LAW PROFESSORS AS PLAINTIFFS

Robert M. Jarvis∗

I. INTRODUCTION

Law professors show up regularly in lawsuits. Their best-known roles, of course, are serving as expert witnesses,[1] acting as pro bono counsel,[2] filing amicus briefs,[3] and having their scholarship cited by

∗ Professor of Law, Nova Southeastern University (jarvisb@nova.edu). The research for this article closed on January 1, 2017. As such, it does not include any of the lawsuits that have been filed by law professors against the Trump Administration. The first such action (involving the federal constitution's Emoluments Clause) was brought by Professors Erwin Chemerinsky (University of California at Irvine), Zephyr R. Teachout (Fordham University), and Laurence H. Tribe (Harvard University) on January 23, 2017. *See* Karen Sloan, *Law Profs Butt Heads over Suit Filed Against Trump*, NAT'L L. J. (Jan. 23, 2017), http://www.nationallawjournal.com/id=1202777437761/Law-Profs-Butt-Heads-Over-Suit-Filed-Against-Trump?slreturn=20170123173922. Likewise, it does not include the lawsuits that faculty members at Charlotte School of Law ("CSL") and Whittier Law School ("WLS") have threatened to file in the wake of CSL's mass firing of its faculty in January 2017 and the announced closing of WLS in April 2017. *See* David Frakt, *How Charlotte Law Wrongfully Terminated Half Its Faculty*, FAC. LOUNGE (Feb. 6, 2017), http://www.thefacultylounge.org/2017/02/how-charlotte-law-wrongfully-terminated-half-its-faculty.html; Sean Emery, *Faculty Fights Back Against Plan to Close Whittier Law School*, ORANGE COUNTY REG. (Apr. 21, 2017), http://www.ocregister.com/2017/04/20/faculty-fights-back-against-plan-to-close-whittier-law-school-in-costa-mesa/. Lastly, it does not include the short-lived lawsuit filed by Jennifer S. Bard against the University of Cincinnati. Bard was ousted as dean after her attempts to reform the law school's budget upset the faculty. *See* Kate Murphy, *Law School Dean Sues UC*, CIN. ENQUIRER (Apr. 24, 2017), http://www.cincinnati.com/story/news/2017/04/24/law-school-dean-sues-uc/100838604/. The suit settled for $600,000. *See* Kate Murphy, *UC Law Dean Gets $600k to Drop Suit, Step Down*, CIN. ENQUIRER (May 8, 2017), http://www.cincinnati.com/story/news/2017/05/08/uc-law-dean-gets-600k-drop-suit-step-down/101428204/.

[1] *See, e.g.*, New Props., Inc. v. George D. Newpower, Jr., Inc., No. 97-15769-CH, 2004 WL 5724109 (Mich. Cir. Ct. Oct. 1, 2004) ("The analysis of the Bank's liability was best addressed by the Plaintiffs' expert and distinguished professor of law, James J. White. Professor White is well known to any lawyer who has studied the Uniform Commercial Code in the last 30 years. He is a co-author of the Uniform Commercial Code and the hornbook used most frequently by law students on that topic. His unimpeachable academic credentials are also supplemented with practical experience as a former president of the University of Michigan Credit Union and as a member of its Board of Directors.").

[2] *See, e.g.*, Sigafus v. Brown, 416 F.2d 105, 106, 107 (7th Cir. 1969) ("Phillip H. Ginsberg of the faculty of the University of Chicago Law School volunteered to serve as plaintiff's attorney [in this prisoner civil rights action]. The Court is appreciative of his distinguished representation.").

[3] *See, e.g.*, *In re* Brennan, 134 N.W.2d 126, 131 n.2 (Minn. 1965) ("A helpful brief amicus curiae has been submitted by Professor Robert J. Levy of the faculty of the University of

the court.[4] They also routinely appear as defendants, such as when they are sued by a disgruntled law school applicant, student, or staff member.[5] In addition, they intercede on behalf of friends and relatives[6] and occasionally are picked to sit on juries.[7]

Some law professors, however, are in the courthouse for an entirely different reason—they are there as plaintiffs. Usually, their interest is a principled one: for example, lending their name and prestige to an action involving a threatened civil or constitutional right,[8] or

Minnesota Law School.").

[4] *See, e.g.*, State *ex rel.* Wash. Toll Bridge Auth. v. Yelle, 377 P.2d 466, 471 n.5 (Wash. 1962) (en banc) ("Professor Millard H. Ruud of the faculty of the University of Texas Law School has made an exhaustive study of this question. It is published in 42 Minn. L. Rev. 389 (1958).").

[5] *See, e.g.*, Radcliff v. Landau, No. 90-55572, 1991 U.S. App. LEXIS 5465, at *1 (9th Cir. Mar. 29, 1991), ("Appellant Arthur Radcliff, a former law student, filed this action against his law school and a former professor [Bruce G. Landau], alleging that he was dismissed from the [University of West Los Angeles] due to his race and his participation in a black law students' association."); McAlpin v. Burnett, 185 F. Supp. 2d 730, 732 (W.D. Ky. 2001) (footnote omitted) ("Plaintiffs, Timothy J. McAlpin and Leslie Dean bring this action against Defendants, Donald L. Burnett, former Dean and a professor at the University of Louisville School of Law . . . and Professor R. Thomas Blackburn for breach of contract, violation of 42 U.S.C. § 1983, and various other state law torts. These claims arise from the Law School's decision to deny Plaintiffs admission after each flunked an exam in the Law School's 'Admission by Performance Program'."); Barcher v. N.Y. Univ. Sch. of Law, 993 F. Supp. 177, 179 (S.D.N.Y. 1998), *aff'd*, No. 98-7305, 1999 U.S. App. LEXIS 1156 (2d Cir. 1999) ("Plaintiff *pro se*, Ann C. Barcher, brings this action against defendants New York University School of Law[,] John Sexton, as Dean and Individually, Oscar [G.] Chase, as Vice Dean and Individually, and Norman Dorsen, as Faculty Member and Individually. . . . Plaintiff alleges that defendants violated Title VII by discriminating against her on the basis of gender and retaliating against her for complaining about the discrimination."). *See* Lisa G. Lerman, *Misconduct by Law Professors: Why It Matters*, 2004 PROF. LAW. 21, 21 (2004) (providing a further look at lawsuits against law professors).

[6] *See, e.g.*, Freedman v. Smith, No. 2:07CV36 TS, 2007 U.S. Dist. LEXIS 52444, at *2–3 (D. Utah July 17, 2007) (footnotes omitted) ("Plaintiff's brother [Monroe H. Freedman] is a Professor of Law at Hofstra University in New York. Since Plaintiff was in Europe, Plaintiff's brother retained Defendants to represent Plaintiff in litigation relating to Plaintiff's alleged [business] damages. Prior to retaining Defendants, Plaintiff's brother had attempted to settle the matter and had negotiated a deal with Plaintiff's former partners for $150,000. Plaintiff claims that Defendants guaranteed a better settlement, but, in the end, the original deal of $150,000 was not reached and the relationship between Plaintiff and Defendants was terminated. The Complaint alleges failure to exercise skill and care of ordinarily competent attorneys including: bad advice, neglect of duties, and churning of billable hours.").

[7] *See, e.g.*, Richard H. McAdams, *A View from the Box: The Law Professor as Juror*, 68 CHI.-KENT L. REV. 393, 393 (1992).

[8] *See, e.g.*, Burbank v. Rumsfeld, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *1–2, *8 (E.D. Pa. Aug. 19, 2004) (citation omitted) ("University of Pennsylvania Law School full-time faculty members, students, and a student organization bring this suit against the Secretary of Defense to challenge the Department of Defense['s] interpretation and enforcement of the Solomon Amendment against the University of Pennsylvania Law School ('the Law School'). . . . [F]aculty Plaintiff Stephen [B.] Burbank, in his affidavit, describes his ability to teach and communicate messages about the importance of access to justice, and equal treatment and respect for personal autonomy and dignity, as undermined by Defendant's actions. He also notes that the [government's] coerced abandonment of the [law school's] anti-discrimination policy has had an adverse effect on him as a teacher and as a member of an academic

suing on behalf of their students.[9] But every so often, they have a more direct interest in a case's outcome. This most often occurs in the employment realm in suits involving, for example, the denial or loss of tenure.

To date, it appears no one has systematically examined lawsuits brought by law professors.[10] Yet doing so provides a different way to look at the academy and obtain a sense of what it means to work and have a career as a law professor. What is particularly striking is how often the same three issues are at the root of these lawsuits: dissatisfaction with, and professional jealousy of, faculty colleagues;[11] disagreements with, and distrust of, administrators;[12] and a feeling that others are receiving better, and undeserved, treatment.[13]

Several other things stand out about these cases. First, although a few early decisions do exist, these types of actions did not really

community."). During the Vietnam war, James R. Ahrens, a law professor at Washburn University, brought a class action lawsuit to try to stop the bombing of Cambodia. *See* Associated Press, *Law Professor Sues to End Air War*, BALT. SUN, Aug. 7, 1973, at A2. In *Banzhaf v. Smith*, John F. Banzhaf III, a law professor, unsuccessfully sought to have a special prosecutor appointed to investigate alleged improprieties in the 1980 presidential election. 588 F. Supp. 1489, 1493 n.26 (D.D.C. 1984), *vacated*, 737 F.2d 1167 (D.C. Cir. 1984). More recently, in *Whitford v. Gill*, University of Wisconsin law professor William Whitford obtained an order prohibiting the Wisconsin legislature from continuing to engage in gerrymandering. Whitford v. Gill, 218 F. Supp. 3d 837, 843, 845 (W.D. Wis. 2016), *stay granted pending oral argument*, 137 S. Ct. 2289 (June 19, 2017).

[9] *See, e.g.*, *In re* Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994) (explaining that professors from state's three law schools banded together to convince the Minnesota Supreme Court to stop asking bar applicants about their mental health histories).

[10] Individual reporting of such lawsuits, on the other hand, occurs regularly on such web sites as Above the Law, Jonathan Turley, TaxProf Blog, The Faculty Lounge, and The Volokh Conspiracy. *See, e.g.*, Jonathan H. Adler, *Does the Emoluments Clause Lawsuit Against President Trump Stand a Chance?*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 23, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/23/does-the-emoluments-clause-lawsuit-against-president-trump-stand-a-chance/?utm_term=.9a52588d953e; Paul L. Caron, *George Fletcher Sues Columbia Law School for Age Discrimination, Says His Course Assignments May No Longer Allow Him to Teach One Semester Per Year for Full Pay*, TAXPROF BLOG (May 30, 2017), http://taxprof.typepad.com /taxprof_blog/2017/05/george-fletcher-sues-columbia-law-school-for-age-discrimination-says-hi s-course-assignments-may-no-l.html; Dan Filler, *Conservative Widener Law Professor Sues Dean for Defamation*, FAC. LOUNGE (Apr. 11, 2011), http://www.thefacultylounge.org/2011/04/conservative-widener-law-professor-sues-dean-for-defamation.html; Elie Mystal, *Professor Sues Law School Over Pay Inequality, But in Fairness Her Dean Is Notoriously Bad at Math*, ABOVE THE LAW (July 10, 2013), http://abovethelaw.com/2013/07/professor-sues-law-school-over-pay-inequality-but-in-fairness-her-dean-is-notoriously-bad-at-math/; Jonathan Turley, *"Badass Parody": Michigan Lawyer and Adjunct Professor Sues Student and Loses . . . Then Sues Student's Lawyer*, JOHNATHANTURLEY.ORG (Apr. 27, 2015), https://jonathanturley. org/2015/04/27/badass-parody-michigan-lawyer-and-adjunct-professor-sues-student-and-loses-then-sues-students-lawyer/.

[11] *See, e.g.*, Pinder v. John Marshall Law Sch., LLC, 11 F. Supp. 3d 1208, 1213 (N.D. Ga. 2014).

[12] *See, e.g.*, Caron, *supra* note 10.

[13] *See, e.g.*, *Pinder*, 11 F. Supp. 3d at 1213.

take off until fairly recently.[14] Second, the defendants in these cases are not always employers—sometimes, they are outside parties.[15] Third, law professors generally do a poor job assessing their chances, for they lose much more often than they win.[16] And fourth, many law professors are guilty of a shocking level of thin-skinnedness.

It is not possible, of course, to find every lawsuit filed by a law professor.[17] But a sense of such litigation can be gained by looking at reported cases. Accordingly, what appears below is a summary of these decisions.

A few caveats are in order. First, I do not claim to have located every reported case brought by a law professor. Indeed, no one could, because most cases give no hint that the plaintiff was a law professor.[18]

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[14] The reasons for this change are not hard to pinpoint: "The overall number and demographic characteristics of tenured law professors in the United States have changed in the last few decades. In 1947, there were only 991 full-time professors at 111 accredited law schools. In 2007-2008, there were 197 law schools with 8,142 full-time professors. . . . Donna Fossum of the American Bar Foundation conducted the first systematic study of U.S. law professors; she found that the law professoriate in the 1970s and 1980s was highly homogeneous in terms of gender, race, and law school background. Thus in 1975-1976, the characteristics of law faculty were similar to that of the legal profession in general: 96% of professors were white, 93% were male, and 66% were between the ages of 30 and 50. . . . [T]he population of law professors became a much more diverse group in subsequent years." ELIZABETH MERTZ ET AL., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 14 (Am. B. Found. 2011) (citations omitted). Thus, the average law school in 1947 had a full-time faculty of nine white men with similar backgrounds; in 2008, the average law school had a full-time faculty of 41 men and women from many different walks of life. *See id.*

[15] *See, e.g.*, Adler, *supra* note 10.

