JUDICIAL DEFERENCE TO ACADEMIC DECISIONS: EVOLUTION OF A CONTROVERSIAL DOCTRINE

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Abstract

Over four decades ago, the U.S. Supreme Court ruled that students were not entitled to robust due process protections when public institutions dismissed them on academic grounds. A subsequent Supreme Court decision reinforced the notion that courts should defer to academic decisions that were based on "genuine professional judgment." In the years since these decisions were announced, federal (and some state) courts have shown considerable deference to academic judgments in cases brought by faculty challenging denials of promotion or tenure, and by students challenging academic dismissal decisions, often dismissing the lawsuit or awarding summary judgment to the institution, seemingly without a thorough review of the institution's supporting evidence for its exercise of "genuine professional judgment." Although scholars have roundly criticized judicial deference, especially when discrimination claims are before the court, deference persists to this day in most, but not all such litigation. This article traces the development of judicial deference in decisions involving faculty and student plaintiffs, discusses why courts refuse to defer in a few cases, and suggests implications for college and university defendants facing litigation involving academic judgments.

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INTRODUCTION

Litigation against colleges and universities, once infrequent,[1] has become ubiquitous, as increasing state and federal regulation and broadened protections for the rights of employees and students have virtually erased any notion that, in the eyes of the law, academic organizations differ substantially from business organizations in most respects. In fact, higher education, as a sector, is more heavily regulated than most, if not all, businesses.[2]

Prior to the 1970s, most courts deferred to the decisions of colleges and universities, using a form of the business judgment rule[3] that encouraged a judicial "hands off" approach to the decisions of those with superior knowledge and expertise in the ways of academe.[4] The civil rights movement[5] and the demise of the *in loco parentis* doctrine[6] encouraged students to challenge colleges' decisions made about their behavior, both academic and nonacademic, with, as will be seen, more success in their challenges to discipline on the basis of nonacademic behavior.[7] However, courts were more likely to defer to the judgment of academics for decisions involving hiring,[8] promotion and tenure of faculty[9], or curriculum,[10] believing that judicial competence to review these issues was inferior to that of the academic decision-makers. This belief was, in part, encouraged by two decisions by the U.S. Supreme Court[11] that ordered deference to a university's academic

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1 Government Regulation of Higher Education 1 (Walter C. Hobbs ed., 1978); Harry Edwards & Virginia Davis Nordin, Higher Education and the Law 5 (1979); Robert O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept*?, 36 J.C. & U.L. 729, 741 (2010).

2 *See generally* Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Room*, 36 J.C. & U.L. 749 (2010).

3 The U.S. Supreme Court has noted that judicial review of a business decision is typically deferential under the business judgment rule. *See, e.g.*, Kamen v. Kemper Fin. Servs., 500 U.S. 90 (1991).

4 Ernest Gellhorn & Barry B. Boyer, *The Academy as a Regulated Industry*, Government Regulation of Higher Education, *supra* note 1, at 34. (The courts' "active judicial role in the discipline arena has not been transferred to the review either of academic judgments or of administrative decisions … Individual academic judgments have long been considered part of the faculty's academic freedom.")

5 *See generally* Thomas C. Holt, The Movement: The African American Struggle for Civil Rights (2021).

6 Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 Higher Educ. Rev. 65 (2011).

7 *See* Goss v. Lopez, 419 U.S. 565 (1975). Student challenges to discipline resting on academic grounds are discussed *infra* Part II. See also Healy v. James, 408 U.S. 169 (1972) (public college could not deny student organization recognition unless organization refused to comply with reasonable rules).

8 *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974), *infra* text accompanying notes 47–50.

9 *See, e.g.*, Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

10 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (ruling that a Louisiana statute mandating the teaching of "creation science" violated the Constitution's Establishment Clause). *See also* Yacovelli v. Moeser, 324 F. Supp. 2d 760 (M.D.N.C. 2004) (rejecting legal challenge to university's requirement that students read a book about Islam) and Subhail v. Univ. of the Cumberlands, 107 F. Supp. 3d 748, 757 (E.D. Ky. 2015) (rejecting student's breach of contract claim for adding required courses to the curriculum. "Universities are afforded great deference in developing their academic curriculum.").

11 Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

judgment about the evaluation of students; but it was even more prevalent when a court was asked to review, and the plaintiff hoped, to reverse, a negative promotion, tenure, or dismissal decision.[12]

Most judicial rulings in the early post-1970 period involved challenges by students using constitutional due process or first amendment theories to challenge discipline.[13] In the area of student discipline, as opposed to the evaluation of student academic performance, courts were less likely to defer to the institution.[14] And later, when students began challenging institutional decisions related to requests for disability accommodations,[15] courts subjected the basis for these academic decisions to somewhat more scrutiny than those grounded in contract or constitutional claims.[16]

There were relatively few challenges by faculty to employment decisions until, in 1972, Congress amended Title VII of the Civil Rights Act of 1964 to include colleges and universities within the definition of employers subject to the Act.[17] Beginning

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12 *See Faro* and its progeny, *infra* text accompanying notes 47–50.

13 O'Neil, *supra* note 1, at 732, noting "the dramatic rise in student activism starting in the late 1960s, which brought to the courts a host of novel free speech and due process issues seldom seen on college and university campuses in earlier times. If only because the claims of student plaintiffs in such cases were familiarly constitutional, based on readily available First and Fifth Amendment precepts, judges were less inclined to defer to academic judgments. As early as the Supreme Court's 1972 ruling in favor of a student political group's claim not to be barred from a public campus because of the controversiality of its views, it was clear that deference would not foreclose review of such clearly constitutional interests—that would have been the Court's view even if the institution claimed an 'academic' rationale for excluding the student group. And where the challenged sanction involved disciplining a student (or occasionally an outspoken professor) for campus protest or disruption, the historical basis for judicial deference was far less apparent. Thus, intervention became far more difficult for colleges and universities to resist in cases of this type." (footnotes omitted).

14 *See* Goss v. Lopez, 419 U.S. 565 (1975) and its progeny. "[I]f the judgment to be reviewed by the court is not a 'genuinely academic decision,' courts are less likely to defer . . . if the judgment being reviewed is a disciplinary rather than an academic judgment, the court's competence is relatively greater and the university's is relatively less; the factor of relative institutional competence may therefore become a wash or weigh more heavily in the court's (and thus the challenger's) favor. Similarly, when the challenge to the institution's decision concerns the procedures it used rather than the substance or merits of the decision itself, the court's competence is greater than the institution's, and there is usually little or no room for deference." William A. Kaplin et al., The Law of Higher Education 161 (6th ed. 2019). In cases involving student academic performance, the courts have been overwhelmingly deferential to academic judgments. *See infra* Part II.

15 *See, e.g.*, Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992) (appellate court reversed summary judgment for the University, ruling that the University must demonstrate that it had attempted to accommodate the student and had evaluated the impact of the requested accommodation on the medical school's academic program).

16 *Id*. *See also* Guckenberger v. Bos. Univ., 957 F. Supp. 306 (D. Mass. 1997). Of course, in many cases courts agreed that the defendant college or university had not violated the laws against disability discrimination but not because the court had simply deferred to the institution's academic judgment. *But see* Class v. Towson Univ., 806 F.3d 236, 246 (4th Cir. 2015) (court rejected football player's failure to accommodate claim, saying "deference is due to a university's professional judgment in the context of student qualifications"). *See* cases discussed *infra* Part II.C.3.

17 42 U.S.C. § 2000e-1 (1970), as amended. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, § 3 (1972), amended Title VII to extend the Act's coverage to colleges and universities.

in 1974 with the *Faro* case,[18] federal courts fashioned a deferential approach to evaluating faculty plaintiffs' claims of discrimination when their quest for hiring, promotion and/or tenure was rejected by the institution.[19] Courts were somewhat less willing to defer when faculty filed breach of contract or constitutional claims after a negative employment decision,[20] but many still bowed to the academic judgment of the faculty and administrators who evaluated the plaintiffs.[21] The rationale of these federal courts was that judges lacked the disciplinary expertise to understand whether, in fact, a faculty member's scholarship or teaching was worthy of promotion and/or tenure, and juries had even less ability to make these judgments.[22] Noting that these decisions are subjective and complicated,[23] the

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18 Faro v. N.Y. Univ, 502 F.2d 1229 (2d Cir. 1974), *infra* text accompanying notes 47–50.

19 Most of these cases involve women faculty; a few male faculty also sued alleging sex, race, or national origin discrimination. *See, e.g.*, George R. LaNoue & Barbara A. Lee, Academics in Court: The Consequences of Faculty Discrimination Litigation (1987).

20 *See, e.g.*, McAdams v. Marquette Univ., 974 N.W.2d 708 (Wisc. 2018) (court rejected university's claim that institutional academic freedom required the court to defer to its judgment). *See also* McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1993) (professor brought action claiming breach of contract and defamation. McConnell was a tenured professor dismissed by Howard University for refusing to teach one of his assigned courses because a student had called him a "condescending, patronizing racist" during a previous course meeting. McConnell demanded that the student either apologize or be removed from the class. A disciplinary review process was initiated against McConnell, and the board of trustees voted to terminate him. The trial court granted summary judgment to Howard University, saying, in part, that the board of trustees should be granted special deference to making personnel decisions about tenured faculty. The appellate court disagreed and remanded the case, explaining that allowing the board of trustees to determine whether the contract between Dr. McConnell and Howard University had been violated would effectively be allowing one of the contracting parties to make a decision about a contract to which they are bound.).

21 *See, e.g.*, Allworth v. Howard Univ., 890 A.2d 194 (D.C. Ct. App. 2006); Fredieu v. Case W. Rsrv. Univ., 2021 Ohio 1953 (Ohio App. June 10, 2021).

22 "Indeed, it is the rare case in which a court could fairly claim comparable competence or familiarity with the ways in which academic decisions develop. For the very reasons that many observers of the academy express frustration, even outrage, at the slow pace of hiring or other key intra-college and university decisions, an outsider who happens to be a judge is seldom better equipped to understand or adjudicate arcane academic disputes or conflicts." O'Neil, *supra* note 1, at 736. *See also* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs 227, 227–47 (1990) (arguing that judicial review should be deferential on academic freedom grounds). *See also* Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945, 994 (2009) (arguing that academic speech should have First Amendment protection and thus judicial deference).

23 Mayberry v. Dees, 663 F.2d 502, 519 (4th Cir. 1981). *See also* Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 Ohio N.U. L. Rev. 115, 120 (2019). ("In adjudicating such challenges, the judiciary acknowledges that the burden of proof rests upon '[a] disappointed candidate' who is denied tenure. The judiciary also acknowledges that subjective factors *may* be present in tenure decisions. This does *not* support any conclusions that arbitrariness or capriciousness play a role in educational institutions› decision-making deliberations. In the final analysis, since the burden of proof to invalidate a tenure-denial decision falls upon the denied faculty member, the weight of the burden of proof matters. Additionally, certain 'practical considerations make a challenge to the denial of tenure at the college or university level an uphill fight-notably [because of] the absence of fixed, objective criteria for tenure at that level'" (citing Blasdel v. Nw. Univ., 687 F.3d 813, 815, 816 (7th Cir. 2012)). And for an analysis of how courts might review employment decisions for professional employees and recognize that subjectivity is not necessarily a signal of a Title VII violation, see Andrea R. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979).

courts typically ruled for the institution.[24] University defendants in some of these cases also argued that their decisions were protected by academic freedom and that judicial "intervention" into these decisions was an inappropriate violation of an institution's autonomy with respect to academic judgments.[25]

Beginning in the late 1970s, scholars began reviewing cases involving faculty challenges to negative employment decisions and commenting on the degree to which courts deferred to the defendants' academic judgment. Although some scholars applauded the judicial restraint in these decisions and reviewed them relatively uncritically,[26] a 1980 article by Professor Richard Yurko argued that judicial deference to academic judgments, particularly in claims of employment discrimination, was inappropriate, noting that

> such a response [from the reviewing courts] not only misstates the issue--absent discrimination, the title VII plaintiff has no legal basis for expecting judicial intervention—but also produces a classic problem of circularity. Academic institutions are accorded judicial deference unless a plaintiff can prove discrimination, but few plaintiffs can prove discrimination because academic institutions are accorded judicial deference.[27]

Yurko noted that judges have not applied deference in their review of other complicated issues, saying

> much modern litigation—whether it involves determining the cause of complex industrial accidents, or sifting through the sophisticated economic analyses of a major antitrust case, or deciding whether tonal similarities in

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24 LaNoue & Lee, *supra* note 19.

25 "[J]udicial deference based upon regard for academic freedom may incline courts to avoid adjudicating personnel claims of a type that would almost certainly not be spurned in less sensitive contexts." O'Neil, *supra* note 1, at 734–35. *See also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 254 (1989) and Rabban, *supra* note 22, at 291 (concluding that that he "favor[s] judicial deference to departmental decisions as long as stated disciplinary judgments are plausible and are not pretexts").

26 *See, e.g.*, Robert M. O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275 (1984); Edward Stoner & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in* Grutter *Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before* Grutter, 30 J.C. & U.L. 583 (2003–04).

27 Richard Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U. L. Rev.473, 496 (1976). Yurko also listed three rationales used by reviewing courts to defer to the defendant institution's academic judgment: "Three major justifications have been offered for this markedly diffident treatment of the personnel decisions of educational institutions. First, some courts have professed an incompetence to evaluate academic qualifications. They view judgments about such matters as requiring expertise in particular academic areas that the judiciary simply does not possess. Related to this concern is a second suggestion that deference is warranted because the employment decisions of academia are unavoidably subjective. One district judge described the problem: 'A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards' (citing Lewis v. Chicago State College, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969). In contrast to these primarily substantive concerns, institutional considerations are at the heart of the third rationale—the 'floodgates of litigation' argument. In part, this proffered justification for deference merely echoes the usual dire predictions about the 'devastating effects' on the federal court docket of an influx of new litigation." *Id.* at 496–97 (footnotes omitted).

> musical scores are close enough to imply copyright infringement—requires courts to resolve difficult factual issues by exercising judgment in fields where they possess no particular expertise.[28]

The Yurko article and others published in the late 1970s and early 1980s signaled a sea change in scholarly attitudes toward judicial deference to academic judgments in employment decisions. Most subsequent articles criticized the federal courts, particularly in Title VII sex discrimination cases, for their light touch that usually resulted in a ruling for the college.[29] Later still, more recent articles have asserted that deference has no place in judicial review of academic employment decisions, including hiring as well as promotion and tenure.[30]

Most scholars addressing judicial deference to decisions based on student academic performance were less critical, however. For example, one concludes that, after *Horowitz* and *Ewing*,[31] federal courts embraced judicial deference in student challenges (as they had in faculty challenges as well), and predicted that the trend would continue and was generally appropriate.[32] Another scholar, reviewing challenges to academic judgments brought by students under the disability discrimination laws concluded that judges should defer to such academic judgments because "the incompetence of the courts to review academic standards" meant that judges needed to rely on "academic expertise."[33]

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28 *Id.* at 497–98. In a later article, another scholar commented on the purported lack of judicial expertise issue: "On the surface, this appears to be a legitimate rationale, except for the fact that other employment fields, where the evaluation of performance entails highly specialized knowledge and is discretionary, have not intimidated federal courts. The courts have ruled on discrimination claims in fields such as accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry. If the courts are willing to venture into these highly specialized areas in order to determine if discrimination has occurred, then the deference given to universities where many of these fields are taught and professors tenured should cease as the court has established the precedent of adequate knowledge and expertise." Guillermo S. Dekat, Comment: *John Jay, Discrimination, and Tenure*, 11 The Scholar: St. Mary's L. Rev. on Minority Issues 237, 263–66 (2009).

