. Phi Delta Theta Fraternity v. Commissioner of Internal Revenue, 887 F.2d 1302 (6th Cir. 1989).
230. DiBona v. Matthews, 269 Cal. Rptr. 882 (Ct. App. 1990)
231. Lueth v. St. Clair County Community College, 732 F. Supp. 1410 (E.D. Mich. 1990).

In Indiana, on appeal, a former dormitory resident assistant brought suit against the state university trustees when he was not rehired.[232] The resident assistant claimed he was not rehired because of a disagreement with his political statement concerning the Vietnam War and his display of an automatic rifle in his dormitory room, both violations of his rights of freedom expression. The court found evidence supporting the university's assertion of behavioral problems amounting to insubordination as well as displaying poor judgment in his role as a resident assistant, both valid reasons for the nonrenewal decision.

Dismissal

Disciplinary Dismissal. There were numerous cases involving disciplinary dismissal due to academic dishonesty. Two cases involving plagiarism were in the courts during this reporting period. In a case that has been in litigation for several years,[233] a dismissed law student claimed that the judge in the case was impartial since he graduated from the same law school.[234] The Sixth Circuit Court of Appeals found that there was no abuse of discretion or evidence of impartiality. In another plagiarism case, a New York court decided that a student was denied due process resulting from an associate dean's failure to reveal factual findings and evidence used to make a decision of guilt on a plagiarism charge.[235]

The alleged violation of the due process clause was also charged in a couple of academic dishonesty dismissal cases. In Minnesota, two former law students filed action alleging violation of due process and breach of contract after they were suspended from school for one year.[236] They were found guilty of violating the honor code by the university. Due process was not violated when proper proceedings were provided nor was the contract breached by adoption of an honor code. Lack of procedural due process as a claim could not be raised for the first time on appeal in a New York case involving academic dishonesty.[237] The court also determined that the penalty of suspending the student during the senior year was neither harsh nor excessive.

Cheating was at the center of four other cases dealing with academic

---

232. Shelton v. Trustees of Ind. Univ., 891 F.2d 165 (7th Cir. 1989).
233. *See* The Yearbook of Education Law 1990 at 233, Easley v. University of Mich. Bd. of Regents, 444 N.W.2d 820 (Mich Ct. App 1989); *see also* The Yearbook of Education 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); *see also* The Yearbook of School Law 1986 at 272, Easley v. University of Mich. Bd of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).
234. Easley v. University of Mich. Bd. of Regents, 906 F.2d 1143 (6th Cir. 1990).
235. Kalinsky v. State Univ. of N.Y., 557 N.Y.S.2d 577 (App. Div. 1990).
236. Shuman v. University of Minn. Law School, 451 N.W.2d 71 (Minn. Ct. App. 1990).
237. Rauer v. State Univ. of N.Y. at Albany, 552 N.Y.S.2d 983 (App. Div. 1990).

dishonesty among graduate students. In one instance, a student claimed that the college acted arbitrarily when she received a failing grade due to cheating; furthermore, her grade point average fell below 3.0 causing her automatic dismissal.[238] The dismissal was upheld by the court. In a second case, twin brothers who were dismissed from medical school after having been caught cheating in a course, successfully established protractable interest by alleging contract rights.[239] They agreed to certain provisions with the understanding they would be allowed to continue their medical education. Affirming the injunction for them to remain in school pending a resolution of their lawsuit, the court also decided that irreparable injury would be incurred if their medical school careers were interrupted during litigation. In Pennsylvania, the superior court reversed a lower court decision and found that there was no basis for interfering with the right of a private school to impose sanctions on students for conduct found to be "compatible with cheating."[240] Finally, a Florida court, in a controversy over cheating on an exam, ruled that a student must pursue the institution's administrative remedies before she would have a right of action in court.[241]

There were other cases involving disciplinary dismissal. Due process procedures were not followed in a Louisiana case where a theological seminary student was dismissed and denied a diploma because of marital difficulties.[242] At issue was not the ecclesiastical matter between a church and a minister, but rather a contractual dispute between a school and its student. The court refused to accept the validity of the student's dismissal because the faculty committee failed to exercise due process procedures articulated in the school's policy documents.

A New York court held that the three-month delay in initiating disciplinary charges against a university student was abuse of discretion and violated the student's right to a prompt hearing.[243] In Alabama, a graduate law school student sued to block disciplinary action after it was learned that the student had been barred from practicing law in other states.[244] The student's motion was denied and sanctions on the student were ordered after the court determined that the graduate law student's personal attacks on the law school dean, magistrate, and district judge warranted sanctions.