[16] *See, e.g.*, Bagley v. Ameritech Corp. 220 F.3d 518, 522 (7th Cir. 2000); Scott v. Univ. of Miss., 148 F.3d 493, 514 (5th Cir. 1998); Choudhry v. Regents of the Univ. of Cal., No. 16-cv-05281-RS, 2016 U.S. Dist. LEXIS 155745, at *25 (N.D. Cal. Nov. 9, 2016); Morrissey v. United States, 226 F. Supp. 3d 1338, 1346 (M.D. Fla. 2016); Morales-Cruz v. Univ. of P.R., 792 F. Supp. 2d 205, 214 (D.P.R. 2011).

[17] *See, e.g.*, McCord v. Ford, 398 F. Supp. 750, 754–55 (D.D.C. 1975). Although *McCord* has nothing to do with law professors, in the course of his opinion Judge Richey alerted readers to an earlier lawsuit brought by a law professor that did not result in a reported decision: "There is direct precedent to support the finding that McCord does not have standing to maintain this action challenging the pardon [of former President Richard M. Nixon] on behalf of the public. In an action filed in the United States District Court for the District of Columbia last year, plaintiff Joseph [H.] Koffler, a law professor [at New York Law School], sought to have the pardon declared null and void. . . . [T]hat action [was dismissed by] Judge Gerhard Gesell . . . ." *Id.* In a footnote, Judge Richey indicated that Koffler's lawsuit was styled "Koffler v. Ford, et al., Civil No. 74-1406 (D.D.C. Sept. 25, 1974)." *Id.* at 755 n.24 (citation omitted). Without the reference in *McCord*, finding Koffler's lawsuit would be extremely difficult unless one knew to look for it.

[18] Consider in this regard *Morrissey v. United States*. Joseph F. Morrissey, a gay Stetson University law professor, claimed that the IRS discriminated against him when it disallowed his $37,000 deduction for IVF treatments. *Morrissey*, 226 F. Supp. 3d at 1340. Although the press routinely noted that Morrissey was a law professor, the opinion makes no mention of Morrissey's occupation. *See, e.g.*, Eric Kroh, *Fla. Law Prof. Sues IRS over In Vitro Fertilization Costs*, LAW360 (Dec. 14, 2015), https://www.law360.com/tax/articles/737604/fla-law-prof-sues-

Second, I have not included cases that mention the plaintiff is a law professor if they have nothing to do with the plaintiff's occupation as a law professor. A good example is *Raskind v. Ryan*.[19] In describing the parties, the court wrote, "Plaintiff Leo J. Raskind ('Raskind') has been a [University of Minnesota] law professor for over twenty years, and is the landlord of commercial rental premises located at 226 and 218 Water Street, Excelsior, Minnesota (the 'Properties')."[20] The remainder of the case is a garden-variety landlord-tenant holdover dispute, with Raskind's job as a law professor playing no role in its outcome.[21]

irs-over-in-vitro-fertilization-costs. Even when a case does say the plaintiff was a law professor, such information is not always sufficient. In *Bagley v. Ameritech Corp.*, for example, the court stated: "Ellis Bagley, Jr. likes to take a leisurely breakfast. Specifically, the 51-year-old reinsurance intermediary and adjunct professor of law begins each day with a 2-hour stint at the Walker Brothers Original Pancake House in Lincolnshire, Illinois, where he reads several newspapers over coffee and then orders food." *Bagley*, 220 F.3d at 519. No further information about Bagley's teaching is provided, and searching on the web turns up nothing.

[19] Raskind v. Ryan, No. CT 04-5747, 2005 WL 5088471 (D. Minn. Mar. 29, 2005).

[20] *Id.* ¶1.

[21] *See id.*; *see, e.g.*, Charlton v. Comm'r, 611 F. App'x 91, 93 n.1 (3d Cir. 2015) ("Shortly after filing their complaint [against the IRS over their personal taxes], the plaintiffs also filed a motion for a preliminary injunction seeking to enjoin what they alleged were the Commissioner's improper collection activities. While the defendant's motion to dismiss was pending, the plaintiffs [Anna E. Charlton and Gary L. Francione], who are both law professors [at Rutgers University] and had initially appeared pro se, retained counsel and withdrew their motion for a preliminary injunction."), Walker v. Harris Cty., 477 Fed. App'x 175, 176–77 (5th Cir. 2012) (affirming dismissal of civil rights action filed by April J. Walker, a municipal judge and law professor at Texas Southern University); Franklin v. Office of Balt. City State's Att'y, No. WDQ-14-2356, 2015 WL 799416, at *1 (D. Md. Feb. 24, 2015) (dismissing suit brought by Byron Franklin, an adjunct law professor at the University of Baltimore, who claimed that the reason the state dropped a criminal assault case against Franklin's neighbor was because Franklin was black and his neighbor was white); Bebchuk v. Elec. Arts, Inc., No. 08 Civ. 3716 (AKH), 2013 U.S. Dist. LEXIS 59776, at *2 (S.D.N.Y. Apr. 25, 2013) (dismissing shareholder lawsuit filed by Harvard University law professor Lucien A. Bebchuk); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433 (W.D. Mo. 1973) ("The plaintiff Richard H. Ralston also gave evidence as to his financial resources [to serve as lead plaintiff in a proposed class action arising from the defendant's method of selling cars]. . . . He is currently employed as a law professor at Creighton University in Omaha."); Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 704–05 (Cal. 1989) ("[This case concerns] insurance coverage under the 'all risk' section of a homeowner's insurance policy when loss to an insured's property can be attributed to two causes, one of which is a nonexcluded peril, and the other an excluded peril."); *Garvey,* 770 P.2d at 718 (Mosk, J., dissenting) ("At all times relevant herein Mr. [Jack I.] Garvey was a lawyer and a professor of law [at the University of San Francisco]."); Harper v. Adametz, 18 Conn. Supp. 435, 436 (Conn. Super. Ct. 1953) ("The plaintiff [Fowler V. Harper], a member of the faculty of Yale Law School, is seeking to impose a trust upon sixty-three acres of woodland in Haddam that were originally part of an eighty-acre farm that was owned by William Tesar. . . . The plaintiff alleges that fraud was practiced upon him and seeks a decree conveying the sixty-three acres to him."), *vacated*, 113 A.2d 136 (Conn. 1955); Okpaku v. Okpaku, 359 N.Y.S.2d 310, 311 (N.Y. App. Div. 1974) (citation omitted) ("Giving due consideration to all of the circumstances disclosed in the record before this Court, and in particular to the fact that plaintiff [Sheila R. Okpaku], an attorney and assistant professor of law [at Hofstra University], has the present ability to be self-supporting, we conclude that temporary alimony and counsel

Third, I have omitted cases in which the plaintiff sued for acts that occurred before he or she became a law professor.[22] By the same token, I have not bothered with cases in which the plaintiff sued for something that occurred after he or she stopped being a law professor.[23] I also have excluded cases in which the plaintiff was a

fees are not justified.");.

[22] *See, e.g.*, Davis v. Billington, 76 F. Supp. 3d 59, 66 n.9 (D.D.C. 2014) (citation omitted) ("The plaintiff [Morris D. Davis] asserts that since [his] allegedly unlawful termination [by the Library of Congress due to an op-ed he published], [he] 'has been unable to find comparable employment' and 'believes' that prospective employers view the plaintiff as 'damaged goods.' This speculative assertion is belied by the fact that the plaintiff is currently a law school professor [at Howard University], notwithstanding the events that gave rise to this case."). *See also* Steinbuch v. Cutler, 518 F.3d 580, 583–84 (8th Cir. 2008) (discussing a defamation suit by University of Arkansas at Little Rock law professor Robert Steinbuch stemming from a sexually explicit novel partially based on an affair Steinbuch and the author had while both worked as staffers for U.S. Senator Mark DeWine), *cert. denied sub nom.* Steinbuch v. Hyperion Books, 555 U.S. 939 (2008); Sterling v. Commercial Union Ins. Co., 674 F.2d 697, 698 (8th Cir. 1982) (discussing a slander and invasion of privacy suit by University of Arkansas at Fayetteville law professor Robert M. Sterling, Jr. arising out of a personal injury he suffered while working as an attorney in New York City).

[23] *See* Affeldt v. Carr, 628 F. Supp. 1097, 1098–99 (N.D. Ohio 1985) ("Plaintiff [Robert J. Affeldt] is a former law professor who taught at various universities, including the University of Toledo, for eighteen years. . . . Defendant [James G. Carr], formerly a law professor at the University of Toledo Law School, has been a full-time Magistrate of the United States District Court for the Northern District of Ohio, Western Division sitting in Toledo since September 29, 1979. Plaintiff alleges that the Magistrate engaged in a 'pattern and practice of dismissing class actions without an evidentiary hearing when disputed facts exist, of depriving plaintiffs and class members of their choice of counsel, of penalizing them when they exercise their constitutional rights of free speech and association.'"); Wells v. Perry, No. 76-649, 1977 WL 860, at *1–2 (D.D.C. May 31, 1977) (footnotes omitted) ("In 1967, [plaintiff Gwendolyn M. Wells] accepted a position as an Equal Employment Officer with the EEOC and was promoted one year later to the position of District Director of that agency's Washington, D.C. District Office. She held that position until August 1973, when she resigned to accept a position as an Associate Professor at the University of Missouri-Kansas City, School of Law. On March 10, 1975, plaintiff was notified by the EEOC of her 'selection' as District Director of that agency's Kansas City Office. . . . On April 4, however, plaintiff was officially advised by the EEOC that her appointment was being held 'in abeyance' due to purported 'budgetary restrictions.' On or about April 30, after plaintiff had resigned her professorship, she received a letter advising her of the cancellation of the appointment due to 'procedural error,' to wit, that she had been improperly 'preselected' for the position in question. . . . The gravamen of plaintiff's complaint is that she did not receive a particular employment position with the EEOC. She alleges that this denial constitutes race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964."); Bouton v. Byers, 321 P.3d 780, 784 (Kan. Ct. App. 2014) ("The district court erred in dismissing the promissory estoppel claim [Ellen Byers] Bouton brought against Defendant Walter Byers, her father, for breaching a promise she says he made to bequeath valuable ranchland to her—a promise that induced her to leave the Washburn University [law school] faculty so she could help him manage his cattle business."); *In re* Application of R.G.S., 541 A.2d 977, 981 (Md. 1988)) ("We hold that on the record before us, the applicant [former University of Baltimore law professor Royal G. Shannonhouse III] was practicing law . . . from June 1983 until the date he submitted his petition for admission [to the Maryland bar] on 22 December 1986. This period of practice, added to his full-time professorship, adds up to the requisite five years within the seven years prior to December, 1986 [to qualify for admission on motion].").

law professor in a non-law school.[24]

II. HIRING DECISIONS

A. Successful Candidates

Becoming a law professor often means relocating to a new city. This fact has led to two reported cases.[25]

After receiving his LL.B. from Yale University in June 1970, James F. Blumstein moved to Nashville to join the Vanderbilt University faculty.[26] In July 1970, he attempted to register to vote but was turned away because he did not meet either the state's one year, or the county's three months, residency requirement.[27] When he challenged these provisions, both a three-judge district panel and the U.S. Supreme Court (in an opinion by Justice Marshall) agreed that the rules served "no valid purpose."[28]

In 1973, F. Patrick Hubbard earned an LL.M. from Yale University and landed a job with the University of South Carolina.[29] To get his family's belongings from New Haven to Columbia, he hired a professional mover.[30] The trip did not go well and Hubbard and his wife ended up suing the company for negligence.[31] They also sought recovery for emotional distress and asked for punitive damages.[32]

In an unpublished order, the district court struck their latter two requests. In restoring these counts, the Fourth Circuit explained:

> We hold that a private right of action exists under 49 U.S.C. § 316(d) [of the Interstate Commerce Act], and that in a proper

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[24] *See, e.g.*, Rosa v. City Univ. of N.Y., 306 F. App'x 655, 657 (2d Cir. 2009) (citation omitted) (involving breach of contract suit by business law professor); EEOC v. Catholic Univ. of Am., 856 F. Supp. 1, 2, 6 (D.D.C. 1994) (citation omitted) (involving employment discrimination suit by canon law professor), *aff'd*, 83 F.3d 455 (D.C. Cir. 1996); Grossman v. Smart, 807 F. Supp. 1404, 1406, 1408 (C.D. Ill. 1992) (addressing a defamation suit by University of Illinois agriculture law professor); McNeil v. United States, 64 Ct. Cl. 406, 406–07 (1928) (back pay suit by U.S. Military Academy law professor); Strong v. United States, 60 Ct. Cl. 627, 630 (1925) (back pay suit by U.S. Military Academy law professor).

[25] *See* Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224, 1225 (4th Cir. 1976); Blumstein v. Ellenington, 337 F. Supp. 323, 324 (M.D. Tenn. 1970), *aff'd sub nom.* Dunn v. Blumstein, 405 U.S. 330 (1972).

[26] *Blumstein*, 337 F. Supp. at 324; *James Blumstein*, VAND. U., https://law.vanderbilt.edu/bio/james-blumstein (last visited Oct. 18, 2017).

[27] *Blumstein*, 337 F. Supp. at 324.

[28] *Dunn*, 405 U.S. at 331–33; *Blumstein*, 337 F. Supp. at 330.

[29] *F. Patrick Hubbard*, U.S.C. SCH. LAW: DIRECTORY, https://sc.edu/study/colleges_schools/law/faculty_and_staff/directory/hubbard_patrick.php (last visited Oct. 18, 2017).

[30] *Hubbard*, 540 F.2d at 1225.

[31] *Id.* at 1226.

[32] *Id.* at 1225.