29 *See, e.g.*, Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 961 (1982); Harry Tepker, *Title VII, Equal Employment Opportunity and Academic Autonomy: Toward a Principled Deference*. 16 U. Cal. Davis L. Rev. 1047 (1983); Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University,* 8 Buff. Women's L.J. 55 (1999–2000); Susan L. Pacholski, Comment: *Title VII in the University: The Difference Academic Freedom Makes,* 59 U. Chi. L. Rev. 1317 (1992); Scott A. Moss, *Against "Academic Deference": Keeping Title VII Alive to Redress Academic Discrimination.* 27 Berkeley. J. Empl. & Lab. L. 1 (2006); Leacock, *supra* note 23.

30 Dekat, *supra* note 28, at 241.

31 Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (U.S. 1978) and Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

32 Thomas A. Schweitzer, *Academic Challenge Cases: Should Judicial Review Extend to Academic Evaluation of Students?* 41 Am. U. L. Rev. 267 (1992).

33 James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act.* 75 Neb. L. Rev. 27, 30, 90 (1996). *But see* Sam McHale, Comment: *The Amorphous Student-University Contract: Origins, Development, and the Need for State Oversight.*168 U. Pa. L. Rev. 223 (2019) (arguing that judicial review of student contract claims is too deferential, and state oversight agencies should develop performance-based metrics and outcome metrics to analyze, and hold institutions accountable for, how students fare in the job market after graduation).

Despite the criticism of scholars concerning deference to academic judgments concerning faculty employment issues, whether the plaintiffs in these lawsuits were faculty or students, the courts, for the most part, have continued to rely on the "academic expertise" of faculty and administrative decision-makers. Although in a few recent cases courts have rejected deference, particularly when faculty claim that negative decisions were infected with discrimination, the courts have continued to reject the invitation to substitute their judgment (or that of a jury) to the evaluations of both faculty and student performance by the academic experts.

This article reviews the history of academic deference by the federal (and some state) courts in reviewing claims regarding evaluation of faculty performance and student academic achievement, often dismissing the lawsuit or awarding summary judgment to the institution, seemingly without a thorough review of the institution's supporting evidence for its exercise of "genuine professional judgment." Beginning with early cases involving faculty challenges to negative employment decisions and, later, to academic evaluations of students, it moves through the decades of the late twentieth century and the early twenty-first. It reviews both court cases and the legal literature with respect to the challenges to "external" review of academic judgments, and what may appear to be the slow evolution of judicial skepticism of academic deference, at least for decisions involving faculty claims of employment discrimination. It notes some inclination over the years for courts to review the institution's defense of academic judgment more closely, even while continuing to award summary judgment in most cases.[34] Even more recent cases have begun to show a pattern of ordering a jury trial when the court concludes that material facts call into question whether the decision was based on "genuine academic judgment" rather than on impermissible factors such as discrimination.[35] It concludes with a series of observations regarding the intensity of judicial scrutiny of the parties' factual allegations that respects the greater competence of the academic evaluators while at the same time retaining the court's role as ensuring the fairness, if not the accuracy, of these academic judgments.

I. Judicial Deference to Faculty Personnel Decisions

Prior to the 1960s, when the Higher Education Act[36] was passed and the movement to desegregate public higher education[37] was active, litigation against a college or

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34 *See, e.g.*, Amy Gajda, The Trials of Academe 5–6 (2009). As will be seen in Part I, jury trials are unusual in faculty employment discrimination cases, even if the court opinion demonstrates that it has closely reviewed the college's evidence of a nondiscriminatory motive.

35 *See, e.g.*, Tudor v. Se. Okla. State Univ., 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. Oct. 26, 2017) (denying summary judgment because of the existence of disputes regarding material facts), Professor Tudor was eventually reinstated with tenure after an appellate court upheld a jury verdict in her favor. 13 F.4th 1019 (10th Cir. 2021). *See Tudor infra* text accompanying notes 99–104.

36 Higher Education Act of 1965, 20 U.S.C. §§ 1001 et seq.

37 Litigation concerning the desegregation of formerly *de jure* segregated systems of public higher education began in the 1960s and continued throughout the rest of the twentieth century in some states. For a history of desegregation litigation in public higher education, see generally Jean Preer, Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education (1982). *See also* John B. Williams, Race Discrimination in Public Higher Education: Interpreting Federal Civil Rights Enforcement, 1964–1996 (1997). For a thorough review of the cases involving the desegregation of public higher education, see

university was unusual and typically resulted in victory for the institution. Hobbs reminds us that courts sharply rejected the few student challenges to institutional discipline between the mid-nineteenth and mid-twentieth centuries, when courts developed the concept of *in loco parentis* to justify the "parental" role of the college.[38] The courts began to apply constitutional due process protections to students at public colleges and universities in 1961 with the *Dixon* case.[39] Eight years later, the U.S. Supreme Court ruled in favor of high school students who had peacefully protested, saying that they had First Amendment rights to do so,[40] and in 1972, the Court applied the same reasoning to college students.[41]

Students challenging academic evaluations, however, have not encountered the same response from the courts. In 1978, the U.S. Supreme Court rejected a medical student's request to overturn her dismissal, saying that "[c]ourts are particularly ill equipped to evaluate academic performance . . . [and the Court] warned against any such judicial intrusion into academic decision making."[42] Seven years later, the Court rejected a medical student's challenge to his dismissal, stating

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[43]

The *Horowitz* and *Ewing* decisions have become a powerful justification for courts to defer to the academic judgments of institutional defendants, not only in situations involving student academic performance, but also, in many instances, to those involving judgments about hiring, promotion or tenure, or in some cases dismissal, of college faculty.

A. The Evolution of Judicial Deference to Faculty Personnel Decisions

Prior to the extension of Title VII of the Civil Rights Act of 1964 to colleges and universities in 1972,[44] litigation by faculty against their potential or actual college

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Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Towards Desegregation*, 36 J.C. & U.L. 945 (2010).

38 Government Regulation of Higher Education, *supra* note 1. Hobbs cites cases decided by Illinois, Kentucky, and Minnesota courts that determined that colleges had "inherent power" to discipline students without the procedures that contemporary students expect and are entitled to. *Id*. at 2–3. *See* also Anthony v. Syracuse Univ., 224 A.D. 487 (N.Y. App. Div. 1928) (university need not provide reasons for dismissal of student).

39 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (students expelled for engaging in civil rights protest were entitled to due process prior to implementation of discipline).

40 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (students disciplined for wearing black armbands to school to protest the war in Vietnam).

41 Healy v. James, 408 U.S. 169 (1972) (Court ruled in favor of student group's claim that denial of recognition by the college violated their constitutional right of free association).

42 Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 91–92 (1978).

43 Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

44 42 U.S.C. § 2000e-1 (1970), as amended. The Equal Employment Opportunity Act of 1972, 86

employers primarily involved contract or constitutional law, and courts did not hesitate to interpret those contracts and scrutinize the parties' allegations as they would contracts or constitutional claims in a nonacademic setting.[45] But with the advent of the federal nondiscrimination laws, faculty had new avenues to challenge denials of promotion, tenure, hiring, or dismissal.

1. Early Promotion and Tenure Denial Cases

Lawsuits brought in the 1970s and 1980s claiming discrimination under Title VII of the Civil Rights Act of 1964[46] found federal judges, at both the trial and appellate levels, wary of wading into close reviews of the credentials of those who had been granted promotion and/or tenure and those who had not. Despite this discomfort, plaintiffs were able to obtain bench trials in several important early cases.

One of the earliest such Title VII cases involving a university is *Faro v. New York University*,[47] decided in 1974. Dr. Maria Faro had been employed as a nontenured research scientist funded by a research grant at the New York University Medical Center. When the grant ended, she was offered a non–tenure-track position, which she declined, asserting that the University should have offered her a tenure-track position. When the University did not do so, she filed a sex discrimination claim under Title VII and sought a preliminary injunction to force the University to give her a tenure-track position.[48] The court rejected her claim, with these words, which have been repeated by courts in numerous subsequent Title VII claims brought, primarily, by women faculty since *Faro:*

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally"…[49]

Stat. 103, § 3 (1972), amended Title VII to extend the Act's coverage to colleges and universities.

45 *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969) (breach of contract claim in nonreappointment) and Keddie v. Pa. State Univ., 412 F. Supp. 1264 (M.D. Pa. 1976) (constitutional challenges to denial of tenure).

46 42 U.S.C. § 2000e-1 (1970), as amended.

47 502 F.2d 1229 (2d Cir. 1974).

48 According to the court, Dr. Faro asserted that male faculty had been given tenure-track positions, but she had not. The trial judge commented, "Dr. Faro, in effect, envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice. She would compare herself and her qualifications with all recent appointees to the NYU medical faculty and asserts that she is just as competent as they are. In particular, she selects three doctors for comparison. She states that she was offered $4,000 for the same job for which a Dr. Alves was paid $23,000. Of course, as the district court found and the record substantiates, it was not the same job. Analysis of the proof clearly shows that the experience possessed by such male professors as have been hired is not comparable to the limited teaching and research background of Dr. Faro." *Id.* at 1231–32.

49 *Id*. *See also* Feldman v. Ho, 171 F.2d 494, 497 (7th Cir. 1999) "[F]or a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not…

The court denied the preliminary injunction, and the appellate court affirmed.

Despite this seemingly deferential language, *Faro* is interesting for several reasons. First, there was a bench trial. Second, the trial court did not simply defer to the University's judgment. It held a three-day hearing on the plaintiff's allegations, and numerous witnesses testified about the reasons she was not offered a tenure-track position.[50] But the language of the Second Circuit's *Faro* opinion has invited federal courts to defer to defendants' academic judgment, and, for the most part, the courts have accepted this invitation, usually without conducting a trial.

Four years after the *Faro* decision was published, the same federal circuit addressed a second case involving a female professor. Again, the case went to trial. In *Powell v. Syracuse University,*[51] a visiting assistant professor's contract was not renewed, and she sued, claiming race and sex discrimination. In addition to demonstrating some procedural irregularities in the process the department used to determine that she would not be rehired, she alleged that three White faculty had been hired to teach the courses that she had taught for Syracuse. After the trial concluded,[52] the court dismissed the lawsuit, and the appellate court affirmed.

The appellate court noted that both the University and the trial court had quoted its deferential language in *Faro* reproduced above, and said "In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments."[53] The court then appeared to retreat from what had been interpreted by subsequent federal courts as wholesale deference to academic judgments in discrimination cases:

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act

[T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw."

50 According to the appellate court, "The district court did not dispose of the motion on the affidavits alone but granted a protracted hearing (three days) in which Dr. Faro and Drs. Sabatini (Chairman of the Cell Biology Department), Dr. Rusk (Director of the Institute of Rehabilitation Medicine and Chairman of the Department of Rehabilitation Medicine), [Dr.] Potter (Associate Dean of the Medical Schools) and [Dr.] Goodgold (Professor of Rehabilitation Medicine and Director of Research and Training in the Institute of Rehabilitation Medicine); all testified. The court's conclusion that there was no discrimination against Dr. Faro is amply supported by the proof—in fact, it is the only conclusion which could be properly adduced therefrom." *Faro*, 502 F.2d at 1231.

51 580 F.2d 1150 (2d Cir. 1978). Professor Powell was represented by the National Association for the Advancement of Colored People in this case.

52 Although the appellate opinion in *Powell* does not explicitly address the issue of whether a trial was held, it appears that it was because the opinion refers to the "testimony" of all of the members of the tenure committee that had made the negative decision, and found their testimony credible.

53 *Id*. at 1153. But, as quoted *supra* note 50, the trial court in *Faro* had conducted three days of hearings at which Professor Faro was given an opportunity to listen to medical school administrators' reasons for denying her a tenure-track position and to provide evidence on her own behalf.

> of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.[54]

The court continued,

> Accordingly, while we remain mindful of the undesirability of judicial attempts to second-guess the professional judgments of faculty peers, we agree with the First Circuit when it "caution[ed] against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of…discrimination in institutions of higher learning as readily as for other Title VII suits." *Sweeney v. Board of Trustees of Keene State College*… .
>
> It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.[55]

And yet, the trial and appellate courts rejected the plaintiff's discrimination claim, finding that concerns about her performance and the quality of her students' work provided a legitimate nondiscriminatory reason for her nonreappointment.

Two years after *Powell*, the same U.S. court of appeals issued another opinion involving alleged sex discrimination in denial of tenure. In *Lieberman v. Gant*,[56] a female professor of English sued the University of Connecticut, alleging that her tenure denial was a result of sex discrimination. The *Lieberman* court held a fifty-two day bench trial over a period of two years, but the trial court had refused to review the personnel files of allegedly comparable male faculty, a decision that,

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54 *Id*.

55 *Id*. at 1154. In *Sweeney v. Keene State College,* 569 F.2d 169, 176 (1st Cir. 1978), the trial and appellate courts had ruled for the plaintiff, finding that the college's failure to promote her was infected with sex discrimination. The college appealed to the U.S. Supreme Court, arguing that the trial and appellate courts had applied an incorrect burden of proof to the college—that it must prove that it had not discriminated against the plaintiff, rather than the McDonnell Douglas burden of merely articulating a legitimate nondiscriminatory reason for denying promotion. The Supreme Court agreed, and vacated and reversed the lower court opinions, remanding the case. Bd. of Trs. v. Sweeney, 439 U.S. 24 (1978). On remand, the trial court again ruled for Sweeney, and the college appealed again. The appellate court affirmed, stating

> One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts. The district court could have concluded consistently that [another plaintiff] merited promotion by any standard, that Sweeney was better qualified than the two men who were denied promotion, and that Sweeney would have been promoted had she been evaluated against the standard that was applied generally to men.
>
> Defendants have persuaded us that this was a close case, but not that the district court committed clear error in concluding that Sweeney was denied a promotion because of her sex. 604 F.2d 106,113 (1st Cir. 1979).

