

APPENDIX A

OVERVIEW OF THE LAW ON TENURE

NOTES:

I. Judicial deference

Courts generally defer to colleges in determining whether a tenure candidate has met the qualifications to obtain tenure. However, courts are more likely to intervene if there is evidence of discrimination or failure to follow procedures.

A. The principle of judicial deference

The principle of judicial deference in tenure decisions was articulated particularly well in the case of *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (E.D.Pa. 1974), in which an assistant professor contended that he was denied tenure because of his political activities. The court found that the professor's political activities had not influenced the decision to deny him tenure and stated:

This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision. *The courts will not serve as a Super-Tenure Review Committee. Id.* at 1272 (emphasis added).

This language regarding the inability of a court to serve as a "super-tenure committee" has been cited favorably by numerous federal appellate courts, *see, e.g. Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

B. Remediating discrimination trumps judicial deference

Courts will suspend their deference to academic decision making when allegations of discrimination exist. For example in *Villanueva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir. 1991), the court stated as follows:

[I]t is not the function of the courts to sit as 'super-tenure' committees. We are hesitant to intrude upon academic freedom.... At the same time, we recognize that Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, within educational settings as well as without. Academic freedom does not embrace the freedom to discriminate. (Internal quotations and citations omitted.)

Allegations of discrimination require a court to look at comparators to see if the candidate was treated differently from similarly qualified candidates. An excellent example is the case of *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989), in which Professor Brown alleged that she did not receive tenure in the English department because she was held to higher standards than prior candidates who were male. The court summarized Professor Brown's evidence of disparate treatment as follows:



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Brown introduced evidence showing that over the six year period prior to the time the University denied her tenure no single tenure candidate in the English department had a second published book, and that all the books published by tenure candidates in the department were based on the candidates' dissertations. (This contrasts with testimony from the President suggesting that Brown's qualifications were inadequate because she had published only one book, and that was based on her dissertation.) One male English teacher who was granted tenure shortly after the President made his final decision to deny Brown tenure had not written any book, and while he had written several articles, none of them had received reviews. The evidence also showed that during this time Brown was the only candidate in the English department to be denied tenure after having published a book and having it reviewed. *Id.* at 344, n.6.

A jury concluded that Professor Brown was the victim of sex discrimination and ordered the university to pay her \$200,000 and grant her tenure. The jury verdict was upheld on appeal.

C. Remedying discrimination outweighs confidentiality of reviews

Prior to 1990, many universities were able to preserve the confidentiality of peer tenure reviews requested in discrimination suits. However, in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court held that universities could be required to turn over confidential peer reviews to individuals alleging discrimination. In that case, a female professor alleged that five male faculty had received more favorable treatment than she did and requested "(1) the confidential letters written by [her] evaluators; (2) the department chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure ...; and (4) comparable portions of the tenure-review files of the five males." *Id.* at 186. The Supreme Court held that the university must turn over the documents, reasoning that "if there is a 'smoking gun' to be found that demonstrates discrimination in the tenure decisions, it is likely to be tucked away in the peer review files." *Id.* at 193. The Court acknowledged the value of confidentiality in the peer review process but found that it was outweighed by the need to eliminate discrimination. Furthermore, the Court rejected the university's arguments that confidential peer review files are protected by academic freedom.

II. Failure to follow procedures can provoke court intervention

Courts are not eager to second guess tenure decisions where minor deviations in procedure occurred, but they will intervene if they determine that an institution did not substantially comply with its tenure procedures. For example, in *Loebel v. New York University*, 680 N.Y.S.2d 495, 497-498 (App. Div. 1998), the court stated:

It is now settled that courts should not invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion and tenure, especially in institutions of higher learning. Where a university has adopted rules or guidelines in such areas, the courts will only intervene where there has not been substantial compliance with those procedures.



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In the *Loeb* case, the university agreed to re-review its tenure denial but did not consult with the professor's department chair in selecting members of the committee. The court held that "failure to consult with [the plaintiff's] departmental chairwoman on the make-up of the re-review committee was not such a substantial deviation from New York University's rules and procedures as to justify" overturning the committee's decision.

In contrast, in *Sackman v. Alfred University*, 717 N.Y.S.2d 461 (Sup. Ct. 2000), the court found that such a substantial deviation in procedures had occurred that the university was required to start its tenure process all over again. The court stated that it "may not substitute its judgment for the judgment and discretion of Alfred University, but may determine whether Alfred University's action in denying tenure to Dr. Sackman violated the Handbook and was arbitrary and capricious" *Id.* at 464. The handbook required that the chairperson shall "through classroom visitations" keep up-to-date on the teaching of a tenure candidate. Yet the department chair only visited Dr. Sackman's classroom one time, and the P&T committee found the information on teaching skills lacking. The court therefore decided to intervene, reasoning as follows:

The interpretation of an unambiguous provision in the Handbook is a function of the Court ... Classroom visitations means two or more. This Court cannot change a plural requirement into a single one. Alfred University violated its own tenure policy in an arbitrary and capricious manner by making an evaluation of Dr. Sackman which included only one classroom visit by the Chairperson. *Id.* at 465 (internal citations omitted).