The last case in this area was a suit claiming violations of constitutional rights. A former midshipman was terminated from the United States

---

238. Braham v. Brown, 548 N.Y.S.2d 440 (App. Div. 1989).
239. James v. Wall, 783 S.W 2d 615 (Tex. Ct. App. 1989).
240. Boehm v. University of Pa. School of Veterinary Medicine, 573 A.2d 575 (Pa. Super. Ct. 1990).
241. Florida Bd. of Regents v. Armesto, 563 So. 2d 1080 (Fla. Ct. App. 1990).
242. Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90 (La. Ct. App. 1989).
243. Machosky v. State Univ. of N.Y. at Oswego, 546 N.Y.S.2d 513 (Sup. Ct. 1989).
244. Katz v. Looney, 733 F. Supp. 1284 (W.D. Ark. 1990).

Naval Academy after admitting his homosexuality. The district court first dismissed a motion claiming (1) that there was no requirement for exhausting administrative remedies before filing suit and (2) that the Tucker Act did not apply to the case.[245] In a motion for dismissal of the same case, the court stated that the former midshipman was not excused from answering a deposition question regarding homosexual acts committed while at the academy.[246] The case was subsequently dismissed with prejudice.

Academic Dismissal. Cases involving academic dismissal once again had a significant role in the courts. Of the nine cases, six were by students in professional schools. In Colorado, a resident trainee was dismissed from the medical school's residency training program.[247] Since the required thirty-day written notice was not provided, the student claimed that the dismissal violated due process of law. The court affirmed that due process does not require a formal hearing before termination but, in turn, reversed a lower court decision stating that the dismissal did violate the notice provision of an agreement between the trainee and the program. The case was remanded.

A former medical student in Iowa sought preliminary injunctive relief, disqualification of her defense counsel and stayed proceedings in federal court pending an administrative hearing.[248] The student was a third-year medical student who was dismissed from the university for poor clinical performance. The court found that the student was not entitled to preliminary injunction for reinstatement while the merits of her claim were adjudicated. A former Kentucky medical student sued the university for what he claimed was an unlawful dismissal and a deprivation of his liberty interest in his reputation.[249] A liberty interest was an issue because an associate dean of student affairs and the dean of the medical school disclosed a letter by the student's former psychiatrist to the student affairs committee, resulting in the student's dismissal. The Sixth Circuit Court of Appeals held that the eleventh amendment barred suit against a state university in federal court and that the former student was not deprived of a liberty interest. In still another case involving a former medical student,[250] the New York Supreme Court decided that a medical school's dismissal of a student for academic reasons was not arbitrary or capricious. The student displayed difficulty in achieving acceptable grades throughout his first two years and repeated the third-year medical rotation before being dismissed for academic deficiency.

In Mississippi, a former dental student alleged violations of his

---

245. Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1990).
246. Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1990).
247. Dillingham v. Univ. of Colo., Bd. of Regents, 790 P.2d 851 (Colo. Ct. App. 1989).
248. Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990)
249. Cowan v. University of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990)
250. Chusid v. Albany Medical College of Union Univ., 550 N.Y.S.2d 507 (App. Div. 1990).

constitutional rights to due process and free speech after being dismissed for academic reasons.[251] The district court held that an adequate appeal process was instituted and that the student's due process was not violated. It was also found that eleventh amendment immunity was not waived by the state, thus the court lacked jurisdiction to adjudicate claims against university trustees since the claims in reality were against the state.

The Supreme Court of New York earlier dismissed a petition by a law student who was dismissed for academic deficiency.[252] On appeal, the New York Court of Appeals found no evidence of either arbitrariness or a constitutional violation associated with the assignment of a poor grade in a course which resulted in the student's dismissal for a deficient grade point average.

Grades were also at issue in cases involving undergraduate students. In Tennessee, a former nursing student was dismissed from the state nursing program and denied readmission after receiving two substandard grades.[253] The court of appeals upheld a lower court decision that the policy requiring dismissal was constitutional. A student in Texas attempted to use the Family Educational Rights and Privacy Act in challenging a grade he received in a university physics class.[254] The district court held that the Act does not provide the means to obtain information on the assignment of grades.

In the final case, a dismissed nursing student sought damages for invasion of privacy and intentional infliction of emotional distress.[255] The student failed her clinical course partially due to her obesity and claimed a breach of contract. A trial court had found that a breach of contract was in order and awarded monetary damages to the student,[256] but did not find evidence of intentional infliction of emotional distress by the college. On consolidated appeals, the court of appeals affirmed the decision of the district court in all respects.

Other Constitutional Issues

In Kansas, a former student at a community college alleged deprivation of property without due process after fines were levied against him by the college baseball coach.[257] The district court granted summary judgment on claims of deprivation of a liberty interest in playing basketball by the enforcement of rules limiting hair length, prohibiting facial hair,

---

251. Davis v. Mann, 721 F. Supp. 796 (S.D. Miss. 1989), *aff'd*, 882 F.2d 967 (5th Cir. 1989).
252. Susan M. v. New York Law School, 556 N.E.2d 1104 (N.Y. Ct. App. 1990).
253. Lilly v. Smith, 790 S.W.2d 539 (Tenn. Ct. App. 1990).
254. Tarka v. Cunningham, 741 F. Supp. 1281 (W.D. Tex. 1990).
255. Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989).
256. *See* The Yearbook of Education Law 1988 at 258, Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986).
257. Lesser v. Neosho County Community College, 741 F. Supp. 854 (D. Kan. 1990).

and restricting dress. The court found issues of merit in claims of deprivation of property in violation of due process and fraudulent misrepresentation in the levy of fines.