> case punitive damages and damages for mental distress may be recovered. The allegations of plaintiffs' complaint were sufficient to entitle them to introduce proof supporting the recovery of such damages.[33]

Successful lateral candidates can also be plaintiffs. In *Westin v. Shipley*,[34] for example, Dean David E. Shipley hired Richard A. Westin, a law professor at the University of Houston, to fill the Laramie L. Leatherman Distinguished Professorship of Tax Law at the University of Kentucky.[35] According to Westin, Shipley told him the position was permanent and carried a $25,000 annual salary supplement.[36] When neither of these statements turned out to be true, Westin sued Shipley for negligence and fraudulent misrepresentation.[37] The trial court granted Shipley's motion for summary judgment, but the Kentucky Court of Appeals reversed: "[I]f the Dean *did* negligently misrepresent the compensation package to Professor Westin, the jury could find liability. Of course, we are assuming for purposes of summary judgment that there was a misrepresentation, not just a misunderstanding."[38]

B. Unsuccessful Candidates

Most candidates who fail to get hired as law professors simply continue on with their lives. Some, however, sue. In *Avins v. Gould*,[39] for example, Alfred Avins sued the State University of New York at Buffalo when the university denied him a job as a law professor.[40] According to Avins, he had been rejected because of his conservative political views.[41] In upholding the dismissal of Avins' lawsuit, the New York State Supreme Court, Appellate Division, Third Department, wrote: "Appellant has failed to produce any evidence upon which it can be concluded that respondent's determination was based on considerations other than his professional qualifications

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[33] *Id.*

[34] Westin v. Shipley, No. 2003-CA-001548, 2004 Ky. App. Unpub. LEXIS 727 (Oct. 8, 2004).

[35] *Id.* at *1–2.

[36] *Id.* at *2.

[37] *Id.* at *2, 3.

[38] *Id.* at *6 (emphasis added). In a brief dissent, Judge Dyche wrote: "I cannot find any evidence whatsoever of fraudulent misrepresentation. Dean Shipley is protected from the claim of negligent misrepresentation by qualified official immunity." *Id.* at *6 (Dyche, J., dissenting).

[39] Avins v. Gould, 316 N.Y.S.2d 560 (App. Div. 1970), *appeal denied*, 28 N.Y.2d 484 (1971), *and appeal dismissed*, 28 N.Y.2d 718 (1971).

[40] *Id.* at 561.

[41] *Id.*

and ability."[42]

Similarly, Teresa R. Wagner sued the University of Iowa when it did not hire her to be a legal writing instructor.[43] According to Wagner, her candidacy had foundered because of her conservative political beliefs.[44] The district court ruled against Wagner, but on appeal the Eighth Circuit reversed and remanded.[45] A trial then ensued, at which the jury deadlocked.[46] Following motions by both sides, the district court entered judgment for the university.[47] Finding this to be error, the Eighth Circuit ordered a new trial.[48]

In *Reise v. Board of Regents of University of Wisconsin System*,[49] Edward H. Reise, a disappointed white job applicant, filed a four million dollar lawsuit in which he claimed that "his race and sex account[ed] for the decision, [because] in recent years the Law School has been unwilling to consider anyone, no matter how skilled, who is not black, female, or otherwise eligible for preferential treatment."[50] The district court denied Reise's request for interim injunctive relief, a decision with which the Seventh Circuit agreed:

> Reise sought a preliminary injunction that would require the Law School to obtain the court's approval before hiring or promoting anyone, or spending money for two programs designed to support minority teachers and scholars. The judge denied this request. Reise's demand is so extravagant that we need know nothing about the merits to conclude that the district court did not abuse its discretion. "Remedies" of this kind would be problematic even if Reise were to prevail at trial. As demands for preliminary relief, they are absurd.[51]

The district court also ordered Reise to undergo a psychiatric

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[42] *Id.* at 562. Avins also lost his federal lawsuit. *See* Avins v. Mangum, 450 F.2d 932, 933 (2d Cir. 1971) ("[Avins'] complaint with respect to the law school's failure to employ him is wholly conclusory and alleges no facts on which a court could find that the refusal of employment was, as he states, solely based on his political beliefs.").

[43] Wagner v. Jones, 664 F.3d 259, 264 (8th Cir. 2011).

[44] *Id.*

[45] *Id.* at 264, 275.

[46] Wagner v. Jones, 928 F. Supp. 2d 1084, 1090 (S.D. Iowa 2013).

[47] *Id.* at 1113.

[48] *See* Wagner v. Jones, 758 F.3d 1030, 1031 (8th Cir. 2014), *cert. denied*, Jones v. Wagner, 135 S. Ct. 1529 (2015). In June 2015, a second jury rejected Wagner's claims. *See* Vanessa Miller, *Jury Rules Against Former University of Iowa Employee; Law School Did Not Discriminate, They Find*, GAZETTE (July 2, 2015), http://www.thegazette.com/subject/news/education/higher-education/jury-finds-no-political-discrimination-in-case-involving-former-university-of-iowa-employee-20150630.

[49] Reise v. Bd. of Regents of Univ. of Wis. Sys., 957 F.2d 293 (7th Cir. 1992).

[50] *Id.* at 293.

[51] *Id.* at 293–94.

examination due to his allegation that the law school's actions had caused him mental distress.[52] Because such orders are not appealable, the Seventh Circuit refused to review it.[53]

The remaining three reported cases each involved a claim that the plaintiff was not hired due to age discrimination. In the first, Linda A. Scott, fifty-four, was passed over for a legal writing position at the University of Mississippi in favor of Anne B. Gullick, who was thirty-three.[54] A jury found in Scott's favor and the district court entered an order awarding her back and front pay.[55] On appeal, the Fifth Circuit reversed: "[W]e conclude that Scott's evidence, taken as a whole, is insufficient to create . . . a reasonable inference that age was a motivating factor in the University's decision. . . . We accordingly hold that the district court erred in denying the University's motion for judgment as a matter of law."[56]

In the second, Donald S. Dobkin, fifty-six, sued the University of Baltimore when its job opening for an immigration law professor went to a woman (whose identity was not revealed in court) who was thirty-two.[57] A state trial court entered summary judgment for the school, which was affirmed by the Maryland Court of Special Appeals:

> On the record before us, we conclude that U.B. has presented a legitimate, non-discriminatory reason for its refusal to hire appellant. Appellant further failed to adduce sufficient evidence to meet his burden of establishing that U.B.'s reasons were pretextual, and its motive was discriminatory. Additionally, appellant did not establish that U.B.'s hiring practices had a disparate impact on applicants over the age of forty.[58]

In the third, Nicholas J. Spaeth, sixty, filed a federal lawsuit in Washington, D.C. against six law schools (Georgetown University, Michigan State University, University of California Hastings, University of Iowa, University of Maryland, and University of Missouri) because they refused to interview him at the 2010

[52] *Id.* at 294.

[53] *Id.* at 294, 296 (citations omitted). Two months after the Seventh Circuit ruled, Reise's case went to trial and resulted in a jury verdict for the defendants. *See Law School Not Guilty of Reverse Bias*, CAPITAL TIMES (Madison), Apr. 11, 1992, at 6A.

[54] Scott v. Univ. of Miss., 148 F.3d 493, 497–98 (5th Cir. 1998).

[55] *See* Scott v. Univ. of Miss., No. 1:94CV241-JAD, 1996 U.S. Dist. LEXIS 21331, at *4 (N.D. Miss. Mar. 8, 1996), *rev'd*, 148 F.3d 493 (5th Cir. 1998).

[56] *Scott*, 148 F.3d at 512–14 (citation omitted).

[57] Dobkin v. Univ. Of Balt. Sch. of Law, 63, A.3d 692, 695 (Md. Ct. Spec. App. 2013).

[58] *Id.* at 713.

American Association of Law Schools ("AALS") Faculty Recruitment Conference in Washington, D.C.[59] After the other defendants moved for and were granted severance and transfer to their home jurisdictions,[60] Georgetown sought summary judgment, which was granted in part.[61] Following discovery, it renewed its motion, which the district court granted because:

> [N]o reasonable jury could conclude, based on the undisputed evidence, that age was the "but-for" cause of—or even that age had a "determinative influence" on—Georgetown's decision not to interview or hire Spaeth. Simply put, Spaeth has not demonstrated the necessary qualifications for an entry-level tenure-track position at the school.[62]

III. FIRING DECISIONS

A. Untenured Faculty

Law professors who lack tenure are subject to two types of dismissal. Although terminations "for cause" can occur at any time, it is much more common for an untenured faculty member who is proving to be a bad hire to be "non-renewed" at the end of the school year.[63]

1. Termination

In *Jones v. Florida Board of Control*, Thomas B. Jones, a law professor at the University of Florida, was fired in the middle of the Spring 1960 semester.[64] Although the school had a rule prohibiting

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[59] *See* Spaeth v. Georgetown Univ., No. 11-1376 (ESH), 2012 U.S. Dist. LEXIS 31232, at *2 (D.D.C. Mar. 8, 2012) (Maryland); Spaeth v. Georgetown Univ., 845 F. Supp. 2d 48, 50–51 (D.D.C. 2012) (citations omitted) (addressing the transfer to Hastings, Iowa, Michigan State, and Missouri).

[60] *See Spaeth*, 2012 U.S. Dist. LEXIS 31232, at *3–4; *Spaeth*, 845 F. Supp. 2d at 50, 61 (citation omitted).

[61] *See* Spaeth v. Georgetown Univ., 839 F. Supp. 2d 57, 59 (D.D.C. 2011) ("[T]he Court will deny Georgetown's motion insofar as it seeks dismissal of the age discrimination claim, but will grant it insofar as it seeks to dismiss the prayers for compensatory and punitive damages under the ADEA.").

[62] Spaeth v. Georgetown Univ., 943 F. Supp. 2d 198, 201, 214–15 (D.D.C. 2013), *appeal dismissed*, No. 13-7091, 2014 U.S. App. LEXIS 3336 (D.C. Cir. Feb. 4, 2014).

[63] *See* Jones v. Bd. of Control, 131 So. 2d 713, 714 (Fla. 1961) (demonstrating termination of a law professor "for cause"); *see also* Pinder v. John Marshall Law Sch., LLC, 11 F. Supp. 3d 1208, 1212–13 (N.D. Ga. 2014) (demonstrating termination of a law professor by "non-renewal" of the employment contract). *But see* Arenson v. S. Univ. Law Ctr., 911 F.2d 1124, 1126–27 (5th Cir. 1990) (demonstrating a case that fits neither category).

[64] *Jones*, 131 So. 2d. at 714.

employees from seeking public office, Jones decided to run for a local judgeship; when he did so, he was let go.[65] After losing the election, he sued the school for firing him.[66] In upholding both the rule and Jones's termination, the Florida Supreme Court explained:

> [T]here are many reasons why the appellee Board would be justified in placing restrictions on the University faculty in connection with political campaigns. The demands upon the time and energies incident to a warmly contested campaign for an important public office would necessarily affect the efficiency of the candidate; the potential effect upon the students, not only as the result of such inefficiency, but also in the nature of the political influences that might be brought to bear upon them would be further justification; the potential involvement of the State University which is dependent upon public support from all political elements would be another major consideration supporting the reasonableness of the rule. Although appellant suggests that he might well have conducted his campaign in the evening so as not to interfere with his professorial duties, the reasons which we have epitomized above would still apply. Moreover, anyone who has ever been associated with a heated political campaign well knows that it involves handshaking, speech making, telephone calling, letter writing, and door to door campaigning from morning well into the night. To anyone familiar with the practical aspects of American politics, it is asking too much to expect him to agree that success in a strenuous political campaign can be achieved merely by appearances at Saturday afternoon fish fries or early evening precinct rallies. The result simply is that it would be extremely difficult for a university professor to conduct his classroom courses with efficiency over a period of eight to ten weeks while simultaneously "beating the bushes" in search of votes to elevate him to the position of a circuit judge.[67]

In *Morales-Cruz v. University of Puerto Rico*,[68] Myrta B. Morales-Cruz was terminated for failing to report that another faculty

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[65] *See id.*

[66] *See Hearing Is Set on Damage Suit of Ex-Professor*, TALLAHASSEE DEMOCRAT, July 17, 1960, at 13 (reporting that Judge George L. Patten of Starke beat Jones in the May 1960 primary).

[67] *Jones*, 131 So. 2d at 718.

[68] Morales-Cruz v. Univ. of P. R., 676 F.3d 220 (1st Cir. 2012).

member was having a sexual affair with a student.[69] At the time, the student was enrolled in a legal aid clinic run by Morales-Cruz and the other professor; as a result of the affair, the student became pregnant.[70]

Believing she would not have been fired if she had been a man, Morales-Cruz sued for gender stereotyping.[71] As proof, she pointed to comments by the dean and others that described her as "'fragile,' 'immature,' 'unable to handle complex and sensitive issues,' engaged in 'twisting the truth,' and exhibiting 'lack of judgment.'"[72] Finding no discrimination, the district court dismissed the case.[73] On appeal, the First Circuit affirmed:

> In the amended complaint, the plaintiff asserts that she was unfairly terminated because the Dean and others expected her, as a woman, to report the student-teacher relationship. This is the heart of her gender-stereotyping claim—but the allegation that she was held to a different standard because she was a woman does not follow from any *factual* content set out in the pleading or any reasonable inference therefrom. By the same token, the supposed stereotype of which the plaintiff complains is not one that, by common knowledge or widely shared perception, is understood to be attributable to women. To say that women, but not men, are expected to be forthcoming about the sexual foibles of others is sheer speculation—and speculation, unaccompanied by any factual predicate, is not sufficient to confer plausibility.[74]

In *Raymond v. Alexander*,[75] Donald J. Raymond, a law professor at Southern Illinois University, was fired "for threatening to hit a fellow professor with a crowbar, and for making disparaging remarks toward co-workers and students."[76] In an attempt to win back his job, Raymond filed a lengthy amended complaint.[77] Finding the due

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[69] *See id.* at 222–23.