56 630 F.2d 60 (2d Cir. 1980).

according to Professor Lieberman, was a significant omission.[57]

The trial court ruled in favor of the University, and the appellate court affirmed. Although the appellate panel's deference language in *Lieberman* was more restrained than that of the *Faro* panel, the appellate court signaled a clear reluctance to perform an in-depth analysis of the plaintiff's evidence, saying

> Although academic freedom does not include "the freedom to discriminate", *Powell…*this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee(s)", *Keddie v. Pennsylvania* [citation omitted]; their role was simply to root out discrimination. Chief Judge Clarie thus did not err in declining plaintiff›s invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess the numerous scholars at the University of Connecticut who had scrutinized Dr. Lieberman's qualifications and found them wanting, in the absence of independent evidence of discriminatory intent or a claim that plaintiff's qualifications were clearly and demonstrably superior to those of the successful males, a claim which was not made by Dr. Lieberman because it could not have been substantiated.[58]

Even in cases in which plaintiffs raised constitutional challenges to denials of tenure, courts continued to cite the *Faro* deference language to justify their refusal to review the comparative qualifications of faculty for tenure. In *Clark v. Whiting*,[59] for example, a professor challenged a tenure denial by North Carolina Central University under the Constitution's equal protection and due process clauses. The professor had submitted information on the qualifications of allegedly comparable faculty who had been granted tenure. The trial court rejected his constitutional claims without a trial and dismissed the lawsuit, and the appellate court affirmed. The appellate court's language made an important distinction between the judicial duty to examine the defendant's motive for the negative decision in constitutional claims, compared with those claims brought under the nondiscrimination laws. Said the court,

> If perchance courts were, on equal protection grounds, to undertake to review faculty promotions by engaging in a comparison of competency and qualifications of those granted and those denied promotion in any academic field, they would, by parity of reasoning, be obligated to review the equality of treatment in connection with the grant or denial of faculty tenure. Nor is it a far step from such a review of faculty promotions and tenure to faculty salaries or assignments. In essence, what plaintiff thus argues for, if carried to its logical conclusion, is the judicial supervision of the most delicate part

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57 LaNoue & Lee, *supra* note 19, at 51–88.

58 *Id.* at 67–68.

59 607 F.2d 634 (4th Cir. 1979).

> of every state educational institution's academic operations, a role federal courts have neither the competency nor the resources to undertake. The burden, which such an exercise of judicial process would involve, was vividly described by the Court in *Faro v. New York University*…We, therefore, refuse to embark upon a comparative inquiry under an equal protection claim into either the quantity or the quality of the published scholarly contributions of the University's faculty members who have been granted or denied promotion, holding that the determination of such matters by the appropriate University authorities is not reviewable in federal court on any ground other than racial or sex discrimination or a First Amendment violation.[60]

Subsequent cases demonstrate that courts continued to defer to academic judgments, even if asked to review claims of discrimination in denial of tenure.[61] In yet another Second Circuit opinion, *Zahorik v. Cornell University*,[62] the appellate court affirmed a summary judgment ruling for the University and said

> Courts, moreover, are understandably reluctant to review the merits of a tenure decision [citing *Lieberman v. Gant*, which had cited *Faro*]. Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited. Finally, statements of peer judgments as to departmental needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination.[63]

One year later, another federal circuit court struggled with balancing the scrutiny of an allegedly discriminatory tenure denial with deference to the academic judgment of faculty and academic administrators. In *Namenwirth v. Board of Regents of the University of Wisconsin System*,[64] a magistrate judge, acting on behalf of the trial court, compared Marion Namenwirth's academic performance with that of several male comparators and concluded that the University's decision to deny her tenure was not based on sex discrimination.

Professor Namenwirth was hired by the Department of Zoology—the only woman in the department, and the first faculty member of either sex to be denied tenure in that department as well. According to the appellate court opinion, the University of Wisconsin had been cited by the U.S. Department of Health, Education

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60 *Id.* at 640–41. The judge dismissed the case on jurisdictional grounds; it does not appear that a trial was held.

61 As noted, the early cases (*Faro, Powell, Lieberman*, and *Kunda*) involved bench trials (jury trials were not available until the Civil Rights Act of 1991 provided for a jury trial for Title VII lawsuits. 42 U.S.C. § 1981a(c) (1991)).

62 729 F.2d 85 (2d Cir. 1984).

63 *Id*. at 93.

64 769 F.2d 1235 (7th Cir. 1985).

and Welfare, finding that it had discriminated against women in hiring and salary decisions.[65] When it was time for Namenwirth to be evaluated for tenure, she was unsuccessful at every level of the decision-making process.[66] She was able to show that a male comparator from the same department was granted tenure after a request from her department that a preliminary negative recommendation regarding him be reconsidered. The department had made no such request for reconsideration of her negative evaluation. The court found that the University's decision was "reasonable" and not the product of sex discrimination, and dismissed her claim with prejudice.

The appellate court showed some discomfort with the nature of academic decision-making and its potential to allow discrimination to affect the outcome but concluded that it could not justify attempting to second-guess the academics. Said the court,

> To allow the decision-maker also to act as the source of judgments of qualification would ordinarily defeat the purpose of the discrimination laws. But in the case of tenure decisions we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions.
>
> But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem—the decision-maker is also the source of the qualifications—there may be no solution; winning the esteem of one's colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose.[67]

Throughout the 1990s and early 2000s, opinions using language deferential to academic judgments were far more frequent than those scrutinizing defendants' justification for tenure denials either on the basis of alleged discrimination or breach of contract.[68]

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65 *Id.* at 1237.

66 Namewirth was granted reconsideration after the tenure denial in a subsequent year. Again, the decision was negative.

67 *Id.* at 1243.

68 *See, e.g.*, Tanik v. S. Methodist Univ., 116 F.3d 775, 776 (5th Cir. 1997) (summary judgment for the university, no trial); Villanueva v. Wellesley Coll., 930 F.2d 124, 129 (1st Cir. 1991) (summary judgment for the college, no trial); Broussard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975–76 (8th Cir. 1991) (summary judgment for the college, no trial); Brown v. Geo. Wash. Univ., 802 A.2d 382, 385 (D.C. 2002) (summary judgment for the university on plaintiff's breach of contract claim, no trial); Okruhlik v. Univ. of Ark., 395 F.3d 872, 879 (8th Cir. 2005) (judgment notwithstanding the verdict for

The Civil Rights Act of 1991 permitted Title VII plaintiffs to request a jury trial,[69] where none had been available before. And although the number of plaintiffs who avoided a ruling of summary judgment for the employer and thus potentially could have a jury hear their case increased slightly after that amendment to Title VII,[70] many courts continued to accept the defendant college's request to award summary judgment, thus avoiding a jury trial.[71] And the deferential approach of the federal (and some state) courts continued.

For example, in *Bina v. Providence College*,[72] the appellate court, citing its earlier decision in *Brown v. Trustees of Boston University*,[73] said

> A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.[74]

In *Figal v. Vanderbilt University*,[75] a state appellate court affirmed the trial court's award of summary judgment to the University. The appellate court agreed with the trial court's deference to the academic judgment of the University that the plaintiff's scholarly performance did not meet the standard of excellence required for a positive tenure decision, as defined in the Faculty Manual.[76] The appellate court quoted the trial court's rationale with approval: "The law provides that courts are to defer to the academic decisions of colleges and universities and not intrude on faculty employment determinations or substitute their judgment with respect to qualifications of faculty members for promotions or tenure. Only a substantial departure from accepted academic norms or from procedural regularity, to demonstrate that the university did not actually exercise professional judgment, warrants court intervention."[77] The appellate court noted that the trial

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university after jury verdict for plaintiff); Qamhiyah v. Iowa State Univ. of Sci. & Tech., 2008 U.S. Dist. LEXIS 138071 (S.D. Iowa June 27, 2008) (summary judgment for the university, no trial); Figal v. Vanderbilt Univ., 2013 Tenn. App. LEXIS 656 (Tenn. Ct. App. Sept. 27, 2013) (summary judgment for the university, no trial); and Kouassi v. W. Ill. Univ., 2015 U.S. Dist. LEXIS 64926 (Ill. Cent. Dist. Ct. May 18, 2015) (summary judgment for the university, no trial).

69 42 U.S.C. § 1981a(c) (1991). Prior to this Act, plaintiffs were limited to a bench trial.

70 *See, e.g.*, Kahn v. Fairfield Univ., 357 F. Supp. 2d 496, 505 (D. Conn. 2005); Hinton v. City Coll. of New York, 2008 U.S. Dist. LEXIS 16058 (S.D.N.Y. Feb. 29, 2008); Moore v. Univ. of Memphis, 2013 U.S. Dist. LEXIS 174525 (W.D. Tenn. Dec.13, 2013). But in other cases, the trial judge overturned the jury verdict through a judgment notwithstanding the verdict*: See, e.g.*, Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997) (en banc).

71 *See, e.g.*, cases cited *supra* note 68.

72 39 F.3d 21 (1st Cir. 1994).

73 891 F.2d 337, 346 (1st Cir. 1989).

74 *Bina*, *supra* note 72, at 26. The court found that the college had carried its burden of supplying a legitimate nondiscriminatory reason for its failure to hire the plaintiff—his teaching evaluations had been problematic.

75 2013 Tenn. App. LEXIS 656 (Tenn. Ct. App. Sept. 27, 2013).

76 *Id*. at *21–22.

77 *Id*. at *21. This recitation of Tennessee law is similar to the provisions of New York's Civil

court had not deferred to the University's interpretation of its Faculty Manual, but only to the university's "assessment of the strength or weakness of Dr. Figal's scholarly work."[78]

And in *Davis v. Western Carolina University*,[79] a faculty member denied tenure lost discrimination claims under the Rehabilitation Act[80] and the Americans with Disabilities Act (ADA).[81] The trial court, in awarding summary judgment to the University, noted that the Fourth Circuit has stated

> [W]e review professorial employment decisions with great trepidation. We must be ever vigilant in observing that we do not sit as a 'super personnel council' to review tenure decisions, always cognizant of the fact that professorial appointments necessarily involve 'subjective and scholarly judgments,' with which we have been reluctant to interfere.[82]

The appellate court affirmed, noting that it was "hesitant to second guess the 'subjective and scholarly judgments' involved in professorial employment matters."[83]

2. The Outliers Rejecting Deference

Since *Faro*, a handful of cases has rejected deference and examined each party's facts without reference to the matter of academic judgment. For example, in an early federal court opinion, *Sweeney v. Board of Trustees of Keene State College*, after a four-day bench trial, the trial court found for the plaintiff, who had alleged that denial of promotion to full professor was a result of sex discrimination.[84] The federal appellate court affirmed the trial court's finding for the plaintiff, noting the same concern as the *Powell* opinion, stating

> [W]e voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts'

Practice Law & Rules § 7801–7806, which provides that judicial review by state courts of the decisions of a "corporation," (including a private college or university) be limited to whether the decision was "arbitrary, capricious, or an abuse of discretion." N.Y.C.P.L.R. § 7803 (2014).

78 *Figal*, 2013 Tenn. App. LEXIS 656, at *21.

79 2016 U.S. Dist. LEXIS 20354 (W.D.N.C. Feb. 19, 2016), *aff'd*, 695 Fed. App'x 686 (4th Cir. 2017). The trial court noted that the record contained "thousands of pages" of evidence, and very few, minor disputes about the facts of the case—just its outcome. *Id.* at *3.

80 29 U.S.C. § 794 (1973).

81 42 U.S.C. §§ 12101 et seq. (1990).

82 *Davis*, 2016 U.S. Dist. LEXIS 20354, at *50–51.

83 *Davis*, 695 Fed. App'x at 689.

84 569 F.2d 169 (1st Cir. 1978), *vacated and remanded*, Bd. of Trs. v. Sweeney, 439 U.S. 24 (1978), *on remand*, 1979 U.S. Dist. LEXIS 14798 (D.N.H. Jan. 29, 1979), *cert. denied,* 444 U.S. 1045 (1980), *appeal after remand* 604 F.2d 106 (1st Cir. 1979). The U.S. Supreme Court ruled that the trial and appellate courts had applied the wrong burden of proof to the defendant, requiring the college to prove that it did not discriminate, rather than simply articulating a nondiscriminatory reason for the tenure denial. The outcome on remand was the same using the correct burden of proof.

> recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.[85]

A case from the U.S. Court of Appeals for the Third Circuit artfully combined a form of deference with an insistence that college faculty plaintiffs were no different from blue-collar workers with respect to Title VII protections. In *Kunda v. Muhlenberg College*,[86] Connie Kunda, an assistant professor of physical education, was denied tenure because she had not earned a master's degree, which she was told, after the tenure denial, was required for promotion. At trial, she was able to show that male faculty had been advised to earn a master's degree, and they had been awarded tenure. After a four-day trial, the court ruled in Kunda's favor and the appellate court affirmed, finding that the lack of advising was motivated by sex discrimination. The appellate decision, written by Judge Dolores Sloviter, a former law school professor, appeared to disagree with the prevailing deference arguments, saying "Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands."[87] On the other hand, Judge Sloviter wrote,

> [I]t is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.[88]

In another case where a federal court refused to defer to the university's academic judgment, the U.S. Court of Appeals for the Third Circuit, citing *Kunda*,[89] affirmed the finding of a trial court that Rutgers University had discriminated against a

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85 *Sweeney*, 569 F.2d at 176.

86 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980).

87 *Kunda*, 621 F.2d at 550.

88 *Id.* at 548. The *Kunda* case is interesting because Professor Kunda had been judged worthy of tenure by her peers, but the provost and president rejected that recommendation because she lacked the master's degree. Thus, the ultimate tenure denial was based upon an objective criterion—the lack of a master's degree—and not upon the academic judgment of the provost and president. The trial court fashioned a remedy that, in the appellate court's view, respected academic judgment while acknowledging the right of the college to require educational credentials. It ruled that, if Professor Kunda obtained a master's degree within two years, she would be given tenure. She did earn the degree and was awarded tenure. LaNoue & Lee, *supra* note 19, at 89–113.

89 *Kunda*, 621 F.2d 532.

professor on the basis of his national origin by denying him promotion to full professor.[90] Rejecting the university's argument that faculty committees had determined that Professor Bennun's research did not meet the required standard of excellence, the trial court performed an extensive comparison between the plaintiff and his comparators, concluding that the university's claim that Professor Bennun's research was of lesser quality than that of his comparators was a pretext for discrimination. The appellate court concurred, rejecting the notion that federal courts should defer to academic judgments.[91]

And in *Jew v. University of Iowa*,[92] the trial court, reviewing the plaintiff's evidence of hostile treatment by the male faculty in her department, including the circulation of false rumors of a sexual affair with the department chair, concluded that the promotion denial was tainted by sex discrimination and not an appropriate exercise of professional judgment. Furthermore, the court, in its findings of fact, determined that

> in November of 1983 Dr. Jew was qualified for promotion to full professor. I further find and conclude that defendants have failed to prove by a preponderance of the evidence that a majority of the senior faculty would have voted against recommending Dr. Jew for promotion if the discriminatory factor had been absent. Defendants have also failed to prove by a preponderance of the evidence that if the discriminatory factor had been absent the proposed promotion of Dr. Jew to full professor would have been rejected at any subsequent stage of the promotion process.[93]

The trial court did not mention the term "academic deference," nor did it indicate that the defendant university had claimed that deference should be given to its academic judgments.