Discrimination was claimed by the white college student editors of an off-campus newspaper of a private college.[258] The students were suspended by the private college after writing an article critical of a black professor and subsequently alleged that their suspension was racially motivated. The First Circuit Court of Appeals affirmed an earlier decision that the claim did not state any cause of action under title VI or section 1981 and that the college's handling of the situation fell outside the purviews of the court.

Discrimination was also contested in two other cases. In New Jersey, a female university undergraduate student claimed gender discrimination against the eating clubs at Yale University.[259] The Supreme Court of New Jersey stated that the relationship between the allegedly private eating clubs and the university was "symbiotic" thus prohibiting discrimination. In Michigan, the district court ruled in favor of a psychology graduate student who challenged the constitutionality of the university's policy on discrimination.[260] The court found that the terms of the policy which prohibited "stigmatizing or victimizing" individuals or groups from a protected status was too vague. The vague policy violated the due process clause and resulted in a restriction against free speech.

A case which involved trespassing was reversed by the Ohio Court of Appeals.[261] The university student was originally arrested for criminal trespass at a park located on campus after being caught building a fire inside a park building. The student's conviction was reversed due to the fact that there were no signs of communication at the point of entrance to the park stating restrictions on the use of the park or particular buildings. In Texas, ten college students were arrested for disruptive activity on campus during an anti-apartheid demonstration.[262] The court of appeals denied a rehearing and affirmed the judgment of the trial court. Furthermore, civil rules setting forth grounds for recusal of judges do not apply in criminal cases.

In Washington, D.C., a student sued a university for violation of the Rehabilitation Act.[263] The student had tested positive for Acquired Immune Deficiency Syndrome (AIDS) antibodies, and this information was improperly leaked to unauthorized personnel which eventually resulted in his withdrawal from the university. The district court found that the

---

258. The Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989).
259. Frank v. Ivy Club, 576 A.2d 241 (N.J. 1990).
260. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).
261. State v. McMechan, 549 N.E.2d 211 (Ohio Ct. App. 1988).
262. Arnold v. State, 778 S.W 2d 172 (Tex. Ct. App. 1989).
263. Doe v. Southeastern Univ., 732 F. Supp. 7 (D.D.C. 1990).

intentional infliction of emotional distress and invasion of privacy claims were barred by the statute of limitations. The absence of these common law claims and the failure to allege physical injury meant only equitable damages under the Rehabilitation Act could be recovered.

In California, a former student filed a petition to disqualify a temporary judge who was hearing his motion.[264] The student sued the university after the institution failed to change errors on his transcripts. The state court, on appeal, found no grounds to disqualify the judge.

Liability

Personal Injury. Injuries to one's body, good name, or well being have come before the courts. Cases range from issues of jurisdiction to the actions or failure of actions as the cause of the injury. The cases may involve an individual who enters the campus area as an invitee or a faculty, staff, or student from the institution.

Jurisdictional questions were before the court. An Illinois case involved the question of whether the lower court had jurisdiction over the personal injury case of a gymnastics student which resulted from the actions of a university faculty member.[265] While the state supreme court could decide the merits, the lower court had jurisdiction, and the matter was remanded for a decision on the merits. In Missouri, the plaintiff alleged that the enactment of a law which removes the state's sovereign immunity defense should allow her case to be reopened when judgment was rendered prior to the enactment of the new law.[266] The retroactive nature of the act was not intended to reopen court decisions already rendered. In Colorado, the waiving of sovereign immunity injuries resulting from the operation of public hospitals, correctional facilities, and jails did not apply to injuries to animals treated at a public university's veterinary hospital.[267] Ohio decided that a statute which prevented tort action against an architect or contractor more than ten years after the completion of the project was constitutional.[268] A residence hall student attempted to sue the architect for design flaws which were the cause of his hand going through a glass door. A California college emergency technical training course was immune from liability by state law.[269] The federal district court found that the state of Louisiana had sovereign immunity in a case involving claims from a fall off a public university's assembly center stage.[270]

---

264. McCartney v. Superior Court, 273 Cal. Rptr. 250 (Dist. Ct. App. 1990).
265. Healy v. Vaupel, 549 N.E.2d 1240 (Ill. 1990).
266. Anderson v. Central Mo. State Univ., 789 S.W.2d 41 (Mo. Ct. App. 1990).
267. State v. Hartsough, 790 P.2d 836 (Colo. 1990).
268. Sedar v. Knowlton Constr. Co., 551 N.E.2d 938 (Ohio 1990).
269. McAlexander v. Siskiyou Joint Community College, 272 Cal. Rptr. 70 (Ct. App. 1990).
270. Hinson v. Belcher, 736 F. Supp. 711 (M.D. La. 1990).