[70] *Id.* at 222.

[71] *See id.* at 224–25 (citations omitted).

[72] *Id.* at 225.

[73] *See id.* at 222.

[74] *Id.* at 225 (emphasis added) (footnote omitted). Like the district court, the First Circuit rejected Morales-Cruz's retaliation claim. *See id.* at 22627. By the time of her appeal, Morales-Cruz had dropped her state law claims, over which the district court had declined to exercise supplemental jurisdiction. *See* Morales-Cruz v. Univ. of P.R., 792 F. Supp. 2d 205, 213–14 (D.P.R. 2011) (citations omitted).

[75] Raymond v. Alexander, No. 11-cv-00532, 2012 U.S. Dist. LEXIS 136662 (S.D. Ill. Sept. 25, 2012).

[76] *Id.* at *1.

[77] *See id.* at *1–2 (citation omitted).

process and equal protection counts to be baseless, the district court dismissed them with prejudice.[78] Although equally unimpressed with Raymond's retaliation and tortious interference counts, the court agreed they could not be disposed of on summary judgment.[79]

In *Pinder v. John Marshall Law School, LLC*, Kamina A. Pinder, an African-American woman, and Scott W. Sigman, a white man, were hired as associate legal skills professors.[80] Subsequently, Pinder was promoted to the school's tenure track.[81]

In 2010, the pair "began organizing a for-profit company called Law School Advantage ("LSA"), a summer preparation program for incoming law students."[82] According to Pinder, prior to doing so she had spoken to both Richardson R. Lynn, the law school's dean, and Dr. Michael C. Markovitz, the chairman of the law school's board of directors.[83] Nevertheless, in 2011, Pinder and Sigman both received non-renewal letters advising them that their work on LSA had created a possible conflict of interest.[84]

In a side e-mail, Lynn explained to Markovitz that his real intention was to fire the pair for cause:

> Michael, rather than fire Kamina and Scott for cause, I have decided to notify them that their contract will not be renewed, as I am doing with Profs. Marbes and Butts. The faculty handbook has a lot of process for firing for cause, including an appeal to the Retention, Promotion & Tenure Committee, before an appeal to you. Since I assume that they will finish out their courses professionally, other than trashing me, non-renewal will [be] easier and reduces, but does not eliminate, the threat of litigation. It will cost one more month of pay, since they're entitled to six months notices of non-renewal, but I think that's cheap compared to the alternative. I'm planning to talk to them tomorrow. Thanks.[85]

Upon being terminated, Pinder and Sigman filed a joint lawsuit in which Pinder alleged racial discrimination; Sigman claimed retaliation; and both asserted breach of contract and bad faith

[78] *See id.* at *7–*8, *11–*12, *20.

[79] *See id.* at *24, *31.

[80] Pinder v. John Marshall Law Sch., LLC, 11 F. Supp. 3d 1208, 1210 (N.D. Ga. 2014).

[81] *Id.* at 1211.

[82] *Id.*

[83] *See id.*

[84] *See id.* at 1212–13. Pinder also was cited for failing to prepare a letter to the board of directors on an unrelated matter despite being asked to do so by Lynn and for not adhering to the law school's policy for making up missed classes. *Id.* at 1213.

[85] *Id.* at 1212 (alteration in original).

claims.[86] The school, in turn, moved for summary judgment, which was denied because the school had taken no action when Kathleen M. Burch, a white female professor, started a for-profit bar exam tutoring business without Lynn's permission[87]:

> The Magistrate Judge found that professor Burch is a valid comparator to Pinder. Defendant argues that Burch is not a valid comparator, and that Sigman is Pinder's comparator. Defendant contends that Pinder, and Sigman, were terminated for a legitimate, non-discriminatory reason, and therefore a *prima facie* case of discrimination cannot be made by Pinder.
>
> The Court finds that Burch is a viable comparator—albeit barely. That Defendant argues Sigman also is a comparator and, Defendant impliedly argues, a better one, creates an issue of fact, and it is up to the fact finder to decide how to weigh the evidence of such competing comparators. . . . Defendant proposes that there can be no unlawful discrimination here given individuals from different racial backgrounds were terminated at the same time for the same purported reasons. A reasonable jury, however, could conclude that Pinder was fired because of her race, while Sigman was fired in retaliation for complaining about racial discrimination exhibited by other individuals in the workplace. On the other hand, reasonable jurors presented only with evidence from which inferences can be drawn, could also conclude that the simultaneous termination of individuals from different racial backgrounds weighs against any inference of intentional discrimination on the basis of race. These examples illustrate the fact-intensive nature of this dispute.[88]

Lastly, in *Russell-Brown v. University of Florida*,[89] Sherrie L.

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[86] *Id.* at 1214 (citations omitted).

[87] *See id.* at 1218.

[88] *Id.* at 1218 (citation omitted). In 2015, Pinder and Sigman reached an undisclosed settlement with the school. *See* Stipulation of Dismissal with Prejudice, *Pinder*, 11 F. Supp. 3d 1208 (No. 1:12-cv-3300-WSD-JSA). In 2016, Patrice A. Fulcher, the first black woman in the school's history to receive tenure, having resigned in protest over the treatment she was receiving, filed a racial discrimination lawsuit that largely mirrored Pinder's complaint. *See* Karen Sloan, *Another Racial Bias Suit Filed Against Atlanta's John Marshall Law School*, DAILY REP. (Dec. 13, 2016), http://www.dailyreportonline.com/id=1202774579518/Another-Racial-Bias-Suit-Filed-Against-Atlantas-John-Marshall-Law-School?slreturn=20170825224042.

[89] Russell-Brown v. Univ. of Fla., No. 1:09-cv-257, 2014 U.S. Dist. LEXIS 187256 (N.D. Fla. Sept. 2, 2014).

Russell-Brown sued for constructive discharge.[90] According to her complaint, everything had been fine until she started speaking out about racism at the law school, after which she began to be mistreated and eventually stopped being paid.[91] Following years of litigation, during which Russell-Brown regularly dropped and revived her case,[92] she was defaulted and ordered to pay the university's legal fees.[93] In justifying this sanction, the district court wrote: "Plaintiff and her counsel throughout the course of this five-year debacle of a lawsuit 'have continued to flagrantly disregard the Court's orders and delay and disrupt this litigation, repeatedly abusing the judicial process.'"[94]

2. Non-Renewal

As stated above, law professors who lack tenure can have their employment contracts non-renewed for poor performance. This occurred, for example, in *Krasik v. Duquesne University of the Holy Ghost*.[95] In 1977, Margaret K. Krasik was hired to be the director of the law library, given faculty rank, and awarded a one-year contract at a salary of $21,000.[96] In June 1978, she received a second one-year contract and a pay increase to $22,500.[97] In December 1978, however, the dean advised her that she was being let go as of June 30, 1979 for poor performance:

> Over the past year and a half, I have had the occasion to review your work as Head Law Librarian with both you personally and with our colleagues. When you were hired, I was very optimistic that you could provide the professional leadership sorely needed in our Library. Unfortunately, that

[90] Russell-Brown v. Jerry, 270 F.R.D. 654, 655 (N.D. Fla. 2010) (citations omitted).

[91] *See* Complaint at para. 43–46, 89, *Russell-Brown*, 270 F.R.D. 654 (No. 1:09-cv-00257).

[92] *See Russell-Brown*, 270 F.R.D. 654; Russell-Brown v. Jerry, No. 1:09-cv-00257, 2010 WL 3943625 (N.D. Fla. Oct. 6, 2010); Russell-Brown v. Univ. of Fla. Bd. of Trs., No. 1:09-cv-00257, 2012 WL 1571393 (N.D. Fla. Mar. 21, 2012), *report and recommendation adopted*, No. 1:09cv257, 2012 WL 3064242 (N.D. Fla. July 27, 2012); Russell-Brown v. Univ. of Fla., No. 1:09cv257, 2012 WL 1571368 (N.D. Fla. May 4, 2012); Russell-Brown v. Univ. of Fla., No. 1:09-cv-257, 2012 WL 1794254 (N.D. Fla. May 16, 2012); Russell-Brown v. Univ. of Fla. Bd. of Trs., No. 1:09cv257, 2013 WL 11458814 (N.D. Fla. Feb. 6, 2013); Russell-Brown v. Univ. of Fla., No. 1:11-cv-257, 2014 WL 11510601 (N.D. Fla. June 2, 2014).

[93] *Russell-Brown*, 2014 U.S. Dist. LEXIS 187252, at *2 (citations omitted).

[94] *Id.* at *2–3. The court also sanctioned Russell-Brown's attorney for violating Rule 11. *See* Russell-Brown v. Univ. of Fla., No. 1:09-cv-257, 2014 WL 4678342, at *1 (N.D. Fla. Sept. 18, 2014), *vacated*, No. 1:09cv257, 2016 U.S. Dist. LEXIS 189126 (N.D. Fla. Dec. 20, 2016).

[95] Krasik v. Duquesne Univ. of the Holy Ghost, 437 A.2d 1257 (Pa. Super. Ct. 1981).

[96] *Id.* at 1258.

[97] *Id.*

> has not turned out to be the case. You are well aware of the many problems of a personal nature that you have had with various members of the Law School staff. In general, however, I have been disappointed in your lack of imagination and creativity as it reflects on the Library. In times past you have summarily dismissed contribution opportunities to our Library, thereby giving the impression of insensitivity to the possible donor. I have been particularly disappointed with your extreme sensitivity in your relationships with other members of the Law School community. Your overall attitude has severely hampered the growth and development of our Law Library.[98]

In response, Krasik sought an injunction on the ground that "her employment contract incorporated the standards of the AALS and the ABA, and . . . these standards required faculty approval before her employment could terminate."[99] In a brief opinion, the Pennsylvania Superior Court rejected this argument:

> Reading the employment contract as a whole, including the ABA standards and the AALS Bylaws which were incorporated by reference, it seems clear that appellant was employed pursuant to a one-year contract which expired on a specified date. The ABA Standards and AALS Bylaws do not convert the agreement into a contract for permanent employment, nor do the Standards or Bylaws require faculty review prior to the expiration of the term of the agreement.[100]

In *Kossow v. St. Thomas University, Inc.*,[101] Julian R. Kossow was non-renewed because of a lack of scholarship.[102] Nearly 20 years earlier, he had been denied tenure by Georgetown University for the same reason.[103] Because he was 63, Kossow sued for age discrimination.[104] In granting the school summary judgment, the district court stated:

> The Court finds that the employer has provided a legitimate, nondiscriminatory reason for not reappointing Plaintiff to the tenure track. . . . The Plaintiff argues that the proffered

[98] *Id.* at 1258–59.
[99] *Id.* at 1259–60.
[100] *Id*. at 1261 (citation omitted).
[101] Kossow v. St. Thomas Univ., Inc., 42 F. Supp. 2d 1312 (S.D. Fla. 1999), *aff'd mem*., 251 F.3d 160 (11th Cir. 2001).
[102] *Id.* at 1314.
[103] *Id.* at 1313.
[104] *Id.* (citation omitted).

> reason—lack of scholarly publication—is a pretext, and that the real reason he was terminated was because of his age. The only evidence in support of this position is the sole two year old statement attributed to [Professor Stephen A.] Plass, who eventually became the Chairman of the Tenure Committee. This statement is insufficient to discredit the proferred reason for non-retention, i.e. lack of scholarly publication. . . . .Quite simply this is a case involving the long-standing rule in academia of "publish or perish." Whatever the merits of that tradition, it is not up to the courts to interfere with an institution as St. Thomas University, which aspires to be accepted in the academic circles that adhere to that proposition.[105]

In *Han v. Univ. of Dayton*,[106] Sam S. Han was non-renewed for inadequate scholarship.[107] When he sued, the trial court ruled against him.[108] In affirming its decision, the Ohio Court of Appeals wrote:

> Han's teaching contract was not renewed because the Dean accepted the PRT [Promotion, Retention and Tenure] Committee's finding that he did not produce adequate scholarship to merit continued retention as a professor at UDSL. This is the sole reason relied upon by Dean [Lisa A.] Kloppenberg when she decided not to renew Han's teaching contract. Han was put on notice that the PRT committee was seriously concerned with his scholarship pursuits in his 2010 performance evaluation, wherein the committee criticized him for the quality of his scholarship. Han cannot compel this Court to sit as a second review committee to decide if UDSL should have retained him, despite the PRT committee and the Dean's conclusion that his record of scholarship was insufficient for retention pursuant to the university's standards.[109]

Poor teaching was the problem in *Fruehwald v. Hofstra Univ.*[110]

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[105] *Id.* at 1316–17 (citations omitted).

[106] Han v. Univ. of Dayton, 28 N.E.3d 547 (Ohio Ct. App. 2015)

[107] *Id.* at 550.

[108] *Id.* at 549–50.

[109] *Id.* at 557–58. In an earlier case in federal court, Han had argued that his non-renewal was due to race and gender discrimination. Han v. Univ. of Dayton, 541 F. App'x, 622, 624 (6th Cir. 2013). Both of these claims were dismissed for lack of proof. *See* Han v. Univ. of Dayton, No. 3:12-cv-140, 2012 WL 6676961, at *12 (S.D. Ohio Dec. 21, 2012), *aff'd*, 541 F. App'x 622 (6th Cir. 2013).

[110] Fruehwald v. Hofstra Univ., No. 686/10, 2010 N.Y. Slip Op. 50878(U), at 2 (Sup. Ct. Apr.