The 1990 decision of the U.S. Supreme Court in *University of Pennsylvania v. EEOC*[94] squelched the use of the "academic freedom privilege" to withhold otherwise confidential evaluative material from the plaintiff in a sex discrimination challenge to the denial of tenure. This decision could have been seen as an invitation to courts to engage in a more thorough review of the "academic judgment" of the plaintiffs' faculty peers and higher levels of decision-making. For at least two decades after that decision was announced, however, there was seemingly little impact on most courts to sharpen the focus of their analyses of the evidence, and the use of summary judgments for defendants in these cases persisted.[95]

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90 Bennun v. Rutgers State Univ., 737 F. Supp. 1393 (D.N.J. 1990), *aff'd*, 941 F.2d 154 (3d Cir. 1991).

91 *Bennun*, 941 F.2d at 174.

92 749 F. Supp. 946 (S.D. Iowa 1990).

93 *Id.* at 961. The facts, as recited by the court, indicate that the harassment and discrimination against the plaintiff engaged in by several of the male faculty was so severe that the court believed the recommendation against tenure was not the type of "genuine academic judgment" required by the *Ewing* court to justify deference.

94 493 U.S. 182, 198–99 (1990).

95 Federal courts continued to award summary judgment to college and university defendants

B. A Movement Away from Deference?

More recently, a few federal appellate courts have spoken strongly against deferring to the judgments of college and university defendants. Perhaps the strongest language appears in *Mawakana v. Board of Trustees of University of the District of Columbia*.[96] In *Mawakana*, a Black law professor sued the University of the District of Columbia Board of Trustees claiming racial discrimination in his tenure denial. The trial court awarded summary judgment to the university, citing academic deference in tenure review cases, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the case. The appellate panel noted that the plaintiff had alleged several facts that, if established at trial, would indicate that the decision to deny tenure was irregular and may have been motivated by discrimination. The court explained:

> [W]e believe that *Ewing* and the concept of academic freedom do not entitle a university to special deference in Title VII tenure cases. Indeed, the first premise of the deference afforded the university in *Ewing* was that the university had "acted in good faith." That premise cannot be assumed in a Title VII case, where the question is *whether* the employer acted in good faith. The second premise of the Court›s deference in *Ewing* was that the Court was being asked to review the substance of a genuinely academic decision. *Id.* That premise also cannot be assumed in a Title VII case, where a court is asked to evaluate the reason for—as opposed to the substance of—the University's decision and thus *whether* the employer›s decision was genuinely academic. In sum, *Ewing* dictates that a court cannot second-guess a university's decision to deny tenure *if* that decision was made in good faith (i.e., for genuinely academic reasons, rather than for an impermissible reason such as the candidate›s race). But a Title VII claim requires a court to evaluate *whether* a university's decision to deny tenure was made in good faith (i.e., for academic reasons rather than for an impermissible reason such as the applicant›s race).[97]

This language suggests that the court believed that the burden was on the defendant university to demonstrate that the decision was a "genuinely academic decision" but did not explain how courts should determine whether or not the decision was made in good faith. The allegations in the *Mawakana* case suggest that factors other than "genuine academic judgment" may have been at play.[98]

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throughout the decade ending in the year 2020. *See, e.g.*, Theidon v. Harvard Univ., 948 F.3d 477 (1st Cir. 2020); Nguyen v. Regents of Univ. of Cal., 823 Fed. App'x 497 (9th Cir. 2020); Seye v. Bd. of Trs. of Ind. Univ., 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff'd*, 830 Fed. App'x 778 (7th Cir. 2020); Maras v. Curators of Univ. of Mo., 983 F.3d 1023 (8th Cir. 2020): and Zeng v. Marshall Univ., 2020 U.S. Dist. LEXIS 53131 (S.D. Va. Mar. 26, 2020), *aff'd*, 2022 U.S. App. LEXIS 855 (4th Cir. Jan. 11, 2022).

96 926 F.3d 859 (D.C. Cir. 2019), *reh'g en banc denied*, 2019 U.S. App. LEXIS 224253 (D.C. Cir. Aug. 14, 2019).

97 *Id*. at 864–65 (emphasis in original).

98 The plaintiff alleged that the dean, who made the effective decision, had treated White tenure candidates more favorably than Black candidates, citing specific examples of such treatment. Of course, if the negative decision was not based on academic judgment, but rather on other factors, such as budget difficulties or an employee's misconduct, then academic deference might not be appropriate. *See,*

Another appellate court rejected a defendant university's argument that the court should defer to the academic judgment of the decision-makers. In *Tudor v. Southeastern Oklahoma State University*,[99] a transgender woman professor of English was denied tenure twice on the grounds that her scholarship and service were insufficient. There was credible evidence that the tenure denial had been based on administrators' and some colleagues' discomfort with her transgender status. In responding to the university's argument that deference supported its motion for summary judgment, the court disagreed. The trial judge noted that "Defendants argue that their decision to deny the plaintiff tenure was a subjective matter based upon decisions made at the administrative level and that the Court should grant deference to the administration's decisions on this issue."[100] But the court noted numerous differences in material facts and ruled that the case must be tried. A jury found for the plaintiff on both her sex discrimination claim and her retaliation claim, but rejected her hostile environment claim. The trial judge refused to reinstate her and ordered back and front pay.

Both parties appealed. The appellate court found that sufficient evidence existed to support the jury verdict, and ordered the plaintiff reinstated. To the defendant's argument that reinstatement was inappropriate because of hostility between the parties, the appellate court replied

> There are plenty of work-arounds and solutions making reinstatement possible in cases where some animosity exists, such as a remote office, a new supervisor, or a clear set of workplace guidelines. And, as discussed further below, some positions such as higher education teaching and scholarship are inherently fairly insulated from the adverse sentiments of colleagues. Courts must look beyond ill feeling and instead address simply whether a productive working relationship would still be possible, and they must do so through the lens of a strong preference for reinstatement [citing *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991) (reinstatement should be granted in "all but special instances of unusual work place hostility").][101]

The court noted that all of the administrators who had rejected the plaintiff's tenure application had left the university, and that the department chair, who had initially opposed her tenure quest, now believed that she deserved tenure.

The court then addressed the plaintiff's request that she be reinstated with tenure. The court agreed, saying

> Given the jury verdict in favor of Dr. Tudor, it is established—and we cannot now question—that Dr. Tudor would have been granted tenure in 2009–10

e.g., Steele v. Mattis, 899 F.3d 943 (D.C. Cir. 2018) (professor dismissed while under contract claimed age discrimination. Because the university had argued that the reason for the dismissal was budget cuts and his failure to follow the prescribed syllabus, the appellate court ruled that the university's defense did not implicate academic judgment and that the case must be tried to a jury.) At the time this article was published, there had been no further proceedings in the case.

99 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. Oct. 26, 2017), *rev'd in part, aff'd in part*, 13 F.4th 1019 (10th Cir. 2021).

100 *Id*. at *7.

101 *Tudor,* 13 F.4th 1019 at 1034.

> absent the discrimination. Thus, in granting Dr. Tudor reinstatement with tenure, we do not serve as a super-tenure committee making academic decisions for Southeastern. We are instead restoring Dr. Tudor to the position she would have been in had Southeastern not engaged in prohibited discrimination against her.[102]

The court added "Southeastern appears to be arguing for a special rule of deference to educators, but illegal decisions by educational institutions do not enjoy special sanctity. In fact, Congress specifically removed the previous Title VII exemption for educational institutions in 1972, making them unquestionably subject to Title VII's general prohibitions."[103] Citing *Kunda*,[104] the court ordered Professor Tudor reinstated as an associate professor with tenure—an unusual ruling but not unprecedented.[105]

C. Is Deference Still the Norm?

Despite what may appear to be a movement toward less judicial reliance on academic judgment, some recent court decisions reviewing claims of discrimination or breach of contract in tenure denials have continued to announce their deference to the defendant institution's academic judgment, although these courts have discussed both parties' evidence prior to making these judgments.[106]In other recent cases, the language of deference may not be as obvious, but courts continue to dismiss lawsuits or award summary judgment to defendant colleges and universities in promotion or tenure denial cases, although after what appears to be a careful review of the plaintiff's and the defendant's evidence.[107] In recent cases where the court has rejected the defendant's invitation to defer, the plaintiff has

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102 *Id*. at 1039.

103 *Id*.

104 Kunda v. Muhlenberg Coll., 621 F.2d 532 (3d Cir. 1980).

105 For other cases in which a court ordered a plaintiff reinstated with tenure or promoted, see Brown v. Trs. of Bos. Univ., 891 F.2d 337 (1st Cir. 1989). *See also* Gladney v. Thomas, 573 F. Supp. 1232 (D. Ala. 1983) and Younus v. Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971), *aff'd mem.* 6 Fair Empl. Prac. Cas. (BL) 314 (7th Cir. 1973).

106 *See, e.g.*, Wei-Ping Zeng v. Marshall Univ., 2020 U.S. Dist. LEXIS 53131, *32 (S.D. W. Va. Mar. 26, 2020) (tenure denial) ("the issue of deference to a university's tenure decision is far from "irrelevant"—indeed, it is precisely this principle that frames a court's approach to Title VII claims raised in relation to tenure denials.") *See also, e.g.*, Graham v. Columbia Coll., 2012 U.S. Dist. LEXIS 44776 (D.S.C. Jan. 11, 2012) (layoff for budget reasons). The court quoted *Smith v. University of North Carolina*, 632 F.2d 316, 345 n.26 (4th Cir. 1980) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.") (quoting Faro v. New York Univ., 502 F.2d 1229, 1231–32 (2d Cir. 1974)).

107 Maras v. Curators of the Univ. of Mo., 983 F.3d 1023 (8th Cir. 2020) (tenure denial); Seye v. Bd. of Trs. of Ind. Univ., 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff'd*, 830 Fed. App'x 778 (7th Cir. 2020) (tenure denial); Nguyen v. Regents of the Univ. of Cal., 823 Fed. App'x 497 (9th Cir. 2020) (tenure denial); Theidon v. Harvard Univ., 948 F.3d 477 (1st Cir. 2020) (tenure denial); Davis v. W. Carolina Univ., 2016 U.S. Dist. LEXIS 20354 (W.D.N.C. Feb. 19, 2016), *aff'd,* 695 Fed. App'x 696 (4th Cir. 2017) (tenure denial); Kouassi v. W. Ill. Univ. 2015 U.S. Dist. LEXIS 64926 (C.D. Ill. May 18, 2015) (tenure denial).

alleged procedural violations serious enough to convince the court that dismissal or summary judgment are inappropriate.[108]

This review of challenges to academic personnel decisions suggests that a simple defense of "academic deference" will not be sufficient to result in dismissal or summary judgment for the institution. Litigation involving denial of tenure or promotion is lengthy, complicated, and expensive, and the number of published opinions suggests that the pace of litigation has not abated. Academic administrators (chairs, deans, provosts) will need to ensure that individuals participating in these decisions, including faculty, justify their recommendations with solid evidence and careful adherence to policies and procedures.

II. Judicial Deference to Student Academic Challenges

Although early judicial decisions tended to reject institutions' arguments that they were entitled to deference in cases of student misconduct,[109] courts have tended to defer to the decision of a faculty member or academic administrator if the dispute involves academic judgments such as grades;[110] whether a student met

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108 *See, e.g.*, Pagano v. Case W. Rsvr. Univ., 166 N.E. 3d 654, 665 (Ct. App. Ohio 2021) (tenure denial). ("Dr. Pagano has identified specific contract provisions that may have been breached and provided evidence that reasonably supports that procedural irregularities prejudiced her during the tenure review process. The procedural irregularities alleged in Dr. Pagano's breach of contract claim and the allegations of resulting prejudice are sufficient to overcome summary judgment." *See also* Moini v. LeBlanc, 456 F. Supp. 3d 34, 51 (D.D.C. 2020) (Professor denied tenure claimed national origin discrimination and breach of contract. The trial court rejected the university's motion to dismiss, stating "The President stresses that courts 'generally give deference to the decisions that universities make, including tenure decisions.' [citation omitted] Even so, Moini has made a plausible allegation of an 'arbitrary and capricious' decision. For example, recall that the Appeals Panel and the dissenting member of the Hearing Panel found it troubling that others had relied heavily on the student evaluations." However, in a later ruling, the same court awarded summary judgment on all claims to the university. Moini v. Wrighton, 2022 U.S. Dist. LEXIS 86537 (D.D.C. May 13, 2022)). And see *Miller v. Sam Houston State University*, 986 F.3d 880 (5th Cir. 2021) (tenure denial), reversing the grant of summary judgment to the university and remanding to a different trial judge. The plaintiff was not awarded tenure on the basis of poor collegiality; the appellate court ruled that the trial judge had impermissibly denied her certain discovery requests, and that a different trial judge should be assigned to the case.

109 *Goss v. Lopez*, 419 U.S. 565, 581 (1975), holding that a student in a public school had a property right in continued attendance and that before being disciplined for social misconduct (as compared with academic misconduct), the student had a right to "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." In *Horowitz v. Board of Curators of the University of Missouri*, 435 U.S. 78 (1978), however, the Court distinguished between the appropriate type of review of behavioral misconduct and academic performance. With respect to academic evaluation, the Court said, "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." *Id.* at 86.

110 *See, e.g.*, *In re* Susan M. v. New York L. Sch., 556 N.E. 2d 1104 (N.Y. 1990) ("Because [the plaintiff's] allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim." *Id.* at 1105).

academic requirements;[111] student academic performance in class[112] or in clinical settings;[113] or, in some cases, to academic misconduct.[114] The courts have been most deferential when a student challenges a grade, unless the student can make an argument that there has been overt bias or procedural violations.[115] In most cases, courts have refused to substitute their judgment for that of a faculty member who has assigned a grade to student academic work.[116] In some cases, however, courts have struggled with the dichotomy established in *Horowitz* [117] because some cases involve an assessment of both the student's academic performance and possible misconduct, either behavioral or academic.[118]

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111 *See, e.g.*, Rhode v. State of Okla. *ex rel*. Bd. of Regents of the Univ. of Cent. Okla., 2021 U.S. Dist. LEXIS 188179 (W.D. Okla. Sept. 30, 2021).

112 The Court in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978), justified its distinction between the nature of judicial review of academic judgments compared to review of discipline thusly: "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss,* the school›s decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances 'provide a meaningful hedge against erroneous action.' *Ibid*. The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 89–90.

113 *See* the discussion of judicial review of academic dismissals for inadequate clinical performance in Part II.C.