Specific claims for injury were in the process of being litigated. A Wyoming case involved a college professor who was charged with causing fear and apprehension of imminent bodily contact when he jumped up, ran towards the student's table yelling, and banged his fist on the table.[271] The professor's summary judgment motion was denied, and the case was remanded for adjudication.

Several cases involved injuries sustained while individuals were walking on campus. A Georgia appeals court affirmed the lower court grant of summary judgment to the institution as the plaintiff failed to show that the cause of her fall and injuries was a hole later discovered in the concrete parking deck.[272] In Ohio, the court found that the institution was not liable for the natural accumulation of ice and snow on a gravel parking lot which the institution kept plowed.[273] However, a New York court found that the defective repair of a sidewalk raised issues of fact.[274] The subcontractor who completed the repairs was denied summary judgment even though the work was accepted.

Finally, several players injured during athletic competition brought personal injury claims. A soccer player was unsuccessful in his claim against opponents and the university for improper supervision.[275] In another case, a Minnesota rugby player who sustained a broken neck in the second Saturday match at a Louisiana rugby tournament was unsuccessful in claims against the university and the tournament.[276] The court found that the institution sponsoring the tournament was not responsible for the preparedness of the members of a visiting team participating in the tournament.

Claims regarding injury to one's good name or slander and defamation were before the courts. An attorney who was acquitted of extortion charges brought malicious prosecution charges against the president and other officials of a private college.[277] The attorney was unable to show the charges made by the institution were false. A medical professor's action of filing complaints with both senior administrators at the university and the AAUP constituted invited libel in the forwarding of allegedly libelous letters and memoranda by the department chair.[278] A student convicted of murder on the night he attended a fraternity party failed to state a cause of action against the fraternity for defamation or personal injury due to

271. Jung-Leonczynska v. Steup, 782 P.2d 578 (Wyo. 1989).
272. Evans v. Green, 391 S.E.2d 10 (Ga. Ct. App. 1990).
273. Coletta v. University of Akron, 550 N.E.2d 510 (Ohio Ct. App. 1988).
274. Sternbach v. Cornell Univ., 558 N.Y.S.2d 252 (App. Div. 1990).
275. Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989).
276. Fox v. Board of Supervisors, 559 So. 2d 850 (La. Ct. App. 1990).
277. Hardge-Harris v. Pleban, 741 F. Supp. 764 (E.D. Mo. 1990).
278. Sophianopoulos v. McCormick, 385 S.E.2d 682 (Ga. Ct. App. 1989).

incarceration.[279] Finally, a faculty member involved in a controversy over parking was unsuccessful in his claim of false arrest.[280] The court found that the faculty member consented to arrest when he climbed into his illegally parked car which was then towed away.

Workers' Compensation. Injury while on the job raised questions about the payment of workers' compensation insurance. Questions revolve around whether the worker is qualified to receive salary compensation or vocational rehabilitation benefits and the amount of awarded benefits.

Qualification to receive compensation was at issue in a number of state cases. In a case reported last year,[281] the court, on appeal, affirmed a lower court decision covering a college employee for injury received while doing volunteer work for the college's charitable foundation.[282] In another case, the court found that workers' compensation was not the only remedy for a charge of intent to inflict emotional distress alleged against a plaintiff's supervisor.[283] The plaintiff, unable to work due to psychological stress created by the supervisors harassment, raised significant issues to thwart a summary judgment motion. A Colorado court ruled that the worker was qualified to receive temporary disability until a vocational rehabilitation program commenced.[284] A Wisconsin court affirmed that a nineteen-year-old Illinois worker was found qualified for disability payments and rehabilitation even though he had only worked for the company one month at the time of injury.[285] The court also ruled that the Illinois workers' compensation board was the appropriate agency to approve the plaintiff's five-year engineering degree as an appropriate compensat. : vocational rehabilitation plan. A Vermont court found that a university student serving as a volunteer fireman did not qualify for workers' compensation stemming from an injury while on duty with the university-sponsored fire department.[286] Foster parents were not employees who qualified for workers' compensation.[287] A college racket sport instructor, injured but not totally disabled, qualified for partial disability compensation.[288] The spouse of a claimant who committed suicide, allegedly due to work related