Edwin S. Fruehwald had been hired as a legal writing professor in 2000.[111] In 2001 and 2005, he was reappointed.[112] In 2009, his application for a new five-year contract was rejected due to a decline in the quality of his teaching.[113] Under protest, Fruehwald accepted a one-year visiting professorship.[114] Halfway through it, he sued, claiming that the decision to not grant him a five-year contract had been procedurally flawed.[115] The trial court disagreed, as did the appellate court:

> Contrary to the petitioner's contention, the determination that there was a significant decline in his teaching performance since the execution of his last contract was not made without sound basis in reason or regard to the facts, and the petitioner failed to demonstrate that the determination to deny his application was arbitrary or capricious. Moreover, even if the law school's Committee on Appointment, Reappointment, and Promotion of Clinical Skills, Legal Writing, and Academic Support Faculty . . . failed to conduct the exact number of classroom and student conference observations outlined in the rules promulgated by the law school, we conclude that the observations undertaken by the Committee constituted substantial compliance under the circumstances.[116]

In two cases, the reasons for the plaintiffs' non-renewal were not clearly specified. In *Hudak v. Curators of University of Missouri*,[117] Leona M. Hudak alleged she was let go due to her age, ethnicity, sex, and religion.[118] By the end of discovery, Hudak had been through three attorneys.[119] Out of money, she asked the district court to appoint counsel for her.[120] It refused to do so.[121] On appeal, the Eighth Circuit affirmed:

> The record reflects here that Hudak is indigent, but it also appears that the case is one in which a contingent fee

12, 2010), *aff'd*, 920 N.Y.S.2d 183 (N.Y. App. Div. 2011).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Fruehwald v. Hofstra Univ., 920 N.Y.S.2d 183, 184–85 (N.Y. App. Div. 2011) (citations omitted).

[117] Hudak v. Curators of the Univ. of Mo., 586 F.2d 105 (8th Cir. 1978).

[118] *Id.* at 106.

[119] *Id.*

[120] *Id.*

[121] *Id.*

> arrangement is feasible, and three attorneys have previously taken her case. More significantly, Hudak is a lawyer and a former professor of law, with an advanced legal degree. As the district court noted, her control over the details of the litigation thus far indicates that she is able to represent herself. Furthermore, while she is not residing in the forum state, the district court noted that the discovery phase of the lawsuit is already completed.
>
> We find under the facts and existing circumstances that the district court did not abuse its discretion in denying the appointment of counsel.[122]

In *Malkan v. Mutua*,[123] Jeffrey D. Malkan was hired in 2000 by the State University of New York at Buffalo to be a Clinical Associate Professor and the Director of the Legal Research and Writing Program.[124] In 2006, he was promoted to clinical professor and signed a three-year contract with a two-year mandatory "administrative extension."[125] This odd arrangement was needed because while the university only permitted term positions to be for three years, the ABA's accreditation standards required full professors to receive five-year contracts.[126]

In March 2008, Malkan was dismissed as the Director of the Legal Research and Writing Program.[127] Six months later, he was notified that his Clinical Professor contract would not be renewed following the end of the 2008–09 school year.[128] Although Malkan repeatedly attempted to speak to Dean Makau W. Mutua about these matters, Mutua refused to meet with Malkan.[129] On September 1, 2009, Malkan's employment at the law school ended.[130]

During the 2008–09 school year, Malkan submitted a grievance to the law school's Grievance Committee based on Mutua's refusal to consult with the Committee on Clinical Promotion and Renewal.[131] When it declined to hear it, Malkan filed an action in the New York State Court of Claims to recover the pay due him under the "administrative

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[122] *Id.* at 106–07.

[123] Malkan v. Mutua, No. 12-CV-236-A, 2012 U.S. Dist. LEXIS 143311 (W.D.N.Y. Oct. 3, 2012).

[124] *Id.* at *2–*3.

[125] *Id.* at *3.

[126] *See id.*

[127] *Id.* at *4.

[128] *Id.* *4–*5.

[129] *Id.* at *5.

[130] *Id.* at *7.

[131] *Id.* at *5.

extension" portion of this contract (*i.e.*, years four and five).[132] Malkan also filed a lawsuit in federal court alleging that his due process rights had been violated because Mutua had not consulted with the faculty prior to non-renewing Malkan's contract and because Malkan had not received any sort of post-termination review by the faculty.[133]

In 2015, a state appellate court, without comment, affirmed the dismissal of Malkan's Court of Claims action.[134] In 2016, a federal district court adopted a magistrate judge's recommendation and dismissed Malkan's due process lawsuit.[135]

B. Tenure Candidates

Numerous cases exist in which a law professor, having been denied tenure, sues. These suits can be divided into two categories: (1) those alleging improper process;[136] and, (2) those alleging discrimination.[137]

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[132] *Id.* at *3, *7.

[133] *Id.* at *1–*2.

[134] *See* Malkan v. State, 125 A.D.3d 1521, 1521 (N.Y.App. Div. 2015).

[135] *See* Malkan v. Mutua, No. 1:12-CV-00236, 2016 U.S. Dist. LEXIS 174754, at **1**–2, *3, *6 (W.D.N.Y. Dec. 18, 2016).

[136] In 2008, Alberto L. Zuppi unsuccessfully sued Louisiana State University for improper process in a case that did not generate a published opinion. *See, e.g.*, Plaintiff's Second Supplemental Complaint, Zuppi v. La. State Univ., No. 308CV00474, 2009 WL 2625138, at ¶II. (M.D. La. June 10, 2009). In his complaint, Zuppi claimed that his bid for tenure fell apart after Dean John J. Costonis stepped down and his successor, Dean Jack M. Weiss, "changed the rules":

> The defendants breached the employment contract entered into between the Plaintiff and the LSU Law Center, which breaches of contract included but are not necessarily limited to failing and refusing to honor the Law Center's assurances to the Plaintiff of a good-faith tenure track review consistent with all applicable policies both stated and represented to the Plaintiff (by Chancellor Costonis), failing and refusing to apply the tenure track criteria to the Plaintiff in accordance with custom, usage and practices, failing and refusing to provide the Plaintiff with due process rights conferred upon the Plaintiff by applicable policy and representations of the Chancellor who hired him, failing and refusing to provide the Plaintiff with grievance and appeal rights and procedures following the arbitrary denial and rejection of tenure and promotion to him, and further breaching implicit causes and considerations that the LSU Law Center promised as part of its inducement for the Plaintiff to sign the otherwise ambiguous contract, and thereby misleading the Plaintiff concerning his reasonable expectations of and rights to a fair tenure and promotion procedure weighted in accordance with the usual practices of the Law Center, its ordinary policies, and university policy as adopted by the Law Center through its Handbook and Catalogue, and AALS Policy by which the Law Center has agreed to be bound.

Id. at ¶ VII.

[137] Although it attracted considerable attention, Grover G. Hankins's lawsuit against Texas Southern University did not result in a published opinion. *See, e.g.*, Jo Ann Zuniga, *TSU Law Professor to Finish Semester: Agreement Ends Action over Firing*, HOUS. CHRON. (Oct. 26, 2001), http://www.chron.com/news/houston-texas/article/TSU-law-professor-to-finish-semester-2039297.php. Hankins, an African-American, had been leading the law school's environmental

Some plaintiffs have asserted both types of claims. In *Honore v. Douglas*,[138] for example, Stephan L. Honore, a law professor at Texas Southern University, claimed he was entitled to "automatic tenure" (based on his length of service) and also insisted he had been denied tenure because he had been a vocal critic of the law school's dean.[139] In allowing Honore to take his case to trial, the Fifth Circuit wrote: "The record before us contains sufficient conflicting evidence about material facts to present jury issues. Honore has adequately challenged the underlying facts upon which the summary judgment motion rests."[140]

1. Improper Process

In *Bason v. American University*,[141] George F. Bason, Jr. was denied tenure without being given an official reason; informally, however, "he was told it was because he devoted too much time to clinical work, and had been late in submitting course grades."[142] He challenged the denial on multiple grounds, although his primary objections were that the Faculty Rank and Tenure Committee had failed to alert him that his performance was deficient and had not given his candidacy a thorough review.[143] The trial court granted the university's motion for summary judgment but the appeals court reversed, explaining that Bason had raised enough questions about

justice clinic for years when he was recommended for tenure. *See id.* His candidacy ran into trouble, however, at the board of regents. *Id.* In response, Hankins went to court, claiming that he was being punished for having sued Governor George W. Bush to ensure that minority universities received their fair share of the state's tobacco litigation settlement fund. *Id.* At Florida Coastal School of Law, three Jewish law professors—Scott D. Gerber, Douglas E. Litowitz, and Malla Pollack—complained that their bids for tenure were derailed due to anti-Semitism. *See* Joe Humphrey, *2 Instructors Claim Law School Is Anti-Semitic*, TIMES-UNION (Jacksonville) (Feb. 27, 2001), http://jacksonville.com/tu-online/stories/022701/met_5504 23 2.html; *see also* Gerber v. Fla. Coastal Sch. of Law, No. 3:98cv888 (M.D. Fla., filed Sept. 9, 1998); Litowitz v. Lively, No. 3:01cv1276 (M.D. Fla., filed Nov. 8, 2001); Pollack v. Fla. Coastal Sch. of Law, No. 16-2001-CA-001213-XXXX-MA (Fla. Cir. Ct., filed Feb. 12, 2001). Gerber's case settled for $72,500. *See* Humphrey, *supra*. According to their respective case dockets, both Litowitz's lawsuit, on Oct. 1, 2002, and Pollack's lawsuit, on Nov. 26, 2002, were voluntarily dismissed, presumably after settlements were reached. *See* Docket Entry, at BL-44, Pollack v. Fla. Coastal Sch. of Law, No. 16-2001-CA-001213-XXXX-MA (Fla. Cir. Ct., filed Feb. 12, 2001) (indicating a notice of dismissal was filed); *see also* Stipulation of Voluntary Dismissal with Prejudice, *Litowitz*, No. 3:01cv1276. A fourth Jewish law professor (Steven S. Nemerson) did not sue the school but also left after receiving a settlement. *See* Humphrey, *supra*.

[138] Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987).

[139] *See id.* at 567, 569.

[140] *Id.* at 570 (citations omitted).

[141] Bason v. Am. Univ., 414 A.2d 522 (D.C. Cir. 1980).

[142] *Id.* at 524.

[143] *See id.*

how he had been treated to get his case to a jury.[144]

Bason was relied on in *Mawakana v. Board of Trustees of the University of the District of Columbia*.[145] Kemit Mawakana was turned down for tenure due to his scholarship.[146] In response, Mawakana sued, claiming that he was never told that his scholarship was deficient, given a chance to rebut the allegation, or provided time to correct the problem.[147] Finding his position to be plausible, the trial court denied the school's partial motion to dismiss for failure to state a claim:

> While the complaint contains little detail about the University's actual customs and practices with regard to other tenured and non-tenured professors, at this early stage . . . the Court finds that plaintiff has alleged just enough to state a plausible claim that the combination of the Appointment Letter, the Standards and Procedures, the Faculty Handbook, and the general customs and practices of the University gave rise to an implied contractual obligation to provide annual reviews to non-tenured faculty.[148]

In *Faculty of the City University of New York School of Law at Queens College v. Murphy*,[149] the entire law school faculty sued when Chancellor Joseph S. Murphy refused to forward to the university's board of trustees the names of Homer C. La Rue and Vanessa H. Merton, two of the law school's founding faculty members.[150] Although they had been recommended for tenure by a joint law school-university review committee, neither had received a unanimous vote.[151] Siding with the faculty, both the trial court and the appeals court held that Murphy was obligated to send their names to the trustees:

> Under New York State Education Law § 6206(7), the CUNY

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[144] *Id.* at 525 ("The vigor of [the parties'] appellate arguments speaks plainly to the existence of at least one genuine issue of material fact.").

[145] Mawakana v. Bd. of Trs., 113 F. Supp. 3d 340, 350–51 (D.D.C. 2015) (citing *Bason*, 414 A.2d 522, 525).

[146] *See Mawakana*, 113 F. Supp. at 345.

[147] *See id.*

[148] *Id.* at 352. Although Mawakana relied on improper process to defeat the university's motion, his primary claim (which is still being litigated) is that the school holds black law professors to a higher scholarship standard than white law professors. *See* Tamara Tabo, *Black Law Professor Sues Predominantly Black Law School . . . for Race Discrimination?*, ABOVE THE LAW (Dec. 15, 2014), http://abovethelaw.com/2014/12/black-law-professor-sues-predominantly-black-law-school-for-race-discrimination/.

[149] Faculty of the City Univ. of N.Y. Sch. at Queens Coll. v. Murphy, 531 N.Y.S.2d 665 (Sup. Ct. 1988), *aff'd as modified*, 539 N.Y.S.2d 367 (N.Y. App. Div. 1989).

[150] *See id.* at 665–66.

[151] *See id.* at 667.

> Board of Trustees has the exclusive, nondelegable power to grant tenure. Appellant's contention that while the Board of Trustees has exclusive authority to grant tenure, the Chancellor is vested with authority to deny tenure by refusing to forward applications which have been favorably recommended to the Board of Trustees, finds no support in the case law.[152]

In three cases, the plaintiff's improper process argument did not succeed. In *Corr v. Mazur*,[153] John B. Corr, a law professor at the College of William and Mary, received a positive vote for tenure from the law school's faculty.[154] The law school's dean, as well as the university's provost and president, disagreed with the vote.[155] As a result, Corr was denied tenure.[156]

When Corr sued, claiming that the university had failed in multiple respects to follow its written procedures, the court rejected his arguments.[157] Not only did it find that Corr had misinterpreted the rules and that any breaches were "immaterial," it concluded that the reason Corr had been denied tenure—insufficient scholarship—was "clearly outside of this court's power to entertain . . . [and] is precisely the type of issue which should only be determined by the school itself."[158]

In *Henry v. Delaware Law School of Widener University, Inc.*,[159]

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[152] *Id.* at 674; *Murphy*, 539 N.Y.S.2d at 369. The appeals court, however, found no merit in La Rue and Merton's discrimination claims. *See id.* ("The mere fact that respondents La Rue, who is black, and Merton, who is a women [sic], were rejected while three white male candidates were granted tenure[,] is insufficient. . . . La Rue acknowledges that the law school, in accordance with its mission, will probably seek out other minority faculty. Neither Merton, La Rue, nor any other of the respondents has supplied the factual elements necessary to make out a prima facie case under [T]itle VII.").