114 For a discussion of lawsuits related to student academic misconduct, see Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct*, 39 J.C. & U.L. 511, 513 (2013). The author defines academic misconduct as "plagiarism, cheating, collaborative work on an assignment that is intended to be done by the student individually, or other violations of the academic expectations of a course or assignment. The use of fabricated data or unauthorized materials, or the destruction of materials in order to prevent other students from using them (such as library resources), is also a form of academic misconduct." *See also* Thomas Schweitzer, "*Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?* 41 Am. U. L. Rev. 267 (1992); Fernand N. Dutile, *Disciplinary Versus Academic Sanctions: A Doomed Dichotomy*? 29 J.C. & U.L. 619 (2003); Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—As Compared with Public Institutions of Higher Education: A Glaring Gap?* 83 Miss. L.J. 863 (2014); and Jessica Barlow, Comment: *Student Challenges to Academic Decisions: The Need for the Judiciary to Look Beyond Deference,* 117 Penn St. L. Rev. 873 (2013).

115 *See, e.g.*, Sylvester v. Tex. S. Univ., 957 F. Supp. 944 (S.D. Tex. 1997) (court ordered law student's grade changed to a "pass" from a D because the law school had not followed its procedures for adjudicating a grade dispute).

116 *See, e.g.*, *In re* Susan M. v. New York L. Sch., 556 N.E. 2d 1104, 1105 (N.Y. 1990) ("Because [the plaintiff's] allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim."). *See also* Babinski v. Queen, 2021 U.S. Dist. LEXIS 187150, at *25 (M.D. La. Sept. 29, 2021) ("The educator's authority to create, assign, and grade assignments is unquestioned, and courts do not engage in *post hoc* assessments of educator›s grading decisions.»).

117 *Horowitz*, 435 U.S. 78.

118 For a discussion of whether all forms of academic evaluation and academic misconduct

Courts typically defer to institutional decisions with respect to academic dismissals[119] and failures of clinical performance, [120] although there are exceptions.[121] Courts have shown somewhat more skepticism when reviewing cases involving academic or professional requirements when they conflict with student speech rights, although in most cases the defendants have prevailed.[122] Review of a student's academic performance in clinical settings is especially deferential, particularly in health care settings.[123] Student claims that they have been discriminated against on the basis of a disability tend to attract somewhat more judicial scrutiny, although, again, the courts have appeared more comfortable analyzing the procedures used than the propriety of the accommodations given or withheld.[124]

A. Failure to Comply with Academic Requirements

Heeding *Ewing*'s admonishment that courts should defer to a college's "genuinely academic decision,"[125] courts have been generally unsympathetic to student claims

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should enjoy the same procedural protections, see Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 Colum. L. Rev. 289 (1999).

119 *Horowitz*, 435 U.S. 78. *See also* Al-Dabagh v. Case Wes. Rsrv. Univ., 777 F.3d 355 (6th Cir. 2015) (upholding dismissal and denying breach of contract claim, stating that academic judgments are to receive judicial deference unless arbitrary or capricious); Chenari v. Geo. Wash. Univ., 847 F.3d 740 (D.C. Cir. 2017) and Hajjar-Nejad v. Geo. Wash. Univ., 37 F. Supp. 3d 90 (D.D.C. 2014). *But see* Sharik v. Se. Univ. of the Health Sci., Inc., 780 So. 2d 136 (Fla. Dist. Ct. App. 2000) (affirming jury verdict for plaintiff, finding that medical school's decision to dismiss student for failing his last course was arbitrary and capricious).

120 Nigro v. Va. Commonwealth Univ./Med. Coll. of Va., 492 Fed. App'x 347, 360 (4th Cir. 2012). *See also* Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 437 (6th Cir. 1998).

121 *See, e.g.*, Ward v. Polite, 667 F.3d 727 (6th Cir. 2021), *infra* text accompanying notes 148–49. The court rejected the university's claim that its dismissal of the student from a master's degree program was academic in nature, reversing summary judgment awarded to the university.

122 *See* the discussion of Brown v. Li, 308 F.2d 939 (9th Cir. 2002); Pompeo v. University of New Mexico, 852 F.3d 973 (10th Cir. 2017); Tatro v. University of Minnesota, 816 N.W.2d 509 (Minn. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011); Ward v. Polite, 667 F.3d 727 (6th Cir. 2012); Oyama v. University of Hawaii, 813 F.3d 850 (9th Cir. 2015); and Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) *infra* in Section II.A of this article.

123 For a discussion of challenges to academic dismissals in clinical settings, see Ellen Babbitt & Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges, New Strategies*. 42 J.C. & U.L. 119 (2016). *See also* Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J.C. & U.L. 258 (2021). The Rothstein article has an extended discussion of the facts of many of the cases mentioned in this article as well as additional cases involving medical students not cited herein.

124 *See, e.g.*, Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 823 (9th Cir. 1999) (Although the trial court deferred to the University, determining that the accommodations given a student with a disability were reasonable, the appellate court disagreed with the trial court's deferential standard of review, saying that the University "did not demonstrate that it conscientiously exercised professional judgment in considering the feasibility" of the requested accommodations, stating that "the school's system for evaluating a learning disabled student's abilities and its own duty to make its program accessible to such individuals fell short of the standards we require to grant deference."). On remand, the trial court determined that the student was not disabled because he had achieved earlier academic success without accommodations; the appellate court affirmed that ruling (Wong v. v. Regents of the Univ. of Cal., 379 F.3d 1097 (9th Cir. 2004)).

125 Bd. of Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

that academic rules or requirements violate free speech rights. A 1988 U.S. Supreme Court case, *Hazelwood School District v. Kuhlmeier*,[126] afforded substantial deference to K–12 schools in regulating student speech if the school could demonstrate that the action was taken because of "legitimate pedagogical concerns"[127] about its content or effect. And although *Hazelwood* focused on public K–12 schools, it has been applied in some federal circuits to higher education cases as well,[128] while other federal circuits have limited its application in higher education cases.[129] But not all federal courts have been as deferential to institutional requirements, as will be seen later in this section.

For example, in *Brown v. Li*,[130] a student sued his master's thesis committee, the dean of the graduate school, and the chancellor of the University of California at Santa Barbara when his thesis committee did not approve his master's thesis because he had included a "Disacknowledgements" section in which he harshly criticized those individuals and others. Although the student eventually received his degree, the school decided not to include the thesis in the University's library. The student claimed that the defendants had violated his First Amendment free speech rights. The court, citing *Hazelwood*,[131] concluded that "an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. [That case] also make[s] clear that the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard."[132] In ruling for the defendants, the court said

> In view of a university's strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech. That standard balances a university›s interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them.[133]

More recently, in *Pompeo v. Board of Regents of the University of New Mexico*,[134] the Tenth Circuit also followed *Hazelwood*. In *Pompeo*, a graduate student claimed that her professor, in criticizing a paper that she wrote for class, had violated her

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126 484 U.S. 260 (1988).

127 *Id*. at 273.

128 *See, e.g.*, Brown v. Li, 308 F.3d 939 (9th Cir. 2002), *infra* text accompanying notes 130-133.

129 *See* discussion in *Babinski v. Queen*, 2021 U.S. Dist. LEXIS 187150 (M.D. La. Sept. 29, 2021), in which the court said that Fifth Circuit jurisprudence narrows the application of *Hazelwood v. Kuhlmeyer*, 484 U.S. 260 (1988), to only those cases involving school-sponsored speech, citing *Morgan v. Swanson*, 659 F.3d 359, 376 (5th Cir. 2011) (en banc), and noted that other circuits apply *Hazelwood* more broadly.

130 308 F.2d 939 (9th Cir. 2002).

131 *Hazelwood*, 484 U.S. 260.

132 *Brown*, 308 F.3d at 949.

133 *Id.* at 951–52.

134 852 F.3d 973 (10th Cir. 2017).

First Amendment free speech rights. The professor had told the student that she had to rewrite a paper because she had focused on her personal opinions about lesbianism rather than providing support for the statements she had made. The student refused to rewrite the paper and stopped attending class. Although the university refunded her tuition for that class, she sued both the professor and the professor's supervisor.

The University conceded that the student had free speech rights, but, citing *Hazelwood*,[135] argued that the professors were protected by qualified immunity because there was no clearly established law that restrictions on student speech that were related to legitimate pedagogical concerns violated the First Amendment. The trial court agreed, awarding summary judgment to the defendants, and the appellate court affirmed. The appellate court noted

> Our case law does not suggest that federal courts are in the business of determining whether a term is actually inappropriate for an academic audience, to the extent appropriateness can be objectively defined. Short of turning every classroom into a courtroom, we must "entrust[] to educators these decisions that require judgments based on viewpoint."[136]

A case from the Supreme Court of Minnesota provides a useful analysis of the legal conflict between academic program rules and student free speech, particularly when made off campus. In *Tatro v. University of Minnesota*,[137] the student plaintiff was enrolled in a mortuary science program. She had posted several comments on her Facebook page about the cadaver with which she was working. The program faculty found her comments not only disrespectful but potentially threatening, concluding that they were a violation of the program's rules requiring confidentiality and respectful behavior regarding the donated cadavers used by the students. She was charged with a code of conduct violation, was placed on academic probation, and was given a failing grade in the course. Tatro sued, claiming that because the social media postings were done off campus, the University did not have the authority to punish her.

Although an appellate court had ruled for the University, citing *Tinker*[138] and noting that Tatro's posting had created a substantial disruption for the mortuary science program, the state's supreme court, in affirming the ruling for the University, rested its analysis on more narrow reasoning. The high court recognized that off-campus student speech would ordinarily be protected by the First Amendment. However, said the court, the plaintiff had agreed that

> a university may regulate student speech on Facebook that violates established professional conduct standards. This is the legal standard we adopt here, with the qualification that any restrictions on a student's Facebook posts

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135 *Hazelwood*, 484 U.S. 260. The Tenth Circuit had ruled in 2004 that a student enjoyed First Amendment free classroom speech rights, *See* Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004), *infra* text accompanying notes 151-154.

136 Pompeo v. Bd. of Regents of the Univ. of N.M., 852 F.3d 973, 989–90 (10th Cir. 2017), quoting Fleming v. Jefferson Cnty. Sch. Dist., 298 F.3d 918, 928 (10th Cir. 2002).

137 816 N.W.2d 509 (Minn. 2012).

138 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

> must be narrowly tailored and directly related to established professional conduct standards. Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program. Accordingly, we hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.[139]

Another case in which professional standards outweighed free speech claims is *Oyama v. University of Hawaii*.[140] The plaintiff was a student enrolled in a post-baccalaureate program in secondary education and seeking teacher certification. He was asked to write a paper for a course in educational psychology, and the opinions he expressed in that paper were of concern to the professors in the teacher preparation program. Oyama wrote that he felt that child predation and consensual sex with a minor should be legal, although he would report such activities as required by state law. He also opined that severely disabled students should not be mainstreamed into regular classes—a perspective that was counter to state education policy. The program staff refused to recommend Oyama for teacher certification and barred him from student teaching; he sued, alleging free speech violations.

The trial and appellate courts deferred to the academic judgment of the program faculty that Oyama's rejection did not violate the First Amendment. The court explained its reasoning for deference:

> We emphasize that the University did not "establish" or "define" these professional standards by fiat. Its decision was not, in other words, based on school policies untethered to any external standards, regulations, or statutes governing the profession. Instead, the University relied upon standards established by state and federal law, the Hawaii Department of Education, the HTSB [Hawaii Teacher Standards Board], and the University's national accreditation agency, the NCATE [National Council for Accreditation of Teacher Education]…the University framed its concerns about Oyama's statements by reference to professional standards set beyond the walls of

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139 *Tatro*, 816 N.W.2d at 521. In June of 2021, the U.S. Supreme Court ruled that a public school could not discipline a student for making comments critical of the school and its staff when done outside of school hours and while under her parents' supervision. Mahanoy Area Sch. Dist. v. B.L., 121 S. Ct. 2038 (2021). The school had argued that the *Tinker* analysis should be used and that the "substantial disruption" caused by the student's social media posts justified the discipline. The trial and appellate courts rejected the *Tinker* defense; the U.S. Court of Appeals for the Third Circuit held that *Tinker* does not apply to out-of-school conduct. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020). The Supreme Court did not address whether *Tinker* applied because it found that the student's comments had not disrupted the school's functioning and thus were fully protected by the First Amendment. *Mahanoy Area Sch. Dist.*, 121 S. Ct. at 2048.

140 813 F.3d 850 (9th Cir. 2015).

> its own institution. The University thus compared Oyama's speech not to its own idiosyncratic view of what makes a good teacher, but rather to external guideposts that establish the skills and disposition a secondary school teacher must possess.[141]

Suggesting that deference to academic judgments was not automatic, the court continued:

> [W]e may defer to the University›s decision because of its prerogative to evaluate professional competencies and dispositions, not because of a blind faith in the University›s sense of what views are right or wrong. Consistent with this rationale for deference, we may uphold the University›s decision only if it reflects reasonable professional judgment about Oyama's suitability for teaching. The University's decision to deny Oyama's application satisfies this requirement.[142]

If, however, a court is not convinced that the proffered reasons for the student's failure to meet academic requirements were squarely based on professional judgment, the student may be able to get a free speech claim to a jury. For example, in *Felkner v. Rhode Island College*,[143] a student enrolled in a master's degree program in social work, grounded in social justice values, frequently expressed politically conservative views with which his professors and fellow students disagreed. The student and the professors sparred frequently over assignments that the student had submitted, and when the student refused to comply with the requirements of assignments, he was given failing grades. He filed suit against several professors and the college, asserting violations of free speech and due process, retaliation, conspiracy to violate his constitutional rights, and violation of the establishment clause.

Although the trial court had awarded summary judgment to the college on all claims, the Rhode Island Supreme Court ruled that Felkner's free speech and retaliation claims must be tried to a jury, given that court's opinion that there were genuine issues of material fact as to whether the faculty's actions were reasonably related to legitimate pedagogical concerns or a pretext for punishing him for his conservative views and his persistence in publicizing them. Said the court,

> The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that

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141 *Id*. at 870.

142 *Id*. at 873. For additional cases involving the application of professional standards to a student teacher's claim of free speech violations, see *Snyder v. Millersville Univ*., 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008) (student teacher who posted controversial photo on social media site available to her young students was not protected by the First Amendment) and *Winkle v. Ruggieri*, 2013 U.S. Dist. LEXIS 59655 (S.D. Ohio Jan. 22, 2013) (teacher training program's requirement of student compliance with "core values" was a legitimate pedagogical method of assessing potential teachers' suitability for the role of a teacher). *See also* Scaccia v. Stamp, 700 F. Supp. 2d 219 (N.D.N.Y. 2010) (faculty had legitimate concerns about student's academic performance; no violation of due process or free speech in his dismissal from graduate program).

143 203 A.3d 433 (R.I. 2019).