279. Van Mastrigt v. Delta Tau Delta, 573 A.2d 1128 (Pa. Super. Ct. 1990).
280. Beraho v. South Carolina State College, 394 S.E.2d 28 (S.C. Ct. App. 1990).
281. *See* The Yearbook of Education Law 1990 at 240, Kim v. Mt. Hood Community College, 769 P.2d 239 (Or. Ct. App. 1989).
282. Mt. Hood Community College v. Kim, 795 P.2d 1100 (Or. Ct. App. 1990).
283. King v. Brooks, 788 P.2d 707 (Alaska 1990).
284. Northeastern Junior College v. Kenyon, 783 P.2d 853 (Colo. 1989).
285. Beloit Corp. v. State Labor and Industry Review Comm'n, 449 N.W.2d 299 (Wis. Ct. App. 1989).
286. Wolfe v. Yudichak, 571 A.2d 592 (Vt. 1989).
287. Murray State College v. Akins, 794 P.2d 1218 (Okla. Ct. App. 1990).
288. McGehee v. Broward Community College, 559 So. 2d 368 (Fla. Dist. Ct. App. 1990).

stress, did not qualify for workers' compensation.[289] In a related case, the workers' compensation board was not authorized to award attorney fees and penalties.[290]

Additional cases determining eligibility to receive workers' compensation follow. The change in a private university employee's medical condition made her eligible for compensation for permanent, total disability.[291] An injured North Dakota worker was eligible for rehabilitation training for a future job which would return him to 90% of his pre-injury earning capacity, but a two-year associate degree in accounting was not sufficient to achieve that end.[292] In a Florida case, the court, on appeal, found that a lump sum payment was insufficient for a disabled worker injured at the college.[293] Additionally, an employer university attempted to recover credit against employee compensation payments.[294] Credit was sought and denied by the courts for a third party settlement paid to surviving family members following the employee's fatal automobile accident.

Contract Liability. Legislative authority was at issue in a Minnesota case where a public university entered into contract with a private firm to install an alternate fuel system at its heat plant.[295] The contract was contingent on continued appropriations by the legislature. The court found that appropriations to the institution's noninstructional funds were continued legislative appropriations, but a bill passed to pay only the interest on bonds, which were part of the contract but not the principle amount due, represented action by the legislature to cancel the project. A Wisconsin court found that action by a subcontractor against the public university was barred by eleventh amendment immunity.[296] A college's action against a manufacturer of building products was barred by the statute of limitations.[297] The court further ruled that notification in 1979 of the possible defect with the recommendation to seek independent inspection removed any deceptive practice claim. A Vermont court found in a product liability claim that the statute of limitations accrued at the time the institution became aware that asbestos was used in the building's plaster, and not at the time of installation.[298] The District of Columbia Court of Appeals refused to

289. Holford v. Regents of Univ. of Cal., Los Alamos Nat'l Laboratory, 796 P.2d 259 (N.M. Ct. App. 1990).
290. Ashley v. University of Or. and SAIF, 787 P.2d 506 (Or. Ct. App. 1990).
291. Styron v. Duke Univ. Hosp., 385 S.E.2d 519 (N.C. App. 1989).
292. Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989).
293. Tallon v. University of Miami, 564 So. 2d 1202 (Fla. Dist. Ct. App. 1990).
294. Bridges v. Texas A & M Univ. Sys. 790 S.W 2d 831 (Tex. Ct. App. 1990).
295. First Trust Co., Inc. v. State, 449 N.W.2d 491 (Minn. Ct. App. 1989).
296. Romco, LTD. v. Outdoor Aluminium, Inc., 725 F. Supp. 1033 (W.D. Wis. 1989).
297. Northampton County Area Community College v. Dow Chemical, 566 A 2d 591 (Pa. Super. Ct. 1989).
298. University of Vt. v. W.R. Grace & Co., 565 A.2d 1354 (Vt. 1989).

certify an interlocutory on the construction of a track facility which is pending before a federal district court.[299]

A question of a private right of action against a federal contractor was at issue in a case involving the Rocky Flats nuclear munitions manufacturing facility.[300] Private individuals brought fraud charges against individual employees of a federal project operated by a California university. The court ruled that private parties could bring such claims against employees working at a federally owned facility under the *qui tam* provisions of the False Claims Act.[301] Jurisdiction under the doctrine of *nullum tempus occurit regi*, which protects state agencies against the statute of limitation, was applied to the claim of a public college and state facilities authority against the building contractor of a student union building.[302] In another jurisdictional case, the court affirmed the right of a paint supplier faced with a suit by a public college to remove the case to federal court under the concept of diversity of jurisdictions.[303] However, a North Carolina court ruled that the claims of a contractor and subcontractor against a public institution based on certain omissions of the state during the construction of a university library were barred by sovereign immunity.[304]

An Alabama case involved the violation of a contractor's due process rights in the termination of a contract. The federal district court granted summary judgment to the institution, and the case was remanded on appeal.[305] On remand the federal district court again issued summary judgment in favor of the university hospital, and the court of appeals affirmed that decision.[306] The court found that the breach of contract claim was not sufficient to support either a constitutionally protected property interest or a claim under section 1983. Another court denied a summary judgment in a conflict over the intent of the United States Army and a university to enter into a contract to deliver educational programs on the base.[307]