[153] Corr v. Mazur, 15 Va. Cir. 184 (Va Cir. Ct. 1988).

[154] *See id.* at 184–85.

[155] *See id.* at 186.

[156] *See id.*

[157] *See id.* at 186–87, 189.

[158] *Id.* at 188, 192. Despite this holding, the court allowed Corr to proceed with his claim that the real reason he was denied tenure was because he had opposed the permanent hiring of a visiting professor who had been the subject of "widespread rumors of . . . inappropriate sexual activities with students . . . ." *Id.* at 192. In 1989, following trial, a jury ordered Professor Glenn E. Coven, a member of the law school's tenure committee, to pay Corr $75,000 in actual damages and $100,000 in punitive damages for hampering Corr's bid for tenure. *See* Ronnie Crocker, *Jury Awards Professor $175,000 in Tenure Case*, DAILY PRESS, Mar. 24, 1989, at B1. The trial judge, however, vacated the award. *See* Ronnie Crocker, *Judge Sets Aside Award in W&M Tenure Case: Jury Had Ordered Coven to Pay $175,000*, DAILY PRESS (Mar. 25, 1989), http://articles.dailypress.com/1989-03-25/news/8903250064_1_tenure-denial-coven-law-school.

[159] Henry v. Del. Law Sch. of Widener Univ., Inc., No. CIV.A. 8837, 1998 WL 15897 (Del. Ch. Jan. 12, 1998), *aff'd mem.*, 718 A.2d 527 (Del. 1998).

Robert J. Henry also tried a shotgun approach when he was denied tenure due to deficiencies in his teaching and "professional behavior."[160] In his lawsuit Henry asserted that the law school's Promotion and Tenure Committee, *inter alia*, had improperly evaluated his record, conducted its meetings without a quorum, and not given him written notice of its final determination.[161] In finding these objections to be meritless, the trial court wrote:

> After considering the record, as a whole, and the plaintiff's allegations regarding the review of his applications, I conclude the defendants acted substantially in accordance with the Tenure Policy both initially and with regard to the appeal process. Having determined that the defendants acted in good faith in reviewing and ultimately rejecting the plaintiff's applications, this Court will not review the defendants' factual findings and substitute its opinion for the deliberative and reasoned decision of the University. No procedure is fool proof, and precisely for this reason, institutions such as the defendants institute appeal procedures in order to correct any wrongs committed earlier in the review process.[162]

In *Blum v. State*,[163] Jeffrey M. Blum, a law professor at the State University of New York at Buffalo, raised a rather novel type of improper procedure argument.[164] Blum was in his sixth year at the law school when the dean informally advised him that he was unlikely to receive tenure.[165] Subsequently, Blum and the dean exchanged several letters.[166] Based on them, Blum claimed he had been led to believe that if he deferred his application for tenure, he could:

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[160] *See id.* at *1, *3. Henry argued that because "professional behavior" was not one of the criteria listed in the school's tenure standards, it could not be considered. *See id.* at *7, *8. The trial court gave this argument short shrift: "[A]ppropriate professional behavior would appear to be a prerequisite to an appointment as a tenured law professor." *Id.* at *8.

[161] *See id.* at *7.

[162] *Id.* at *10. The trial court also dismissed Henry's count accusing Professors Richard H. Humphreys and Herbert S. Schlagman of libel. *See id.* at *12. Both had served on the tenure committee and both had died before they could be deposed. *See id.* at *1, *2 n.3, *12. According to the court: "Even viewing the evidence in light of a motion for summary judgment, Professors Schlagman's and Humphreys' statements (as summarized in the Tenure Committee's written report) still do not amount to defamation. While the statements were uncomplimentary about the plaintiff's teaching abilities, they do not rise to a level sufficiently derogatory so as to injure his reputation or deter others from associating with him." *Id.* at *10.

[163] Blum v. State, 680 N.Y.S.2d 355 (N.Y. App. Div. 1998), *appeal denied*, 710 N.E.2d 273 (N.Y. 1999).

[164] *See id.* at 356.

[165] *See id.*

[166] *See id.*

> Receive an administrative appointment as an associate professor for an additional year, which, under the regulations of the State University of New York, would constitute a "continuing appointment" or de facto tenure. Thus, according to [Blum], it was represented to him that he would become tenured without going through the tenure process. [Blum] was ultimately appointed for an additional year as a "visiting professor" and his appointment was terminated at the end of that year. He was never reviewed for tenure.[167]

When things did not work out as Blum expected, he sued for negligent misrepresentation.[168] In an unpublished opinion, the New York State Court of Claims dismissed his lawsuit.[169] On appeal, its decision was affirmed:

> Upon our review of [the] correspondence, we conclude that defendant established as a matter of law that no such misrepresentation was made to [Blum], negligently or otherwise, and [Blum] failed to raise an issue of fact. The correspondence established only that the parties agreed to defer [Blum's] tenure review. Thus, that cause of action was properly dismissed.[170]

In two cases, the plaintiff's improper process claim was not heard because of a pleading defect. In *Childs v. Koosed*,[171] James W. Childs was a law professor at the University of Akron.[172] During the Fall 1987 semester, he was assigned to teach family law for the first time.[173] In December 1987, Childs was recommended for tenure by the Limited Law Faculty, a group consisting of the law school's tenured faculty.[174] In March 1988, however, Childs learned that he was under investigation because several of his family law students

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[167] *Id.* (citation omitted).

[168] *See id.*

[169] *See id.*

[170] *Id.* at 357. The court also upheld the dismissal of Blum's libel claim, which involved comments made by an assistant attorney general in the law school's newspaper. *See id.* at 357–58 (citations omitted) (finding that Blum was a limited public figure). In addition to his state court lawsuit, Blum filed a federal court lawsuit in which he claimed his First, Fifth, and Fourteenth Amendment rights had been violated. *See* Blum v. Schlegel, 18 F.3d 1005, 1009 (2d Cir. 1994). This suit was dismissed when Blum failed to abide by the terms of a protective order, under which he had been given confidential access to the tenure file of Professor Dianne Avery. *See* Blum v. Schlegel, Nos. 96-7705, 96-7723, 1997 WL 138741, at *1 (2d Cir. Mar. 21, 1997).

[171] Childs v. Koosed, No. 90-3449, 1991 WL 33133 (6th Cir. Mar. 13, 1991).

[172] *Id.* at *1.

[173] *Id.*

[174] *Id.*

claimed he had made offensive remarks.[175] In April 1988, Childs received a terminal contract from the university.[176] In response, he asked for a probationary contract.[177] When this request was denied, Childs sued, claiming that his due process and First Amendment rights had been violated.[178] Without reaching the merits, the district court dismissed the lawsuit because of the Eleventh Amendment.[179] On appeal, the Sixth Circuit affirmed.[180]

Similarly, in *Jones v. Southern University and A & M College System*,[181] Thomas D. Jones sued when he was denied tenure.[182] According to Jones, after the law school made its decision, he should have been given notice and an opportunity to appear before the university's board of supervisors.[183] The trial court dismissed for lack of jurisdiction, as did the appellate court, which explained: "[B]ecause the tenure process challenged by Jones does not constitute a 'rule' or an 'adjudication' within the meaning of the LAPA [Louisiana Administrative Procedure Act], Jones was not entitled to judicial review under the LAPA."[184]

2. Discrimination

In *Brown v. Sessoms*,[185] Stephanie Y. Brown, a black woman, was a law professor at the University of the District of Columbia.[186] At the time she applied for tenure, she had published one law review article and had had a second one accepted for publication.[187] Although the law school's rules required tenure candidates to have three articles, Brown was recommended for tenure by both the law school's Faculty Evaluation and Retention Committee and the law school's dean.[188] Her application, however, was rejected by the university.[189]

In response, Brown sued for racial discrimination under 42 U.S.C.

175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *See id.* at *2.
180 *Id.* at *4.
181 Jones v. S. Univ., 96-1430 (La. App. 1 Cir. 05/09/97), 693 So. 2d 1265.
182 *Id.* at p. 3, 693 So. 2d at 1267.
183 *Id.*
184 *Id.* at p. 7, 693 So. 2d at 1269.
185 Brown v. Sessoms, 774 F.3d 1016 (D.C. Cir. 2014).
186 *Id.* at 1018, 1019.
187 *Id.* at 1019.
188 *Id.*
189 *Id.*

§ 1981, relying heavily on the fact that one year earlier, William G. McLain III, a white man with no publications, had been granted tenure.[190] The district court denied her claim, but on appeal the D.C. Circuit reversed:

> Drawing all inferences in her favor, we believe that Brown's complaint sufficiently makes out that she and McLain had similar records with regard to teaching and service. Because both also failed to meet the publication requirement, their tenure applications appear, from the complaint, to be on comparable footing. The fact that McLain won tenure and Brown did not allows us "to draw the reasonable inference that the defendant is liable for the misconduct alleged." Accordingly, we reverse the district court's dismissal of Brown's section 1981 claim.[191]

In *Hascall v. Duquesne University of the Holy Spirit*,[192] Susan C. Hascall filed a multi-count complaint after she was denied tenure.[193] When the school moved for summary judgment, the district court held that Hascall had produced sufficient evidence to warrant a trial on her gender discrimination and retaliation claims:

> Plaintiff presents no arguments or evidence supporting her age discrimination (Counts I and VI), Equal Pay Act (Count VII), intentional infliction of emotional distress (Count VII), and breach of implied contract (Count IX) claims against Defendants. . . . Accordingly, summary judgment will be entered for Defendants on those claims.
>
> Defendants also move for summary judgment on Plaintiff's claims of religious discrimination (Counts III and VI). The Court agrees with Defendants' position . . . . Scholarship in Islamic and Sharia law does not, on its own, create a sincerely

[190] *Id.* at 1019–20 (citations omitted).

[191] *Id.* at 1023 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The appeals court also reversed the district court's dismissal of Brown's gender and race discrimination claims under the District of Columbia's Human Rights Act. *Brown*, 774 F.3d at 1024 (citations omitted). In 2016, Brown voluntarily dismissed her lawsuit after the university granted her tenure. *See* Resolution, Board of Trustees, University of the District of Columbia, UDC David A. Clarke School of Law Tenure Approval for Professor Stephanie Y. Brown (Nov. 22, 2016), (available at http://docs.udc.edu/bot/UDC_David_A_Clarke_School_of_Law_Tenure_Approval_for_Professor_Stephanie_Y_Brown.pdf) (university resolution approving Brown's tenure); see also Fiscal Impact Statement from David A. Feinstein, U.D.C. Managing Director of Finance on David A. Clarke School of Law Tenure Approval for Professor Stephanie Y. Brown to U.D.C. Board of Trustees (Oct. 11, 2016) (available at http://docs.udc.edu/bot/UDC_David_A_Clarke_School_of_Law_Tenure_Approval_for_Professor_Stephanie_Y_Brown.pdf).

[192] Hascall v. Duquesne Univ. of the Holy Spirit, No. 14-1489, 2016 U.S. Dist. LEXIS 83666 (W.D. Pa. June 28, 2016).

[193] *See id.* at *2–3.

held religious belief. Plaintiff has pointed to no evidence that she herself practices Islam as a religion. . . . Without a sincerely held belief in Islam, Plaintiff cannot establish a claim for religious discrimination. . . .

On the question of Plaintiff's claims of gender discrimination and retaliation, the Court finds that there exist sufficient disputes of material fact in the record that summary judgment is inappropriate. Plaintiff has pointed to several disputed facts regarding the validity of Defendants' "legitimate non-discriminatory reason" for denying Plaintiff tenure. Examples of inconsistencies include: what standard tenure reviewers applied to assess Plaintiff's candidacy; whether Defendant [Dean Kenneth G.] Gormely lobbied members of the Law School Rank and Tenure Committee to vote against Plaintiff prior to the vote; whether [clinical professor] Laurie [B.] Serafino is an adequate comparator; and what basis Defendants used for denying Plaintiff tenure, e.g., teaching or scholarship. These factual disputes, coupled with evidence from which a reasonable jury could conclude that Defendant Gormley has a history of creating a hostile work environment for females, are sufficient for Plaintiff's gender claims to survive summary judgment. Additionally, there is a dispute of material fact as to when Defendant Gormley began drafting his letter recommending that Plaintiff be denied tenure. . . . Therefore, her retaliation claim likewise must survive the summary judgment stage.

Plaintiff bases her defamation claim on two statements contained in an article in the Legal Intelligencer [newspaper]: (i) "Ms. Hascall is a disgruntled faculty member in Duquesne's School of Law who was recently denied tenure by the university"; and (ii) "Indeed, Plaintiff's poor teaching, flawed examinations and disrespect exhibited toward students in the classroom led to ongoing student complaints yet Plaintiff makes the astounding assertion that Duquesne University somehow 'solicited the students . . . and choreographed thereby a slew of poor student evaluations.' Thus she continues to refuse to take responsibility for her poor teaching evaluations."

Defendants argue the first statement is, as a matter of law, not defamatory as it is "merely an expression of Defendants' opinion as to why Plaintiff filed her lawsuit."