III. Candor and clarity in early evaluations of candidates

In litigation, unsuccessful candidates often claim that they were not properly evaluated by their department chair and therefore received inadequate guidance on how to obtain tenure. The following two cases provide contrasting examples.

A. University vindicated

In *Karle v. Board of Trustees of Marshall University*, 575 S.E.2d 267 (W.Va. 2002), Professor Karle alleged that the university denied her due process because it did not follow its own tenure evaluation procedures and gave her inadequate guidance. The official university handbook required that she be evaluated every year by her department chair or dean, but Karle was only evaluated in four out of her six years as a junior faculty member. However, the court held that the violation of the handbook was immaterial given the exceptionally detailed and candid evaluation Karle received from Lynne Welch, dean of the School of Nursing.



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In Karle's second evaluation, Dean Welch rated her overall performance as "Satisfactory" and noted that she needed improvement in the area of "Scholarly/Creative Activities." Dean Welch further noted that Karle had "not presented programs or papers, published or done research." *Id.* at 269. In her third evaluation, Karle was rated "Satisfactory" overall with deficiencies in the "Scholarly/Creative Activities" area. During this evaluation, Dean Welch again noted that Karle "needed to pursue her doctorate and publications." *Id.* It was further noted that students had complained that she failed to keep office hours. In the fourth evaluation, Dean Welch gave Karle an overall rating of "Needs Improvement." In the evaluation, Dean Welch noted that Karle had failed to meet with students and that she needed to pursue doctoral studies, research, and publications. In addition, Dean Welch met with Karle every year to evaluate her performance, at which time requirements for tenure and Karle's deficiencies were discussed. The court held that Professor Karle "was indisputably and fully aware of the requirements for tenure, and was advised repeatedly throughout her career of perceived deficiencies in her progress toward tenure." Consequently, the court concluded that "any failure by the University to provide formal notice, as a result of the missed annual evaluations, does not under these facts constitute a denial of due process, inasmuch as the appellant had previously and repeatedly received actual notice of her deficiencies." *Id.*

B. University held liable

In *Craine v. Trinity College*, 791 A.2d 518 (Conn. 2002), a woman who was denied tenure in the chemistry department alleged sex discrimination and that the college breached its employment contract to her by not following the faculty manual's requirements regarding candor in evaluations. A jury awarded her \$13 million, which was later reduced to approximately \$1 million after numerous appeals. The Supreme Court of Connecticut found that the college had indeed breached its employment contract with her.

The faculty manual stated that, at the second reappointment, "particular attention is given to a candidate's prospects for tenure, and the [Appointments and Promotions] Committee shall indicate as clearly as possible those areas to which a candidate needs to address special attention before the next scheduled review." *Id.* at 527. The manual further stated that "a negative decision must be based on failure to meet the standards of improvement derived from expectations for rank and specified in the last letter of reappointment." *Id.* at 542.

The court found that the college had not lived up to its obligations under that handbook and reasoned as follows:

Despite the faculty manual's directive to be as specific as possible and to pay particular attention to the candidate's prospects for tenure, the defendant was generally positive about the plaintiff's work and vague about her deficiencies. In an academic setting where research projects take place over the course of years, the warning signs, if there were any, that the plaintiff was not going to meet those standards should have been apparent to the defendant after four years of a six year tenure track. The defendant claims that there were such signs and points to the language of the second letter of reappointment as evidence that the plaintiff was given fair warning and that the defendant complied with the contract. The jury concluded that the warning was not specific enough, however, and we conclude that the evidence supports that determination. *Id.* at 541 (internal quotations omitted).



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IV. Collegiality and the law

While academics often debate whether collegiality should play a role in tenure decisions, courts are virtually unanimous that collegiality is a permissible criterion. A 2001 article that reviewed dozens of cases concluded that “courts have affirmed at every turn the use of collegiality as a factor in making decisions concerning faculty employment, promotion, tenure, and termination.” See Mary Ann Connell & Frederick G. Savage, “The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions,” 27 *Journal of College and University Law* 833, 858 (2001). The article stated that while courts recognize that collegiality can sometimes be used as a pretext for discrimination, courts have rejected such claims in the overwhelming majority of published cases. Furthermore, the article said that “while the courts have taken seriously assertions that the use of collegiality was a violation of academic freedom or free speech, they have held in favor of the college or university in the great majority of the cases, finding often that the faculty conduct in question involved petty, personal disputes not protected by the First Amendment.” *Id.* at 854. The American Association of University Professors (AAUP) takes the position that collegiality should not be considered a separate criterion but rather should be considered as part of the traditional three criteria of teaching, research, and service. While some colleges follow the AAUP’s recommendation, many others explicitly list collegiality as a criterion in their tenure policies.

V. Duration of tenure litigation

The nonlegal costs of trial are staggering, and tenure cases can be long and drawn out. The following are some examples of extremely lengthy cases:

In *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1990), the plaintiff was originally denied tenure in 1979 and sued alleging sex discrimination. After a lengthy jury trial, the jury found that the university should pay the plaintiff \$200,000 and reinstate her as a tenured professor. The jury verdict was affirmed on appeal. Legal proceedings did not end until January 1990, and the plaintiff returned as a tenured faculty member more than 10 years after being denied tenure.