Product liability was at issue in a case involving asbestos. A jury trial found that asbestos used in plaster was not a significant health risk for asbestos related disease because asbestos levels found in the building were no higher than those occurring outside in the environment. On appeal

---

299. Georgetown Univ. v. Sportec Int'l, 572 A.2d 119 (D.C. 1990).
300. United States v. Rockwell Int'l Corp., 730 F. Supp. 1031 (D. Colo. 1990).
301. 31 U.S.C. 3730(b) *et seq.* (1982).
302. New Jersey Educ. Facilities Auth. v. Conditioning Co., 567 A.2d 1013 (N.J. Super. Ct. App. Div. 1989).
303. University of R.I. v. A.W. Chesterton Co., 721 F. Supp. 400 (D.R.I. 1989).
304. Bolton Corp. v. State, 383 S.E.2d 671 (N.C. Ct. App. 1989).
305. *See* The Yearbook of Education Law 1989 at 243, Medical Laundry Serv. v. Board of Trustees of Univ. of Ala., 840 F.2d 840 (11th Cir. 1988), *modf'd*, 856 F.2d 128 (11th Cir. 1989).
306. Medical Laundry Serv. v. Board of Trustees of Univ. of Ala., 906 F.2d 571 (11th Cir. 1990).
307. Webster Univ. v. United States, 20 Cl. Ct. 429 (1990).

the court refused to hear the case finding that the institution had failed to refute the evidence presented at trial.[308]

A carpet installer was successful in maintaining that the contract did not contain a specific completion date and that he acted promptly in completing the installation in the student living units.[309] The court also held that the institution was responsible for both the unanticipated extra preparation work on the floors and installer overtime to meet the school's fall occupancy date.

Negligence. The injury of a student who lost his arm while cleaning a printing press was before the courts.[310] The manufacturer of the printing press sued the institution as a third party for failure to properly supervise the student. The court noted that state law failed to recognize claims based on the active-passive negligence doctrine. The court dismissed the case for lack of diversity.

Criminal acts resulted in negligence claims. In a California case, a plaintiff arrested and released with charges being dropped sued the institution for malicious prosecution.[311] The court found that the act of dismissing charges alone would not support a malicious prosecution claim. In another case, the court found no negligence on the part of the institution in the criminal conduct of the plaintiff's ex-husband.[312] The plaintiff was abducted by her ex-husband at gunpoint from a university parking lot and was injured in a shooting incident. A Texas court found that a charge against a university for negligence was barred by the intentional tort exception to the tort claims act.[313] In this case, the plaintiff, who had reported that a dormitory door was being left unlocked because a key was broken off in the lock, was raped in her dormitory room. In a case involving alcohol consumption at a fraternity party where a fire was alleged to have been set by the minor student in another fraternity, neither the national fraternity nor the university was found negligent.[314] The minor student was unable to show that the failure of the university and the national fraternity to control alcohol consumption was the cause of the fire. The court commented on the perceptions of the relationship between students and the university which it characterized as "antithetical to the heightened duty" proposed in this case.[315]

Alcohol consumption was at issue in another case. An intoxicated

---

308. Board of Trustees of Johnson County Community College v. National Gypsum Co., 733 F. Supp. 1413 (D. Kan. 1990).
309. Turner Brooks of Ohio, Inc. v. Bowling Green State Univ., 554 N.E.2d 956 (Ohio Ct. Cl. 1989).
310. Leick v. Schnellpressenfabrik Ag Heidelberg, 128 F.R.D. 106 (S.D. Iowa 1989).
311. Farajpour v. University of S. Cal., 270 Cal. Rptr. 356 (Ct. App. 1990).
312. Klobuchar v. Purdue Univ., 553 N.E.2d 169 (Ind. Ct. App. 1990).
313. Delaney v. University of Houston, 792 S.W.2d 733 (Tex. Ct. App. 1990).
314. Alumni Assoc. v. Sullivan, 572 A.2d 1209 (Pa. 1990).
315. *Id.* at 1213.

football player who was previously involved in an incident of violence against the residence hall staff, assaulted a student at a party in a residence hall where alcohol was consumed.[316] The assaulted student sued the university for a breach of contract and negligence in its failure to provide a secure and properly supervised dormitory environment. The court rejected both claims relying on the relationship between college students and today's institutions where, without "*in loco parentis*," the duty of care to safeguard students' welfare is considerably lessened.[317]