As to the second statement, Defendants correctly indicate that

> it was taken from Defendants' Answer to Plaintiff's initial Complaint, filed on the docket with the Court. This statement, Defendants argue, is privileged and not capable of being defamatory, as it was made in the course of this judicial proceeding.
>
> The Court finds neither of the statements at issue defamatory.[194]

In two cases, the plaintiffs' discrimination claims were deemed meritless. In *Meehan v. New England School of Law*,[195] the district court found that Dorothy K. Meehan had been denied tenure not because she was a woman, but because she was an "ineffective teacher."[196] Similarly, in *Hammer v. University of Michigan Board of Regents*,[197] the Michigan Court of Appeals ruled that Peter J. Hammer had been denied tenure not because he was gay, but because he had not written enough.[198]

In two other cases, the plaintiff's discrimination claim was not reached. In *Erickson v. New York Law School*,[199] Nancy S. Erickson was denied tenure twice.[200] After securing a position on the Ohio State University law school faculty, she sued her former employer for federal and state gender discrimination.[201] In holding that she could not pursue these claims, the district court wrote:

> Had Erickson timely brought suit under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, or under the New York Human Rights Law, *N.Y. Exec. Law § 297(9)*, she might have been entitled to relief. However, she failed to comply with the administrative exhaustion and timeliness requirements of these statutes, and the remedies provided therein were therefore unavailable to her.[202]

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[194] *Id.* at *2–6 (citations omitted).

[195] Meehan v. New Eng. Sch. of Law, 522 F. Supp. 484 (D. Mass. 1981), *aff'd mem.*, 705 F.2d 439 (1st Cir. 1983).

[196] *Id.* at 498.

[197] Hammer v. Univ. of Mich. Bd. of Regents, No. 305568, 2013 Mich. App. LEXIS 1972 (Mich. Ct. App. Dec. 3, 2013), *appeal denied*, 845 N.W.2d 495 (Mich. 2014).

[198] *See id.* at *23 ("The evidence shows that plaintiff was denied tenure based on his scholarship. Plaintiff has not met his burden of establishing a genuine issue of material fact that he was denied tenure because of anti-gay bias.").

[199] Erickson v. N.Y. Law Sch., 585 F. Supp. 209 (S.D.N.Y. 1984).

[200] *See id.* at 211, 212.

[201] *See id.* at 212.

[202] *Id.* For similar reasons, the court found that Erickson's back pay claim was time-barred. *Id.* at 213 (citations omitted). It did, however, find that her Equal Pay Act claim was still viable and therefore ordered the parties to engage in additional discovery. *See id.* at 214 (citations omitted).

More recently, in *Kole v. Loyola University of Chicago*,[203] Karen V. Kole claimed that she was denied tenure because of her gender.[204] In the only reported decision generated by the litigation, the court refused to disqualify Kole's attorney (Mark K. Schoenfield) despite his repeated violation of ethics rule 4.2, which prohibits *ex parte* communications with the other side's employees:

> Fortunately, the misguided effort to settle the case by making an end run around Loyola's corporate attorney does not seem to have prejudiced Loyola. Nor has Schoenfield's pre-hearing contacts with the tenured law professors seem to have prejudiced Loyola. Should some item of evidence or some witness later prove tainted, Loyola is free to move *in limine* for exclusion. If there has been a disclosure of a privileged communication, the court can act to preserve the privilege and exclude the communication from the evidence in the case. If Loyola can prove that some item of evidence was discovered solely as a result of an improper communication, such so-called "fruit of the poisonous tree" can be likewise be excluded.[205]

C. Tenured Faculty

Although tenure often is described as a *contract for life*,[206] it is

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[203] Kole v. Loyola Univ., No. 95 C 1223, 1997 U.S. Dist. LEXIS 1071 (N.D. Ill. Jan. 28, 1997).

[204] *See id.* at *1.

[205] *Id.* at *15–*16.

[206] Whether tenure actually is a contract for life is a much-debated issue. In an unreported case, one court wrote:

> To the extent [Anthony] Chase relies on the word "tenure" in the Personnel Action Form for such terms and conditions, that reliance is misplaced. As the Sixth Circuit recently explained in a similar case, "tenure does not provide additional privileges or protections other than those specified in [his] employment contract . . . . '[T]enure' does not mean anything other than what [the professor's] employment contract provides." . . . Thus, the Personnel Action Form's reference to "tenure" does not in and of itself give rise to contractual rights. Accordingly, Chase has not produced sufficient evidence to support his allegation that he was "promised" or "guaranteed" lifetime employment, let alone that the terms or conditions of any such employment precluded his termination under the circumstances involved here. The absence of such evidence is fatal to his claim.

Chase v. Nova S.E. Univ., Inc., No. 0:11-cv-61290-KMW, at 36 (S.D. Fla. Sept. 14, 2012) (PACER) (quoting Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558, 566 (6th. Cir. 2012)). This decision is an Order Granting [Defendant's] Motion for Summary Judgment. *Id.* at 1. Chase was fired for sending e-mails to other faculty members in which he claimed to have a gun and was prepared to use it to defend himself. *See* Chase v. Nova S.E. Univ., Inc., No. 11-61290-CIV, 2012 U.S. Dist. LEXIS 83815, at *3–4 (S.D. Fla. June 18, 2012). More recently, Carl P. Erlinder, a law professor at the William Mitchell College of Law, was barred from the campus after his behavior became increasingly erratic. *See* Randy Furst, *Prof. Sues William Mitchell over Teaching Ban*, STAR TRIB. (Feb. 11, 2014), http://www.startribune.com/prof-sues-

subject to both relinquishment[207] and revocation.[208]

1. Relinquishment

A relinquishment of tenure occurs when a tenured faculty member resigns, retires, or (presumably) dies.[209] To be effective, a relinquishment must be unequivocal.[210]

In *Osborne v. Stone*,[211] Milton Osborne, Jr., a law professor at Southern University, insisted that his failure to respond to various letters from the administration asking about his future teaching availability did not constitute relinquishment.[212] The Louisiana Court of Appeals disagreed:

> It was plaintiff's voluntary refusal to respond to Southern's reasonable request for advice as to his full-time availability for teaching the fall 1981 semester which created the loss of his job. Plaintiff's failure to respond to [Dean Bhishma K.] Agnihotri's letters did not result in his termination. Plaintiff was terminated only after he voluntarily abandoned his job. He relinquished his property rights, and defendants owed him no hearing because there were no rights left to protect. Plaintiff's suit is dismissed at his costs.[213]

william-mitchell-over-teaching-ban/244817141/. Claiming he was suffering from post-traumatic stress disorder caused by his recent imprisonment in Rwanda, Erlinder responded by suing the school for discrimination. *See* Complaint & Jury Demanded, Erlinder v. Janus, No. 62-cv-14-802, 2014 WL 494304 (Minn. Dist. Ct. Feb. 6, 2014).

[207] In a lawsuit that did not result in a published opinion, William J. Brown, a law professor at the University of Pittsburgh, gave up his tenure in order to join the law faculty at Duquesne University. *See* Civil Complaint & Jury Trial Demanded ¶¶16–18, Brown v. Univ. of Pitt., No. 2:11CV01090, 2011 WL 3706975 (W.D. Pa. Aug. 24, 2011). Years later, he re-joined the Pittsburgh faculty. *See id.* ¶¶19, 25. When his request to be re-tenured was turned down due to his age (73), Brown sued for age discrimination. *See id.* ¶¶3, 60.

[208] In April 2015, R. Carl Moy and A. John Radsan, two law professors at the William Mitchell College of Law, sued the school when it announced it was considering changing its tenure revocation rules. *See* Chao Xiong, *Professors Drop Lawsuit Against William Mitchell in Tenure Fight*, STAR TRIB. (May 14, 2015), http://www.startribune.com/professors-drop-lawsuit-against-william-mitchell-in-tenure-fight/303835971/. According to the pair, the school was looking for ways to make it easier to reduce the size of the faculty following its decision to absorb Hamline University's law school. *See id.* The case lasted for only a few weeks. *See id.*

[209] *See, e.g.*, *3.2 Tenure Process*, MIT POLICIES AND PROCEDURES, https://policies-procedures.mit.edu/faculty-appointment-promotion-and-tenure-guidelines/tenure-process (last visited Oct. 22, 2017).

[210] *See, e.g.*, O'Connor v. Phoenix Sch. of Law, LLC, No. CV-13-01107, 2013 WL 12109761, at *4 (D. Ariz. Dec, 11, 2013) (citations omitted).

[211] Osborne v. Stone, 536 So. 2d 473 (La. Ct. App. 1988), *writ denied*, 537 So. 2d 1164 (La. 1989), *cert. denied*, 493 U.S. 813 (1989).

[212] *Id.* at 474.

[213] *Id.* at 476.

In *Holmes v. Willamette University*,[214] Eric M. Holmes resigned when the law school threatened to institute tenure revocation proceedings due to his chronic alcoholism.[215] Subsequently, however, he sued for constructive discharge.[216] According to Holmes, prior to resigning he had requested an unpaid leave of absence so as to be able to attend a residential treatment program.[217] When his request was denied, Holmes believed he had only two choices: resign or be fired.[218] Although the trial court granted the university's motion for summary judgment, the Oregon Court of Appeals reversed because "plaintiff's 'reasonable accommodation' claim raises triable issues of material fact."[219]

In *O'Connor v. Phoenix School of Law, LLC*, the district court found that Michael P. O'Connor and Celia M. Rumann had relinquished their tenures by making counter-offers while negotiating their annual employment contracts: "Because Plaintiffs did not unequivocally accept the terms of the appointment letters in their May 10, 2013 letters (including those governing the retroactive application of salary increases and the resignation-notice provisions), the completed contracts included with those letters were counteroffers and Defendant PSL was not required to accept them."[220]

2. Revocation

In *Cobb v. Howard University*,[221] James A. Cobb was let go after he appeared before a Congressional committee and opposed an appropriation the university was seeking.[222] While the university insisted that Cobb had never acquired tenure, the court found it unnecessary to resolve this factual question.[223] Instead, it simply

[214] Holmes v. Willamette Univ., 971 P.2d 914 (Or. Ct. App. 1998) (en banc), *opinion modified upon rec.*, 975 P.2d 922 (Or. Ct. App. 1999) (en banc), *review denied*, 994 P.2d 124 (Or. 1999).

[215] *Id.* at 915, 916.

[216] *Id.* at 916–17 (citation omitted).

[217] *Id.* at 916.

[218] *See id.*

[219] *Id.* at 919.

[220] O'Connor v. Phoenix Sch. of Law, LLC, No. CV-13-01107, 2013 WL 12109761, at *4 (D. Ariz. Dec, 11, 2013) (citation omitted); *see also* O'Connor v. Phoenix Sch. of Law, LLC, No. CV-13-01107, 2014 WL 12551216, at *2 (D. Ariz. Mar. 19, 2014) (rejecting the plaintiffs' second amended complaint for the same reason).

[221] Cobb v. Howard Univ., 106 F.2d 860 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 611 (1939).

[222] *Id.* at 862.

[223] Cobb had joined the law school in 1917, when it was a part-time institution. *Id.* at 860, 861. In 1929–30, it was reorganized as a full-time law school. *Id.* at 861. Because Cobb was serving as a municipal court judge, he remained a part-time faculty member. *Id.* Cobb insisted,

relied on the university's power to remove professors for cause:

> Howard University is a private corporation, organized and existing under an Act of Congress and acts amendatory thereto, which vest the government and management of its affairs in a Board of Trustees, give it power to appoint instructors and determine their salaries, and confer upon it the usual corporate powers of acquiring and holding property and of suing and being sued. Section 7 of the original act of incorporation provides:
>
> "That the board of trustees shall have power to remove any professor or tutor or other officers connected with the institution, when, in their judgment, the interest of the university shall require it."
>
> We think this provision precludes the plaintiff from having the relief he seeks in this proceeding.[224]

Although a clear definition of cause does not exist, having, or attempting to have, sex with students is a clear firing offense for tenured faculty members.[225] Thus, in *Tonkovich v. Kansas Board of Regents*,[226] Emil A. Tonkovich was terminated after he had sex with a student following a discussion about the importance of grades.[227] In upholding his firing, the Tenth Circuit wrote:

> We acknowledge that the allegations against Professor Tonkovich required Dean [Robert H.] Jerry [II] and other University officials to confront a difficult question: when does sexual contact between participants in an unequal power relationship become exploitative? However, the fact that reasonable minds might not agree with the way in which the majority of the Hearing Committee, the Chancellor, and the

however, "that during his second year [1918] he was notified verbally by the dean and by the secretary that he was [being] appointed for an indefinite tenure, his work [so far] having been satisfactory." *Id.* at 861. Cobb alternatively claimed, without elaboration, "a contract right to tenure during good behavior extending back to 1923." *Id.* at 862.

[224] *Id.* at 863 (footnotes omitted).

[225] *See* Donna R. Euben, *Faculty Termination & Disciplinary Issues*, AM. ASS'N U. PROFESSORS (Oct. 24, 2004), https://www.aaup.org/issues/appointments-promotions-discipline/termination-discipline-2004.

[226] Tonkovich v. Kansas Bd. of Regents, No. 95-2199-GTV, 1996 WL 705777 (D. Kan. Nov. 22, 1996), *rev'd*, 159 F.3d 504 (10th Cir. 1998), *opinion on remand*, No. 95-2199-GTV, 2000 WL 246587 (D. Kan. Feb. 25, 2000), *aff'd*, 254 F.3d 941 (10th Cir. 2001). Early in the litigation, Tonkovich asked that a judge from outside the district be assigned to the case. Tonkovich v. Kansas Bd. of Regents, 924 F. Supp. 1084, 1086 (D. Kan. 1996). In rejecting this request, the court explained: "The record lacks any basis in fact for the assertion in plaintiff's brief that 'this case has titillated the Kansas academic and legal communities.' The suggestion implies a degree of public importance to the case of which this court is not aware." *Id.* at 1087.

[227] *Tonkovich*, 1996 WL 705777, at *3.