> position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.[144]

On remand,[145] the defendants repeated their motion for summary judgment. The trial court addressed the defendants' earlier claim of sovereign immunity, which the higher court had not addressed because the trial court had ruled in the defendants' favor and thus had not ruled on the sovereign immunity issue. The trial court ruled that at the time of the activities of which the plaintiff had complained, the professors' actions were not clearly established as violations of a student's constitutional rights because they concerned "intangible academic matters, such as grades and internship and project approvals"—matters that were clearly academic in nature.[146] The court awarded summary judgment to the defendants on all claims before it, obviating the need for a jury trial.

If a plaintiff can muster facts that suggest that faculty academic decisions were based, at least in part, on bias against a student's religious views, the court may reject defendants' claims that their judgments were based on legitimate pedagogical concerns and thus should be respected. Two cases decided within a year of each other posed similar issues regarding compliance with academic program rules, but this time they involved student claims of both free speech and religious exercise violations.

In the first, the court deferred to the academic judgment of the faculty; in the second, it did not. In *Keeton v. Anderson-Wiley*,[147] a student enrolled in a school counseling graduate program at Augusta State University resisted the program's requirement that, in her counseling preparation, she recognize and respect the rights of all potential clients, including gay patients. The student objected, stating that homosexuality was against her religious beliefs and thus the program's requirements that she express beliefs with which she disagreed violated her First Amendment free speech and free exercise rights. She also announced that if she encountered a gay client, she would attempt to use "conversion therapy" to change their sexual orientation. The program required her to follow a "remediation plan" so that she would learn to counsel all clients in accordance with the American Counseling Association's Code of Ethics. She refused, and sought a preliminary injunction to halt the imposition of the remediation plan. The court ruled that requiring the student to comply with the Code of Ethics was a valid program requirement and explained

> Just as a medical school would be permitted to bar a student who refused to administer blood transfusions for religious reasons from participating

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144 *Id*. at 450.

145 2021 R.I. Super. LEXIS 69 (R.I. Super. Aug. 21, 2021).

146 *Id*. at *36. The court cited *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978), *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Bethel School District v. Fraser*, 478 U.S. 675 (1986) in support of its ruling. For a case, still in progress, involving claims similar to those of Felkner, see *Babinski v. Queen*, 2021 U.S. Dist. LEXIS 187150 (M.D. La. Sept. 29, 2021).

147 664 F.3d 865 (11th Cir. 2011).

> in clinical rotations, so ASU may prohibit Keeton from participating in its clinical practicum if she refuses to administer the treatment it has deemed appropriate. Every profession has its own ethical codes and dictates. When someone voluntarily chooses to enter a profession, he or she must comply with its rules and ethical requirements.[148]

In the second case, *Ward v. Polite*,[149] a student in a graduate program in counseling at Eastern Michigan University objected, on religious grounds, to being required to counsel gay clients and affirm their values. The plaintiff had performed well in classwork, but, as part of a required practicum, had to counsel clients. She asked her faculty supervisor for permission to refer a gay client to another counselor, which was done, but the faculty member initiated a disciplinary process against the student and a faculty hearing committee expelled her from the program. The student sued the University and several individual defendants, alleging First Amendment and Free Exercise violations. The trial court awarded summary judgment to the University, but the appellate court reversed and ruled that the case had to be tried to a jury.

The University argued that the program had a policy of not allowing referrals resulting from the values or beliefs of a counselor, and that its no-referral policy was based upon the American Counseling Association's Code of Ethics. When the court reviewed the Code of Ethics and the questions that the faculty disciplinary panel had asked the student, the appellate court concluded that there was no formal no-referral policy, and that the Code of Ethics permitted values-based referrals. The court characterized the questions and comments of the faculty on the disciplinary hearing panel as hostile to the plaintiff's religious beliefs, and said that the factual disputes indicated that neither party deserved to win at that stage of the litigation.[150]

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148 *Id*. at 879.

149 667 F.3d 727 (6th Cir. 2012).

150 The court took notice of the outcome in *Keeton*, *supra* text accompanying notes 147–48. But the court was careful to distinguish the two cases, even though both plaintiffs objected to counseling gay clients on religious grounds, because the students' different solutions to their religious objections were the basis for the court's differentiation between them. The court explained:

> At one level, the two decisions look like polar opposites, as a student loses one case and wins the other. But there is less tension, or for that matter even disagreement, between the two cases than initially meets the eye. The procedural settings of the two cases differ. In *Keeton*, the district court made preliminary fact findings after holding a hearing in which both sides introduced evidence in support of their claims. Not only are there no trial-level fact findings here, but Ward also gets the benefit of all reasonable factual inferences in challenging the summary-judgment decision entered against her.
>
> The two claimants' theories of constitutional protection also are miles apart. Keeton insisted on a constitutional right to engage in conversion therapy—that is, if a "client discloses that he is gay, it was her intention to tell the client that his behavior is morally wrong and then try to change the client's behavior." That approach, all agree, violates the ACA code of ethics by imposing a counselor's values on a client, a form of conduct the university is free to prohibit as part of its curriculum. Instead of insisting on changing her clients, Ward asked only that the university not change her—that it permit her to refer some clients in some settings, an approach the code of ethics appears to permit and that no written school policy prohibits. Nothing in *Keeton* indicates that Augusta State applied the prohibition on imposing a counselor's values on the client in anything but an even-handed manner. Not so here, as the code of ethics, counseling norms, even the university's own practices, seem to permit the one thing Ward sought: a referral.

Clearly, the appellate court did not believe that the faculty in the *Ward* case had exercised "genuine professional judgment."

A significant case decided by the U.S. Court of Appeals for the Tenth Circuit weakened the deference to academic judgments previously shown by the courts, although some subsequent opinions have distinguished its ruling. In *Axson-Flynn v. Johnson*,[151] a student at the University of Utah had enrolled in its Actor Training Program. She told the faculty that she would not say certain words in whatever plays were being read or performed because her religious beliefs prohibited saying such words. She was admitted to the program, but refused to say certain words. A faculty member told her that she should speak to other "good Mormon girls" who were willing to say those words, and that she would either have to "modify your values" or leave the program.[152] The student sued, claiming violations of her free speech and free exercise rights.

Although the appellate court, citing *Hazelwood*,[153] agreed with the University that courts should give "substantial deference to [the defendant's] stated pedagogical concern,[154] it speculated that the program faculty's motivation for its ultimatum was hostility to the student's Mormon faith rather than a "legitimate pedagogical concern." And with respect to the student's free exercise claim, the court suggested that refusing to grant the student's requested religious exception could also be pretextual because the program faculty had made a prior exception for a Jewish student to be absent on a religious holiday. Both claims were remanded to the trial court for further action.

As was evident in *Axson-Flynn* and *Ward v. Polite*, reviewing federal appellate courts recognize the tradition of judicial deference to academic judgments, but allegations that the judgments were not "truly academic" are taken seriously by these courts and may persuade them to reject summary judgments for the defendant university. However, when asked to opine on differences of opinion between students and faculty about the evaluation of class assignments (*Pompeo, Felkner*)[155] or the propriety of academic and professional standards (*Tatro*, *Oyama*),[156] reviewing courts are still more comfortable deferring to these "genuine" academic judgments.

B. *Academic Dismissals*

1. Deference to Academic Judgments

In the majority of cases involving dismissals of students on the basis of academic failure, the courts have characterized these decisions as academic judgments and have

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Id. at 741 (internal citations omitted).

151 356 F.3d 1277 (10th Cir. 2004).

152 *Id.* at 1282.

153 Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260 (1988).

154 *Axson-Flynn*, 356 F.3d at 1290.

155 *Pompeo, supra* text accompanying notes 134–36. *Felkner, supra* text accompanying notes 143–45.

156 *Tatro, supra* text accompanying notes 137–39; *Oyama, supra* text accompanying notes 140–42.

deferred to the institution. Although students claiming that a failure to accommodate a disability have had some limited success in prevailing, or at least avoiding a grant of summary judgment to the institution, even those claims are usually unavailing. This section will review representative cases involving academic dismissals, noting where courts have questioned the institution's rationale for the dismissal.

In *Madej v. Yale University*,[157] an international undergraduate student was academically dismissed from Yale. Because he had started a consulting business to which he devoted sixty hours per week, he had accumulated an insufficient number of course credits to avoid being placed on academic warning. He then failed a course because he submitted his final exam after the deadline and was academically withdrawn from Yale. Although Madej appealed the withdrawal, the reviewing committee rejected his appeal. Madej sued for breach of contract and negligence, seeking a preliminary injunction to reverse his withdrawal.[158] Citing *Horowitz*[159] and several state court opinions,[160] the court noted that judicial deference to academic judgments was appropriate, saying "to the extent that the action challenges Madej's withdrawal, it challenges an academic judgment."[161] The court concluded that Yale had followed its policies with respect to academic withdrawal appropriately, and rejected the plaintiff's breach of contract claim as well as his claims that Yale's actions were arbitrary and capricious and a breach of the duty of good faith and fair dealing. Finding that Madej's contract and negligence claims were insufficiently supported, the court denied his request for a preliminary injunction.

In *Chan v. Board of Regents of Texas Southern University*,[162] two law students were academically dismissed when they failed a final exam in their first-year contracts course. They appealed their grades, but were unsuccessful. The students argued that the process of "curving" class grades was a violation of their substantive due process rights. Citing *Ewing* and *Horowitz*,[163] the court noted, "The Supreme Court has held that federal courts should not override grading and similar decisions about academic merit unless they so substantially depart from accepted academic norms as to demonstrate a failure to exercise professional judgment."[164] And since the exams were graded anonymously, the students' claims of arbitrary action by the professor were similarly rejected by the court.

In *Texas Southern University v. Villarreal*,[165] a first-year law student was dismissed for failing to maintain the required grade point average of 2.0. The student's

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157 2020 U.S. Dist. LEXIS 58651 (D. Conn. Mar. 31, 2020).

158 According to the court, Yale would have permitted Madej to be readmitted after two semesters. *Id.* at *16.

159 Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

160 Ruggiero v. Yale Univ., 2007 U.S. Dist. LEXIS 66290, (D. Conn. Sept. 10, 2007); Gupta v. New Britain Hosp., 687 A.2d 111 (Conn. 1996); Craine v. Trinity Coll., 791 A.2d 518 (Conn. 2002).

161 *Madej*, 2020 U.S. Dist. LEXIS 58651, at *20.

162 2012 U.S. Dist. LEXIS 164429 (S.D. Tex. Nov. 16, 2012).

163 *Horowitz*, 435 U.S. 78; Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

164 *Chan*, 2012 U.S. Dist. LEXIS 164429, at *10–11.

165 620 S.W. 3d 899 (Tex. 2021).

grade point average was 1.976. The student claimed that the administration of the final examination in one course was flawed and that he was disadvantaged as a result, alleging a violation of his right to due process under the Texas Constitution. Although the appellate court had allowed his liberty interest claim to go forward, the state supreme court reversed, calling his dismissal a "purely academic" decision, and saying

> [C]ourts are ill equipped to evaluate the academic judgment of professors and universities…We hold that an academic dismissal from higher education carries insufficient stigma to implicate a protected liberty interest. And assuming without deciding that Villarreal had a protected property right in his continuing education, the procedures followed by the School in connection with his dismissal were constitutionally adequate.[166]

The court also denied that the Texas Constitution provided property right protections for graduate study, saying that higher education is not a fundamental right under the state Constitution.[167]

In a complex case involving both the state and federal courts of Utah, a doctoral student challenged her dismissal from a neuroscience program on both state (contract) and federal (constitutional) law bases. She sued the university and the members of her dissertation committee in both their official and individual capacities. In *Rossi v. University of Utah*,[168] the state supreme court rejected the student's breach of contract claim, finding that none of the documents she relied on were contractual in nature. In a companion case in federal court, *Rossi v. University of Utah*,[169] the plaintiff claimed violations of both procedural and substantive due process regarding the manner in which her dismissal was handled as well as defamation by the chair of her dissertation committee who had alleged that she had fabricated some of her data and accused her of other unprofessional conduct. The defendants sought summary judgment on all counts and asserted qualified immunity defenses. The federal trial judge denied the defendants' motions for summary judgment on the defamation and substantive due process claims regarding the plaintiff's property right to remain enrolled at the public university, stating that Tenth Circuit precedent held that students at a public institution of higher education have a property interest that requires due process before enrollment can be terminated.[170]

The reasons for the student's dismissal from the doctoral program were a mixture of alleged academic and disciplinary failures. Although the plaintiff attempted to characterize the reasons for her dismissal from the program as disciplinary, the trial court had concluded that the primary reason was academic,

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166 *Id*. at 907–08.

167 *Id*. at 909.

168 496 P.3d 105 (Utah 2021).

169 2020 U.S. Dist. LEXIS 79782 (D. Utah May 5, 2020), *rev'd sub nom* Rossi v. Dudek, 2022 U.S. App. LEXIS 12142 (10th Cir. May 5, 2022).

170 *Rossi*, 2020 U.S. Dist. LEXIS 79782, at *90, citing Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975).

and thus the defendants needed to meet only a lower standard under *Horowitz* and *Ewing*. Said the court,

> For purposes of determining adequate process in the context of procedural due process, an academic dismissal is more subjective and evaluative. It requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. For academic dismissals, the court has declined to enlarge the judicial presence in the academic community.[171]

Deferring to the faculty's academic judgment about the quality of the student's work, the trial court granted the defendants' summary judgment motions on the plaintiff's claims of substantive due process violations with respect to her liberty interest claim but denied their summary judgment motions on the plaintiff's substantive due process claims with respect to her property interests on the basis of their alleged mistreatment of the student. The court also denied the dissertation committee chair's summary judgment motion on the defamation claim. Finally, the court dismissed the claims against the four committee members (including the chair) in their official capacities but allowed the claims to proceed against them in their individual capacities.

The appellate court rejected the trial court's rulings for the student,[172] finding that she had received sufficient due process protections—both substantive and procedural—on her property right claim. Said the court,

> [t]he parties suggest that the procedural and substantive due process standards are effectively the same in a case like this, as Rossi alleges she was dismissed for impermissible reasons. . . . We agree, so we analyze Rossi's due process challenges together, focusing on whether it was clearly established that the decision to dismiss her was anything other than careful and deliberate. We conclude that, because the University provided an extensive administrative appeals process which Rossi does not directly charge with bias, Rossi cannot show that her clearly established rights were violated.[173]

The appellate court also reversed the trial court's denial of sovereign immunity to the faculty members who served on her dissertation committee. Although the appellate court stated that the appeals committee had given some deference to the dissertation committee's evaluation of Rossi's work, rather than making its own determination as to its quality, the court explained that "It was not clearly established that an administrative appeals process fails to produce a careful and deliberate decision just because it may not have involved de novo review of all aspects of an academic determination that is alleged to have been based on nonacademic factors."[174]

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171 *Rossi*, 2020 U.S. Dist. LEXIS 79782, at *92.

172 *Rossi*, 2022 U.S. App. LEXIS 12142.

173 *Id.* at *23–24.

174 *Id.* at *29.

2. Rejection of Academic Deference

Courts have occasionally refused to defer to the academic judgment of faculty or administrators in academic dismissals, however, particularly if the facts are in dispute and allegations of ill-will and retaliation are made.