Other cases involved negligence on university premises. An Alabama court held that the public institution was immune from prosecution of the claims of a student injured during a class.[318] However, a New York court found that the failure of the institution's placement office to change the name of the plaintiff represented a triable claim.[319] In another case, the court found that evidence raised viable issues as to whether the institution was negligent in its failure to foresee that a hole in an athletic field might cause injury.[320] Another institution was not found negligent for the accumulation of snow and ice on its steps during a storm which resulted in the plaintiff's fall,[321] nor was Kent State University found negligent in the maintenance of its residence hall stairs.[322] In the drowning of a handicapped invitee, a public institution was found to be immune from prosecution.[323] The failure of the institution to provide lifeguards did not come under the "defects of the land" nor "real estate exceptions" to immunity.[324] Finally, a New Jersey court denied summary judgment to a fraternity in a negligence suit regarding a fall on the sidewalk in front of the fraternity.[325]

Deceptive Practices. In Illinois, an institution was charged with deceptive practices because it did not have an accredited nursing program. Plaintiffs sued the institution after they were informed in a second year class that the program was not accredited.[326] The court granted summary judgment to the institution which it found never claimed to be accredited.

Defamation. In California, a faculty member and former program chair charged that a report on undergraduate courses was defamatory.[327] The court ruled that the report of the committee was

316. Crow v. State, 271 Cal. Rptr. 349 (Ct. App. 1990).
317. *Id.* at 359.
318. Riggs v. Bell, 564 So. 2d 882 (Ala. 1990).
319. Harris v. New York Univ., 556 N.Y.S.2d 586 (App. Div. 1990).
320. Henig v. Hofstra Univ., 553 N.Y.S.2d 479 (App. Div. 1990).
321. Goldman v. State, 551 N.Y.S.2d 641 (App. Div. 1990)
322. Baldauf v. Kent State Univ., 550 N.E.2d 517 (Ohio Ct. App. 1988).
323. Musheno v. Lock Haven Univ. of Pa., 574 A.2d 129 (Pa. Commw. Ct. 1990).
324. *Id.* at 131.
325. Gilhooly v. Zeta Psi Fraternity, 578 A.2d 1264 (N.J. Super. Ct. Law Div. 1990).
326. Lidecker v. Kendall College, 550 N.E.2d 1121 (Ill. App. Ct. 1990).
327. Rosenthal v. Regents of the Univ. of Cal., 269 Cal. Rptr. 788 (Ct. App. 1990).

privileged communication made without malice and was an opinion not subject to a libel claim.

A Pennsylvania assistant basketball coach sued a Kentucky newspaper for defamation.[328] A high school basketball recruit retracted a claim that the assistant coach had offered him money to play basketball at a Pittsburgh university. A year later the Kentucky publisher printed the information on the claim, but not the basketball players retraction. The court, finding that no public controversy existed at the Pittsburgh school prior to the publication of these allegations, ruled that the plaintiff was not a limited purpose public figure and remanded the case for a determination of whether the newspaper acted with malice.

Educational Malpractice. A former Nebraska basketball player, who after four years of eligibility failed to receive a degree and whose tuition was paid by the university for attendance at a private elementary school, sued the private institution under a claim of educational malpractice and breach of contract.[329] The player claimed the institution recruited him knowing he lacked the skills to be successful in college and advised him to take "bone head courses" during his four years of eligibility to play basketball, leaving him without an education or a degree. The court, finding no basis for any of his claims, including the malpractice claim, commented that "[e]ducational malpractice is a tort theory beloved by commentators, but not by courts. While often proposed as a remedy for those who think themselves wronged by educators, . . . educational malpractice has been repeatedly rejected by the American courts . . . ."[330]

A plaintiff sued an institution for both breach of contract and negligence claims because of a three month delay in the receipt of his master's degree.[331] The plaintiff, who spoke to his advisor about his research project, thought he had approval and went to Yellowstone National Park to do his research. The National Park, under its own regulations on research permits, refused to allow research unless the party had an approved proposal. The plaintiff subsequently changed his committee, conducted research, received the degree, but claimed the delay caused loss of three months earnings. The court rendered judgment for the institution finding a communication problem and plaintiff's failure to pursue all avenues to prevent the delay as the basis of this problem. In an Indiana case, the court found that educational malpractice was not a constitutional claim and was not cognizable under a section 1983 claim.[332]

Medical Malpractice. Several medical malpractice cases were brought against governmental entity owned hospitals or their staff. Several courts

328. Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990).
329. Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).
330. *Id.* at 1327.
331. Smith v. Ohio State Univ., 557 N.E.2d 857 (Ohio Ct. Ct. 1990).
332. Bishop v. Indiana Technical Vocational College, 742 F. Supp. 524 (N.D. Ind. 1990).

ruled that the hospital and its staff were protected by sovereign immunity.[333] In a case on the appropriateness of the prescriptions used in a heart transplant, the court found that the decision on the combination of drugs to be prescribed was discretionary, giving the physician immunity.[334] In Virginia, the court found that a physician was not negligent, nor was he acting as an agent of the hospital, in a patient injury claim.[335]

Several cases involved actions of the physicians. For example, a Florida case raised questions of whether, after urological surgery, the physicians were forthcoming about the nature of a leg problem and whether the physicians were acting as state medical school professors or as private physicians.[336] On appeal another court found that questions needed to be resolved as to whether negligence was the cause of the injury to a patient during surgery performed by a surgical resident of the university hospital.[337] Finally, an insurance company was unable to state a claim against the physician and hospital it insured, which lost a malpractice case, requiring the insurance company to settle the malpractice claim.[338]

Indemnification. In one case, a private university brought a claim against a liability insurance company for failure to defend the institution in several legal claims.[339] The court remanded the case finding that the institution possessed a right to recover for each separate legal expenditure incurred because of the insurance company's refusal to defend. In another case, the court denied summary judgment finding it necessary to determine whether a physician was acting as a state employee or was under a private practice plan during surgery which resulted in a malpractice claim.[340] If operating as a private physician, the physician's insurer is liable; if operating as a state employee, the institution is liable.

ANTITRUST

The Sherman Antitrust Act was at issue in a case involving an Oklahoma public university and a private book dealer.[341] The institution extended credit to students for the purchase of books in the school operated bookstore. The court found that state action immunity exemptions under

---

333. Blue v. Pursell, 793 S.W.2d 823 (Ky. Ct. App. 1989); Joplin v. University of Mich., Bd. of Regents, 459 N.W.2d 70 (Mich. Ct. App. 1990).
334. DeRocco v. Harper Grace Hosp., 451 N.W.2d 549 (Mich. Ct. App. 1989).
335. Floyd v. Humana of Va., Inc., 787 S.W.2d 267 (Ky. Ct. App. 1990).
336. Martin v. Drylie, 560 So. 2d 1285 (Fla. Dist. Ct. App. 1990).
337. Shepard v. Sisters of Providence in Or., 793 P.2d 1384 (Or. Ct. App. 1990).
338. Aetna Casualty & Sur. Co. v. Oregon Health Sciences Univ., 793 P.2d 320 (Or. 1990).
339. Duke Univ. v. St. Paul Mercury Ins. Co., 384 S.E.2d 36 (N.C. Ct. App. 1989).
340. Frontier Ins. Co. v. State, 550 N.Y.S.2d 243 (Ct. Cl. 1990).
341. Cowboy Book, Ltd. v. Board of Regents for Agriculture and Mechanical Colleges, 728 F. Supp. 1518 (W.D. Okla. 1989).

the "Parker Doctrine" applied to the institution and its bookstore because a "clear articulation" existed which substantiated that the policies and operation of the public institution made it a state entity.

PATENTS

In the lead off case to this section, a plaintiff claimed the rights to cellular bodily materials extracted from him by researchers.[342] The plaintiff not only claimed the right to patented cell lines, but also to conversion of those materials into economic gain. Remanding the case, the California Supreme Court found that the institution and its physician researchers failed to adequately inform the plaintiff of the uses of the bodily material being extracted which constituted a breach of fiduciary duty and informed consent. However, the court denied his right to economic conversion.

A patent infringement charge was brought against a Tennessee university and two of its professors.[343] The plaintiff alleged that the university and the faculty had infringed his patent on a structural design by using it as part of a proposal for a defense contract. The court found that the university had an absolute immunity from prosecution, but denied the defendant's motion to dismiss because questions existed as to whether the professors had qualified immunity. In another patent infringement case, the court ruled that venue is appropriate in any district where the corporation does business and is subject to personal jurisdiction.[344]

The state of New York passed a law called the Standardized Testing Act[345] requiring the disclosure of test questions, answers, answer sheets, and related research on the tests. The Association of American Medical Colleges sued alleging a conflict with and violation of the federal copyright laws.[346] The federal district court agreed and granted a motion for summary judgment in favor of the Association.

In another case, a patent examiner denied a patent to a professor for a chemical compound used in the treatment of cancer because it had appeared in a "printed publication."[347] The court found that a thesis is not a "printed publication" within the meaning of the statute and reversed the examiner's ruling.

---

342. Moore v. Regents of University of Cal., 793 P.2d 479 (Cal. 1990).
343. Kersavage v. University of Tenn., 731 F. Supp. 1327 (E.D. Tenn. 1989).
344. Florida Bd. of Regents v. Armesto, 563 So. 2d 1080 (Fla. Dist Ct. App. 1990).
345. New York Educ. Law 340-348 (known as the "Truth in Testing Act").
346. Association of Am. Medical Colleges v. Carey, 728 F. Supp. 873 (N.D.N.Y. 1990).
347. *In re* Cronym, 890 F.2d 1158 (D.C. Cir. 1989).

ESTATES and WILLS

A Georgia court found that the institution had not failed to comply with the wishes of the donor in the disbursement of a scholarship fund.[348] The court refused to return the gift to the donor.

348. Hawes v. Emory Univ., 374 S.E 2d 328 (Ga. Ct. App. 1988).