In a case in which the court was skeptical of the college's grounds for moving for summary judgment, *Sandie v. George Fox University*,[175] a graduate student enrolled in a master's of arts in teaching (MAT) program was dropped from the student teaching portion of the program because faculty members believed her performance as a student teacher was inadequate. Although the program gave her an opportunity to repeat the student teaching portion the following semester, Sandie sued for breach of contract, negligence, violation of the duty of good faith and fair dealing, and disability discrimination. The court rejected her disability discrimination claim, finding no evidence of a relationship between her asthma and the university's decision to dismiss her from the MAT program. The court also awarded summary judgment to the university on Sandie's negligence claim, which, according to the court, made it unnecessary for the court to rule on the defendant's request for judicial deference to its academic judgment. Sandie's breach of contract claim, however, survived the defendant's summary judgment motion because the court found substantial differences in material facts as to whether various documents were contractual in nature and whether a contract between the parties existed.

Despite courts' discomfort with reviewing academic judgments, they are more willing to scrutinize defendants' "academic" defenses when students dismissed on academic grounds claim unlawful discrimination. As in those employment discrimination cases discussed in Part I,[176] trial courts have analyzed defendants' defenses of deference to academic judgment when plaintiffs have alleged a failure to accommodate or ill-will on the part of some faculty or staff, stating that the decision-makers' motive must be evaluated rather than merely accepting the stated academic rationale for the negative decision.

For example, the U.S. Court of Appeals for the Seventh Circuit has stated definitively that *Ewing*'s language regarding deference to academic judgment does not apply to cases where a plaintiff claims that discrimination infected the decision made by the institution. In *Novak v. Board of Trustees of Southern Illinois University* [177] involving a claim of disability discrimination, the court rejected reliance on *Ewing*, saying

> Courts of appeals have been careful not to import this formulation of the deference owed to academic decisions when analyzing allegations under the discrimination statutes. Although such a formulation rests comfortably in the context of substantive due process analysis, the Supreme Court has noted specifically that such a formulation applies only to "*legitimate* academic decision[s]"

175 2021 U.S. Dist. LEXIS 63386 (D. Or. Mar. 11, 2021).

176 *See, e.g.*, *Mawakana*, *supra* text accompanying notes 96–98.

177 777 F.3d 966 (7th Cir. 2015).

and that academic decisions that are discriminatory are not legitimate.[178]

In *Novak*, the plaintiff challenged his dismissal from a doctoral program in curriculum and instruction. The student, who had received accommodations for his posttraumatic stress disorder, had failed an examination required for doctoral candidacy several times. He had received the accommodations he had requested, but each time the professors evaluating his examinations found that he had not met the standard for a passing grade. The trial court had awarded summary judgment to the university, finding that the examination failure was a legitimate nondiscriminatory reason for the student's dismissal and unrelated to his disability. Despite its language rejecting *Ewing* deference, the appellate court concurred, reviewing the testimony of the faculty who had given Novak the failing grades. The appellate court found that the professors' exam grades were made honestly and fairly, and that the plaintiff had produced no evidence that discrimination had infected the decision to dismiss him from the program.[179]

In another case involving dismissal from a graduate program, *Grubach v. University of Akron*,[180] the plaintiff alleged breach of contract and age discrimination in his dismissal from a PhD program for failing the required examination. Although the trial court had awarded summary judgment to the university on all claims, the appellate court reversed on the breach of contract claim. The plaintiff had alleged several irregularities in the way that two of the professors had graded his examination, and the court ruled that the case needed to be tried to a jury. The court said

> A trial court's standard for reviewing the academic decisions of a college or university is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary and capricious. Accordingly, a trial court is required to defer to academic decisions of the college unless it perceived such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[181]

The appellate court determined that the plaintiff had alleged sufficient evidence to suggest that the grading of his examination was not fully an exercise of professional judgment and that a jury would need to resolve the issue.

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178 *Id*. at 975–76 (emphasis in original).

179 *Id.* at 976–77. The appellate court explained: "Mr. Novak points to several perceived faults in the faculty's methodology. None of those alleged faults suggest anything other than an error in the course of a faculty member's evaluation of the student's work. Any lapse hardly supports the inference that the faculty members were involved in something other than a bona fide professional enterprise throughout the course of their assessment. There is no evidence that the faculty members' grading of Mr. Novak's Preliminary Examination was anything other than an honest, professional evaluation of his potential for the particular program in which he was enrolled. In other words, the evidence of record is insufficient to support a finding that the professors' stated reasons for failing Mr. Novak's various Day 3 submissions were deliberately false—a mask for a decision based on discriminatory grounds." *Id.* at 977.

180 2020 Ohio App. LEXIS 2411 (Ohio Ct. App. Sept. 25, 2020).

181 *Id*. at *16–17.

C. Clinical Failure

Perhaps because of the long and expensive training required for medical professionals, former medical or other health care students bring the majority of cases involving academic dismissals related to clinical failure. They involve breach of contract, constitutional, and disability discrimination claims. In dismissal cases where students allege that their dismissal violated their free speech rights, some have been somewhat more successful,[182] but absent such allegations, most cases result in a summary judgment award for the university.[183]

Some cases involving dismissals from medical school or a medical residency discuss a "heightened deference" standard for GME (graduate medical education). For example, in *Kling v. University of Pittsburgh Medical Center*,[184] a federal trial court, citing Third Circuit precedent,[185] rejected the plaintiff's claim that the court should not use a heightened deference standard in reviewing the defendant's justifications for dismissing him from a residency program. While most reviewing courts did not necessarily use this term in their written opinions, it is clear that they were following this presumption in their reasoning.

1. Breach of Contract Claims

In *Hajar-Nejad v. George Washington University*,[186] a medical student lost a breach of contract claim after he was dismissed for lack of professionalism and poor academic performance in his clinical rotations. The court did an extensive review of the criticisms of the plaintiff's performance in the clinical setting, noting that "decisions involving academic dismissal merit summary judgment…'unless the plaintiff can provide some evidence from which a fact finder could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance.'"[187]

> The court concluded that based on the evidence before the [committee responsible for recommending academic dismissals] and in light of the

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182 *See, e.g.*, cases discussed *supra* Part II.B.

183 In some cases, courts have commented that deference should be provided because of concerns about patient safety. *See, e.g.*, Alden v. Geo. Univ., 734 F.2d 1103, 1108 (D.C. Cir. 1999) ("This rule of judicial nonintervention is 'particularly appropriate in the health care field' where the students who receive degrees will provide care to the public," citing Burke v. Emory Univ., 338 S.E. 2d 500 (Ga. Ct. App. 1985).) *See also* Kraft v. William Alanson White Psychiatric Found., 498 A.2d 1145, 1149 (D.C. App. 1985.) ("An academic judgment of school officials that a student does not have the necessary clinical ability to perform adequately and was making insufficient progress toward that goal is a determination calling for judicial deference," citing Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–90 (1978) and Hankins v. Temple Univ. Health Scis. Ctr., 829 F.2d 437, 443 (3d Cir. 1987) ("University faculties…must have the widest discretion in making judgments as to the academic performance of their students.").

184 2021 U.S. Dist. LEXIS 127999 (W.D. Pa. July 9, 2021).

185 *Hankins*, 829 F.2d at 443.

186 37 F. Supp. 3d 90 (D.D.C. 2014).

187 *Id.* at 116, quoting Paulin v. Geo. Wash. Univ. Sch. of Med. & Health Scis., 878 F. Supp. 2d 241, 247 (D.D.C. 2012).

> deference appropriate in reviewing dismissal decisions by medical schools, the Court cannot conclude that either the Committee's recommendation that Plaintiff be dismissed, or the Dean's ultimate decision to dismiss Plaintiff based on this recommendation were arbitrary and capricious.[188]

The court noted that judicial deference to such academic judgments was "particularly appropriate in the health care field."[189]

In *In re Zanelli v. Rich*,[190] the student claimed that her academic dismissal from a nursing program at Nassau Community College breached her contract with the college and violated her due process rights. The student had failed a course, and when she was offered the opportunity to retake the course or be dismissed, she refused to retake the course. The court affirmed the lower court's dismissal of both of her claims. The court noted that "determinations made by educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review" but said that "review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to Constitution or statute."[191] Finding no evidence of arbitrariness, the court rejected the breach of contract claim. With respect to the due process claim, citing *Horowitz*,[192] the court noted that due process requirements are "less stringent" when a student is dismissed for academic reasons than when she is dismissed for disciplinary reasons.[193]

But sometimes students prevail in breach of contract claims. In an unusual case that resulted in a jury verdict for the student,[194] a private medical school dismissed the student for failing his last class before graduation. The student filed numerous tort and contract claims; the court allowed only his allegation of a breach of an implied-in-fact contract to go to the jury. The jury found that the dismissal was arbitrary and capricious, and awarded him a partial tuition refund; the trial court had rejected the student's claim for lost future earnings. The appellate court upheld the jury verdict, but reversed the trial court's limitations on damages and remanded for a new trial on the damages issue.

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188 *Hajar-Nejad*, 37 F. Supp. 3d at 118.

189 *Id.* at 117. *See also* Morris v. Yale Univ. Sch. of Med., 2012 Conn. Super. LEXIS 1216 (Conn. Super. Ct. May 7, 2012), *aff'd*, 63 A.3d 991 (Conn. App. Ct. 2013).

190 8 N.Y.S.3d 217 (N.Y. App. Div. Apr. 1, 2015).

191 *Id*. at 218–19.

192 Bd. of Curators of the Univ. of Mio. v. Horowitz, 435 U.S. 78 (1978).

193 *Zanelli*, 8 N.Y.S.3d at 219. *But see* Paulin v. Geo. Wash. Univ. Sch. of Med. & Health Scis., 878 F. Supp. 2d 241, 247 (D.D.C. 2012) (Student dismissed from physician assistant program filed breach of contract claim, asserting that the clinical rotation to which she was assigned—her last after an academically strong performance in her previous clinical rotations—was disorganized and evaluated her performance based upon "ill will, personal spite and retaliation" instead of appropriate clinical criteria. The court rejected the medical school's motion to dismiss the lawsuit.).

194 Sharick v. Se. Univ. of the Health Scis., 780 So.2d 136 (Fla. Dist. Ct. App. 2000).

2. Constitutional Claims

Students dismissed from health care clinical programs have attempted to convince the court that the dismissal was for disciplinary rather than academic reasons, thus claiming a violation of their procedural due process protections when they are not given a hearing, as required by *Goss v. Lopez*.[195] Given the courts' reliance on *Horowitz*,[196] this strategy typically fails. For example, in *Shah v. University of Texas Southwestern Medical School*,[197] the plaintiff lost on his due process claims. The student had been dismissed for receiving two negative write-ups for what the medical school characterized as failures of professionalism. The student challenged his dismissal on the grounds of both procedural and substantive due process, demanding that the school delete all references to his dismissal from his academic record so that he could seek admission to other medical schools. The court noted that he had been given reasons for his dismissal, had been allowed to appeal that decision, and had been given a further opportunity to appeal the decision to the provost and dean. That process was sufficient, said the court, for an academic decision.

The court then turned to the student's substantive due process claim. Citing the *Ewing* language that a court should defer to the academic judgment of the institution, unless its actions were "such a substantial departure from accepted academic norms as to demonstrate that [the decision-maker] did not actually exercise professional judgment,"[198] the court ruled that the student had been counseled on numerous occasions about his failures to meet the expectations of his clinical instructors, and that the issuance of the two negative reports on the student's academic performance was a legitimate exercise of professional judgment and thus not a substantive due process violation.

Similarly, in *Al-Asbahi v. West Virginia Board of Governors*,[199] a pharmacy student also failed to persuade the court that his due process claim had merit. He sued the West Virginia School of Pharmacy when he was dismissed from its Doctor of Pharmacy program. The student had earned poor grades in his first year and was dismissed, but the dean agreed to readmit him on the condition that he earn no grades below a C in required courses and follow a specific remediation plan. After he was readmitted, the student's academic performance did not comply with the terms of his readmission, and he was dismissed a second time.

The student asserted claims of both substantive and procedural due process violations. His substantive due process claim was based upon his belief that he had been graded unfairly and deserved higher grades than those given to him. The court rejected that claim, saying

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195 419 U.S. 565 (1975). *See, e.g.*, Perez v. Tex. A&M Univ. at Corpus Christi, 589 F. App'x 244, 248 (5th Cir. 2014) (dismissal was academic, not disciplinary).

196 *Horowitz*, 435 U.S. 78.

197 129 F. Supp. 3d 480 (N.D. Tex. 2015), *aff'd*, 668 F. App'x 88 (5th Cir. 2016).

198 Bd. of Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1978).

199 2017 U.S. Dist. LEXIS 12400 (D. W. Va. Jan. 30, 2017), *aff'd*, 724 F. App'x 266 (4th Cir. 2018).

> the decisions made by Dean Chase and other administrators, or even the grading decisions by Martello or any other professor, are not unjustified by any circumstance or governmental interest. Not only do these defendants have an interest, they owe a duty to the public to ensure that pharmacists and other medical professionals are qualified, properly trained, and of the highest caliber.[200]

Citing both *Ewing* and *Horowitz*, the court concluded that the dean had made the dismissal decision "conscientiously and with careful deliberation."[201]

Turning to the plaintiff's procedural due process claim, the court reviewed in detail the facts and ruling of *Horowitz*,[202] and concluded that the plaintiff had received sufficient due process. The court noted that the student was well aware of the faculty's dissatisfaction with his academic performance, the dean's dismissal decision was based upon her knowledge of his performance limitations, and he was given an opportunity to attempt to persuade her not to dismiss him from the program.

In this case, the federal district court stated that the plaintiff had a property right in "continuation and completion of his education" in the Doctor of Pharmacy program.[203] The U.S. Supreme Court has not ruled on whether or not students at public colleges and universities enjoy a property right in continued enrollment. The lower federal courts have used a variety of approaches to this question.[204]

3. Disability Discrimination Claims

By far the most frequent lawsuits brought by medical/health care students challenging dismissals for clinical failures are based on disability discrimination.[205]

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200 *Al-Asbahi*, 2017 U.S. Dist. LEXIS 12400, at *35.

201 *Id*. at *38.

202 *Horowitz*, 435 U.S. 78.

203 *Al-Asbahi* 2017 U.S. Dist. LEXIS 12400, at *39.

204 For a discussion of the differences among the federal circuits in whether or not they recognize a student's property right in higher education, see Dalton Mott, *The Due Process Clause and Students*, 65 U. Kan. L. Rev. 651, 653–64 (2017). According to Mott, courts in the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits analyze the law of the state in which the institution is located to determine whether or not a property right exists. In the First, Sixth, and Tenth Circuits, Mott states, federal courts rule, citing *Goss v. Lopez*, that postsecondary students have the same property right as students in K–12 public schools. And Mott describes a third group—the Fifth and Eighth Circuits, which assume a property right without deciding the issue.

205 Students bringing claims of disability discrimination under the ADA or the Rehabilitation Act must demonstrate that they are "otherwise qualified" to meet the academic and technical standards of the academic program. Students who cannot meet these standards, with or without reasonable accommodation, are not protected by these laws. *See, e.g.*, Chapman v. Meharry Med. Coll., 2021 U.S. Dist. LEXIS 15186 (M.D. Tenn., Aug. 12, 2021) (student who could not pass required examinations, even with accommodations, was not qualified; "Deference is particularly important with regard to degree requirements in the health care field. 'The decision of a college not to waive [a] requirement and lower the standards for continued training in [] medicine is entitled to deference. We should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue [the] chosen profession,'" citing Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432,

Plaintiffs are usually unsuccessful. One of the earliest such cases is *Doherty v. Southern College of Optometry*.[206] In *Doherty*, a student with neurological disorders was admitted to a program in optometry. The program required students to be able to demonstrate proficiency in using four instruments; proficiency was required for successful completion of the degree. The student asked the college to waive the proficiency requirement, but it refused, stating that his inability to use the instruments meant that he was not a qualified individual with a disability (a necessary showing in order for a plaintiff to prevail in a disability discrimination lawsuit). The appellate court concurred, saying that waiving the requirement was not a reasonable accommodation.

Similarly, in *Ohio Civil Rights Commission v. Case Western Reserve University*,[207] a visually impaired student's claim was unsuccessful. She was denied admission to medical school and filed a Rehabilitation Act[208] claim with the state Civil Rights Commission, which ruled in her favor. The University appealed, and the Supreme Court of Ohio reversed. The Commission had ruled that the medical school must provide accommodations to the student such as assisting her in reading X-rays and excusing her from certain requirements, and such as starting an intravenous line and observing surgeries. The medical school followed technical standards for admission created by the Association of American Medical Colleges.

The Commission and lower court had relied on testimony by a blind medical school graduate that Temple University had provided him with substantial accommodations, including extra tutoring and modifications of academic requirements in order to allow him to graduate. The Ohio Supreme Court, citing *Horowitz* and *Ewing*, characterized the medical school's decision not to admit the applicant as an academic one that is subject to judicial deference[209] and ruled that the accommodations requested by the applicant, and ordered by the Commission, were not reasonable. Citing *Doherty*,[210] the court noted that the law does not require an institution "to accommodate a handicapped person by eliminating a course requirement which is reasonably necessary to the proper use of the degree."[211] The court also ruled that the accommodations would impose an undue burden on the faculty.

Similarly, in *McCully v. University of Kansas School of Medicine*,[212] a federal appellate court affirmed a summary judgment ruling for the medical school. The student had been admitted, and disclosed that she had spinal muscular atrophy, which meant

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437 (6th Cir. 1998).

206 862 F.2d 570 (6th Cir. 1988).

207 666 N.E.2d 1376 (Ohio 1996).

208 29 U.S.C. § 794 (1973).

209 *Ohio C.R. Comm'n*, 666 N.E.2d at 1386.

210 *Doherty*, 862 F.2d at 575.

211 *Ohio C.R. Comm'n*, 666 N.E.2d at 1386. *But see* Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n, 850 N.W.2d 326 (Iowa 2014) (Court ruled that college must accommodate visually impaired applicant by allowing another individual to interpret X-rays for him because state licensing board did not require the skills that the college required of its graduates, and two blind students had previously graduated from the college and were licensed and practicing.)

212 591 F. App'x 648 (10th Cir. 2014).

that she was physically limited in standing and lifting. Her disability required an assistant to perform some of the functions required of a medical student, such as lifting and positioning patients and performing certain emergency and life support functions. The court agreed that the requested accommodations would impermissibly alter the medical school's curriculum, and approved the school's rescinding her admission.

In *Falcone v. University of Minnesota*,[213] a medical student with learning disabilities failed multiple courses and clinical rotations, despite receiving several accommodations. The trial court rejected his Rehabilitation Act[214] claim, and the appellate court affirmed. The appellate court noted that the plaintiff was arguing that the medical school should modify its training program to respond to his disabilities; the court disagreed, saying "the statute does not require an educational institution to lower its standards for a professional degree, for example, by eliminating or substantially modifying its clinical training requirements."[215]

In *Shin v. University of Maryland Medical System Corp.*,[216] an intern whose clinical performance was determined to be unsatisfactory lost a challenge to his dismissal. Although the intern claimed that the decision violated the ADA[217] because the medical school did not provide the accommodations he requested, the defendants provided extensive documentation of performance problems, including misdiagnosing patients and giving inappropriate medications as well as evidence that the requested accommodations were unreasonable because they interfered with patient safety. The court agreed with the defendants, saying "[We] defer to the views of Appellees on the standards for professional and academic achievement"[218] in the medical education program, and awarded summary judgment to the defendants.

Similarly, in *Al-Dabagh v. Case Western Reserve University*,[219] a student who had performed well academically in classroom-based courses lost a challenge to his dismissal. The student was dismissed after he was convicted of driving while intoxicated. Although a trial judge required the University to reinstate him on the grounds that he had completed all requirements for graduation, the appellate court reversed, noting that the student handbook provided that meeting professionalism standards was part of the academic requirements for graduation. The court interpreted the language of the handbook as contractual in nature and stated "Al-Dabagh's dismissal on professionalism grounds amounts to a deference-receiving academic judgment for several reasons. The student handbook—the governing contract—says professionalism is part of Case Western's academic curriculum at least four times. Judges are 'ill equipped' to second-guess the University's curricular choices."[220]

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213 388 F.3d 656 (8th Cir. 2004).

214 29 U.S.C. § 794 (1973).

215 *Falcone,* 388 F.3d at 659.

216 369 F. App'x 472 (4th Cir. 2010).

217 42 U.S.C. §§ 12101 et seq. (1990).

218 *Shin*, 369 F. App'x at 482.

219 777 F.3d 355 (6th Cir. 2015).

220 *Id*. at 359, internal citations omitted.

Although colleges and universities have an obligation to accommodate qualified students with disabilities, there is no such requirement if the student does not disclose a disability and does not ask for accommodations. In *Doe v. Board of Regents of the University of Nebraska*,[221] a medical student with depressive disorder did not disclose that disorder to the faculty or his clinical rotation supervisors. Doe had numerous academic problems but did not seek accommodations. After allowing Doe to postpone several examinations and granting him a leave of absence, his supervisors noticed several lapses in professionalism such as tardiness, being abrupt with patients, and a general lack of medical knowledge. He was dismissed from the program, and an appeal was unsuccessful.

The Supreme Court of Nebraska came down firmly on the side of deference to the medical professionals' academic judgment. This court said

> In actions under the ADA and the Rehabilitation Act, substantial deference is generally given to academic judgments. Courts are generally ill equipped, as compared with experienced educators, to determine whether a student meets a university's reasonable standards for academic and professional achievement. Evaluating performance in clinical courses is no less an academic judgment than that of any other course, and is entitled to the same deference.[222]

Finding that the plaintiff had not provided evidence that his dismissal for poor professionalism and inadequate clinical performance was a pretext for discrimination, the court affirmed the lower courts' summary judgment award for the defendants.

In a case with similar facts, *Halpern v. Wake Forest University Health Sciences*, a federal appellate court rejected a medical student's ADA[223] and Rehabilitation Act[224] claims that his dismissal from medical training was discriminatory.[225] The student had been diagnosed with attention deficit hyperactivity disorder and an anxiety disorder but had not requested accommodations. When he was confronted with concerns about unprofessional behavior during his clinical rotations, he claimed that his disabilities were responsible for his allegedly rude, unprofessional treatment of staff and his inability to deal with constructive criticism. He later requested accommodations that the faculty found to be unreasonable, and the problematic behavior continued.

The trial court awarded summary judgment to the medical school, and the appellate court affirmed. The appellate court concluded that meeting standards of professionalism is an essential function of a medical doctor, and that Halpern had requested an accommodation—an unlimited amount of time to modify his behavior—that was unreasonable and of an uncertain outcome, given his previous behavior.

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221 846 N.W.2d 126 (Neb. 2014).

222 *Id*. at 151.

223 42 U.S.C. §§ 12101 et seq. (1990).

224 29 U.S.C. § 794 (1973).

225 2012 U.S. App. LEXIS 5287 (4th Cir. Feb. 28, 2012).

Thus, said the court, Halpern was not qualified, as required by the both the ADA[226] and the Rehabilitation Act,[227] and thus was not protected by either.

Despite the courts' deference to academic judgments when a medical student claims that discrimination on the basis of disability motivated the dismissal from a clinical program, there are occasions when the factual allegations persuade a court to reject deference. For example, in *Pushkin v. Regents of University of Colorado*,[228] a doctor who managed multiple sclerosis and used a wheelchair won his Rehabilitation Act case. He had been rejected from a residency program in psychiatry primarily because the decision-makers were concerned about how psychiatric patients would respond to a doctor in a wheelchair. He filed a lawsuit under the Rehabilitation Act.[229] The court found that the reasons for rejecting the plaintiff were related to his disability and that his qualifications had not been addressed with seriousness by the committee that recommended his rejection.

In a more recent case, *Weiss v. Rutgers University*,[230] a graduate student with learning disabilities survived the university's motion to dismiss her discrimination claim. The student had been dismissed from a program in counseling because of alleged deficiencies in her performance in a required internship. She filed claims of disability discrimination under state and federal law. Reviewing the university's motion to dismiss, the trial court concluded that the student had stated a claim that she was otherwise qualified because she had performed well in classroom courses, despite the fact that the requirements of the internship were quite different from those courses she had previously taken. Many of the faculty members' concerns were about her behavior with clients and issues of professionalism. The court said

> The Court is mindful of the deference given to academic decision making in the ADA context [citation omitted]…However, this deference does not override this Court's duty to draw all reasonable inferences in favor of the non-moving party at the motion to dismiss stage. The Court is unpersuaded that the Complaint's factual allegations support academic deference, and will not defer to the Rutgers Defendants absent a fuller record.[231]

The fact that the defendants had sought a dismissal rather than summary judgment, which would have required a fuller evidentiary record, appears to have influenced the court's rejection of deference in this case.

III. Conclusion

This review of court decisions involving academic judgments concerning faculty and students suggests that, despite some relatively recent judicial rejections

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226 42 U.S.C. §§ 12101 et seq. (1990).

227 29 U.S.C. § 794 (1973).

228 658 F.2d 1372 (10th Cir. 1981).

229 29 U.S.C. § 794 (1973).

230 2014 U.S. Dist. LEXIS 80397 (D.N.J. June 10, 2014).

231 *Id*. at *14–15.

of deference to academic judgment in cases involving denials of promotion or tenure, deference is usually the norm for both faculty and student claims. And while an award of summary judgment for the defendant institution and its officials is more likely than not in these cases, the courts seem to be scrutinizing the factual allegations of the parties more closely in recent cases, rather than deferring to the academic authorities' characterization of the qualifications (or lack thereof) of the students and the faculty.

This research was stimulated by the results of two recent employment discrimination cases[232] in which the courts not only refused to defer to the university's academic judgmen, but in one case rejected it completely and awarded the plaintiff tenure.[233] The courts in these two cases, and in a very few others, rejected deference in situations where the alleged mistreatment by the institution seemed particularly egregious to the judges (for example, *Mawakana*,[234] *Tudor*,[235] and *Pagano*[236]). However, other recent litigation involving faculty promotion and tenure has resulted in summary judgment awards for the institution (*Maras*,[237] *Seye*,[238] *Nguyen*,[239] *Theidon*,[240] and *Zeng*[241]).

With respect to student challenges to academic judgments, a trend away from deference has not occurred. Unless a plaintiff was able to articulate what appeared to the court to be clearly arbitrary actions by faculty members or academic administrators (*Ward v. Polite*,[242] *Pushkin*[243]), courts accepted the defendants' often substantial evidence that the plaintiff's performance problems, even if related to a disability, required a ruling for the defendants.

This review of academic deference litigation suggests that, unless plaintiffs, whether they be faculty or students, can provide substantial evidence of bad faith, serious procedural irregularities, or personal bias by decision-makers involved in making academic judgments, courts will very likely continue to defer. Given the fact that judges and juries have relatively little acquaintance with the inner

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232 Mawakana v. Bd. of Trs. of the Univ. of the Dist. of Columbia, 926 F.3d 859 (D.C. Cir. 2019) and Tudor v. Se Okla. State Univ., 2017 U.S. Dist. LEXIS 177654 (W.D. Okla Oct. 26, 2017), *rev'd in part, aff'd in part*, 13 F.4th 1019 (10th Cir. 2021).

233 *Tudor,* 13 F.4th at 1049.

234 *Mawakana*, 926 F.3d 859.

235 *Tudor*, 2017 U.S. Dist. LEXIS 177654.

236 Pagano v. Case W. Rsrv. Univ., 166 N.E.3d 654, 665 (Ct. App. Ohio 2021).

237 Maras v. Curators of Univ. of Mo., 983 F.3d 1023 (8th Cir. 2020).

238 Seye v. Bd. of Trs. of Ind. Univ., 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff'd,* 830 Fed. App'x 778 (7th Cir. 2020).

239 Nguyen v. Regents of Univ. of Cal., 823 Fed. App'. 497 (9th Cir. 2020).

240 Theidon v. Harvard Univ., 948 F.3d 477 (1st Cir. 2020).

241 Zeng v. Marshall Univ., 2020 U.S. Dist. LEXIS 53131 (S.D. Va. Mar. 26, 2020), *aff'd*, 2022 U.S. App. LEXIS 855 (4th Cir. Jan. 11, 2022).

242 667 F.3d 727 (6th Cir. 2012).

243 Pushkin v. Regents, Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981).

workings of colleges and universities and the way that academic judgments are made, this trend will very likely continue. Most of the cases reviewed for this article were disposed of on summary judgment; few were dismissed prior to the summary judgment stage because courts preferred to have a more complete evidentiary record to review. Given the complexity of many of these judgments, particularly those involving promotion and tenure, it seems that colleges and universities facing this type of litigation will need to prepare thorough defenses that not only show compliance with their own policies and procedures but that demonstrate the fairness of these decisions and the thoughtfulness with which they were made. Inadequacies in faculty or student performance that may seem obvious to faculty in the plaintiff's department or discipline, particularly in cases involving promotion or tenure, may not be obvious to judges, and certainly not to members of the jury.

As is the case with litigation of any kind, college and university defendants would prefer to resolve the litigation before trial, and the analysis in this article shows that, in the majority of the cases reviewed, the lawsuit did not get to a jury. And while some judges in recent cases still refer to *Horowitz*, and occasionally to *Ewing*, as justification for deferring to the institution's academic judgment, as did courts in earlier cases, judges in recent cases appear to have closely scrutinized the institution's reasons for the negative decision that is being challenged to ascertain whether or not it is truly an exercise of professional judgment.