> Regents resolved that question is insufficient to support a substantive due process claim. [228]

Similarly, in *Murphy v. Duquesne University of the Holy Ghost*,[229] Cornelius F. Murphy, Jr. was fired after it was discovered that he was propositioning first-year female law students.[230] In approving his dismissal, the Pennsylvania Superior Court wrote:

> While the term "serious misconduct" is not defined in the contract or University Statutes, the trial court determined "No reasonable person could dispute that the record compiled by the factfinders in this case contains substantial evidence of serious misconduct by Professor Murphy." Trial Court Opinion, at 17. Upon a thorough review of the record, we agree. The record contained substantial evidence of a pattern of conduct that by any reasonable definition constitutes "serious misconduct," particularly when committed by the authoritative figure of a law school professor against first-year students. The factual findings of Professor [Judith R.] Griggs and the committee, the extensive analysis of the evidence by President [John E.] Murray, together with Professor Murphy's own admissions and testimony, adequately support the trial court's conclusion.[231]

In *Traster v. Ohio Northern University*,[232] Vernon L. Traster was terminated for sexually harassing his research assistant and a law library employee.[233] In finding summary judgment appropriate, the district court wrote:

> Traster cannot possibly show that ONU's termination decision lacks an adequate basis in the record. The Hearing Committee on the Dismissal of Faculty heard testimony from law student and employee describing Traster's alleged sexually harassing behavior. The Hearing Committee credited this testimony, and this Court must generally defer

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[228] *Tonkovich*, 159 F.3d at 529. The Court went on to cite a similar case from the Seventh Circuit where the court stated that "'common sense, reason and good judgment should have made [the plaintiff] cognizant of the fact that his conduct could and would be cause for termination.'" *Id.* at 529 (quoting Korf v. Ball State Univ., 726 F.2d 1222, 1226–27 (7th Cir. 1984)).

[229] Murphy v. Duquesne Univ. of the Holy Ghost, 745 A.2d 1228 (Pa. Super. Ct. 1999), *aff'd on other grounds*, 777 A.2d 418 (Pa. 2001).

[230] *Id.* at 1230–31.

[231] *Id.* at 1234.

[232] Traster v. Ohio N. Univ., No. 3:13 CV 1323, 2015 U.S. Dist. LEXIS 170190 (N.D. Ohio Dec. 18, 2015).

[233] *Id.* at *1.

> to those credibility determinations. Having credited this testimony, the Board's decision to terminate Traster for violations of the sexual harassment policy rested on reliable, probative, and substantial evidence.[234]

Law professors who have had their tenure revoked often claim to have been persecuted by the administration. In *Herrmann v. Brooklyn Law School*,[235] for example, William S. Herrmann, a professor at Brooklyn Law School, became embroiled in a bitter salary dispute with the school.[236] Eventually, he began filing harassing lawsuits against its trustees, faculty, and students.[237] In response, his tenure was revoked.[238] In seeking to be reinstated, Herrmann alleged that the real reason he was let go was his frequent demands that the school hire more minority faculty members.[239] In rejecting this argument, the Second Circuit wrote: "[T]here is no evidence that defendants dismissed plaintiff as a professor, or otherwise penalized him, because of his advocacy of Blacks or other minorities."[240]

Likewise, in *Magee v. Trustees of Hamline University, Minnesota*,[241] Robin K. Magee lost her tenure after she was found guilty of state tax evasion.[242] Magee, however, insisted she had been targeted because of her vigorous criticism of the local police department.[243] In rejecting her 42 U.S.C. § 1983 lawsuit, the Eighth Circuit wrote:

> [Magee] believes that [various police officials] acted together to force the university and dean to punish her. However, Magee does not plead specific facts plausibly connecting any "concerted action" to her termination. It is conceivable that

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[234] *Id.* at *30–31 (citations omitted). The court also rejected Traster's age discrimination claim. *See* Traster v. Ohio N. Univ., No 3:13 CV 1323, 2015 WL 12600980, at *2 (N.D. Ohio Jan. 20, 2015) ("Traster lacks a comparator, and therefore cannot establish a prima facie case.").

[235] Herrmann v. Brooklyn Law Sch., 432 F. Supp. 236 (E.D.N.Y. 1976), *aff'd*, Herrmann v. Moore, 576 F.2d 453 (2d Cir. 1978), *cert. denied*, 439 U.S. 1003 (1978).

[236] Brooklyn Law Sch. v. Aetna Cas. & Sur. Co., 661 F. Supp. 445, 447 (E.D.N.Y. 1987).

[237] *Id.* at 447.

[238] *Id.* at 448.

[239] *Herrmann*, 576 F.2d at 457.

[240] *Id.* In defending itself against Herrmann's lawsuits, the school ran up $315,000 in legal costs. Brooklyn Law Sch. v. Aetna Cas. & Sur. Co., 849 F.2d 788, 788 (2d Cir. 1988). When its insurer refused its request for reimbursement, it sued but lost due to the policy's "intentional acts" clause. *See id.* at 790.

[241] Magee v. Trs. of Hamline Univ., 957 F. Supp. 2d 1047 (D. Minn. 2013), *aff'd*, 747 F.3d 532 (8th Cir. 2014).

[242] *See id.* at 1053.

[243] *Id.*

> the university and [Dean Donald] Lewis, after a faculty vote, terminated her because of the [police department's plan to] boycott [Hamline University]. However, without additional facts, Magee has not "'nudged [her] claims'" of retaliation "'across the line from conceivable to plausible.'"[244]

Although retaliation claims normally involve a single faculty member, multiple Ave Maria School of Law professors suffered after they objected to a plan by the school's founder, pizza mogul Thomas S. Monaghan, to move the school from Michigan to Florida.[245] Among those punished was Stephen J. Safranek, who had his tenure revoked.[246] In response, he filed a whistleblower's lawsuit against the school.[247] In an important early discovery battle, Safranek was granted access to Monaghan's private notes.[248] Rather than turn these materials over, the school agreed to restore Safranek's tenure.[249]

Because of the high stakes involved in these cases, courts insist that law schools follow their tenure revocation procedures to the letter.[250] In *McNeill v. New England School of Law*,[251] for example, Bruce G. McNeill was suspended by the dean following a disagreement over a report McNeill had filed while serving as the chair of the school's placement committee.[252] After an investigation, the school's tenure committee decided that no grounds existed to revoke McNeill's tenure.[253] Despite this finding, the school's board of trustees, acting on a recommendation from the dean, revoked

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[244] *Magee*, 747 F.3d at 537 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009)). Undaunted, Magee filed a second lawsuit, this time relying on 42 U.S.C. § 1981. *See* Magee v. Hamline Univ., 775 F.3d 1057, 1057 (8th Cir. 2015). Because it relied on the same facts as her first lawsuit, it was dismissed on the basis of *res judicata*. *Id.* at 1058, 1059.

[245] Sara Stefanini, *Professors Say Law School Ousted Them in Retaliation*, LAW360 (Oct.19, 2007) https://www.law360.com/articles/38015/professors-say-law-school-ousted-them-in-retaliation.

[246] *Id.*

[247] *See id.*; Safranek v. Monaghan, 765 N.W.2d 885, 885 (Mich. 2009) (Weaver, J., concurring).

[248] *See Safranek*, 765 N.W.2d at 886–87.

[249] *See Settlement Reached in Ave Maria Law School Suit*, NAPLES DAILY NEWS (Oct. 2, 2009), http://archive.naplesnews.com/news/education/settlement-reached-in-ave-maria-law-school-suit-ep-396911085-343691452.html/. The school also settled with Safranek's co-plaintiffs, Edward C. Lyons and Philip A. Pucillo. *Id.* Both had been denied tenure as a result of their opposition to Monaghan's plan. *Id.*

[250] *See, e.g.*, Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558, 566 (6th Cir. 2012) ("[T]enure does not provide additional privileges or protections other than those specified in [the] employment contract.").

[251] McNeill v. New Eng. Sch. of Law, No. 94-0091, 1994 Mass. Super. LEXIS 592 (July 12, 1994).

[252] *Id.* at *1–*2.

[253] *Id.* at *9.

McNeill's tenure.[254] In granting McNeill's request for a preliminary injunction, the Massachusetts Superior Court wrote:

> The Court finds, however, that the Rules do not provide for further action by the Trustees after the Tenure Committee has voted that insufficient cause exists to revoke the tenure of a faculty member. Rule 4.8C explicitly provides for further Trustee action if the faculty finds that sufficient cause *does* exist to revoke tenure but provides no mechanism for further trustee review or action following a faculty vote against revocation of tenure. Moreover, if the faculty does find cause to revoke tenure, it provides additional protection to the faculty member, as Rule 4.8C provides that "if the [Tenure] Committee finds cause, it will adjourn and schedule another meeting to vote on the disposition."
>
> A main purpose behind any faculty tenure system is, of course, the protection of tenured faculty. To interpret the Faculty Rules as NESL now suggests and to rule, as NESL now suggests, that it is "not bound" by the Rules, would permit the Board of Trustees to completely ignore the vote of the Tenure Committee (as it did, in fact, in this case). Such an interpretation would, in effect, nullify any protection afforded by the Rules, and thus violate the American Bar Association's Standard 405, which requires a law school to "have an established and announced policy with regard to academic freedom and tenure." The Court concludes that the clear import Rule 4.8C is that *only* if the Tenure Committee finds sufficient cause to revoke a faculty member's tenure may the Trustees proceed to consider revocation. Where, as here, the Tenure Committee has found that insufficient cause exists, the proceedings are terminated.[255]

In *Branham v. Thomas M. Cooley Law School*,[256] Lynn S. Branham was stripped of her tenure under contested circumstances.[257] According to the school, Branham had quit after she was assigned courses she did not want to teach.[258] Branham, however, insisted she had been fired because, while serving as associate dean, she had

[254] *Id.* at *3.

[255] *Id.* at *9–11 (citations omitted).

[256] Branham v. Thomas M. Cooley Law Sch., No. 1:07-CV-630, 2010 U.S. Dist. LEXIS 92558 (W.D. Mich. Sept. 7, 2010), *aff'd*, 689 F.3d 558 (6th Cir. 2012).

[257] *See id.* at *1–2.

[258] *See id.* at *3, *7.

opposed the dean on a hiring matter.[259]

Insisting that Branham had resigned, the school refused to convene a "faculty conference," as required by its "Policy 201."[260] The district court, however, ordered the conference to be held.[261] When it was, the faculty approved Branham's removal by a vote of 85-19-4.[262] Pursuant to "Policy 201," Branham appealed to the school's board of directors, which unanimously affirmed the conference's decision.[263] Nevertheless, Branham continued to argue that her termination had been wrongful.[264] The district court rejected this contention, as did the Sixth Circuit:

> Branham submits that the court-ordered process could never have been adequate because it occurred long after [Dean Don P.] LeDuc had removed her from her position. [However], the court-ordered faculty conference did comply with Policy 201, and she fails to explain how a dismissal [that] is compliant with Policy 201 is "inadequate."
>
> Branham [also] asserts that certain circumstances of the faculty conference, such as votes by proxy and by faculty members who were not faculty members at the time of her dismissal, should render the entire process void. Branham fails to explain how any of these facts violate the requirements of the process set forth in Policy 201 or even whether they changed the outcome of the faculty conference. For these reasons, we find that Cooley complied with the procedures specified in Policy 201.[265]

D. Deans

Law school deans serve at the pleasure of the university's president and board of trustees.[266] As a result, law school faculties rarely play

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[259] *Id.* at *7.

[260] *Id.* at *3, *8.

[261] *Branham*, 689 F.3d at 563.

[262] *Branham*, 2010 U.S. Dist. LEXIS 92558, at *8.

[263] *See id.* at *3, *9.

[264] *Id.* at *13.

[265] *Branham*, 689 F.3d at 563–64.

[266] *See, e.g.*, *Organization and Governance of the University*, *Faculties*, COLUMBIA UNIV., http://www.columbia.edu/cu/vpaa/handbook/organization.html (last visited Oct. 22, 2017). In a case that did not lead to a reported decision, Robert W. Piatt, the dean of St. Mary's University's law school, claimed that he was removed for protesting the university's mistreatment of African-American faculty members and students. *See* Paul L. Caron, *Law Prof Sues St. Mary's for Nonrenewal of Contract After 10 Years on Faculty; Alleges Retaliation for Husband's Lawsuit Over His Removal as Dean*, TAXPROF BLOG (May 5, 2009), http://taxprof.typepad.com/taxprof_blog/2009/05/law-prof-sues-.html; Mary Alice Robbins, *The*

a formal role in decanal firings.[267] However, in *Basial v. Duquesne University of the Holy Ghost*,[268] the Pennsylvania Superior Court upheld a lower court's finding that the law school's faculty had standing to object to the reappointment of Dean Ronald R. Davenport:

> We need not decide whether appellees were contractually required to exhaust their nonjudicial remedies before instituting this action. Assuming, *arguendo*, that they were so required, we conclude that their failure to exhaust those remedies did not oust the lower court's jurisdiction. . . . Accordingly, we hold that the lower court had subject matter jurisdiction to entertain this action. Because the only question before us on this appeal is whether the lower court had jurisdiction, we affirm the lower court's order.[269]

Final Exam: Instructor Alleges St. Mary's University School of Law Discriminated and Retaliated Against Her, TEX. LAW. (Apr. 28, 2009), http://www.texaslawyer.com/id=1202430263848/The-Final-Exam-Instructor-Alleges-St-Marys-University-School-of-Law-Discriminated-and-Retaliated-Against-Her; *Texas Law School Professor Alleges Age and Gender Bias*, BUS. MGMT. DAILY (Sept. 20, 2009), https://www.businessmanagementdaily.com/9791/texas-law-school-professor-alleges-age-and-gender-bias. Shortly after he filed an EEOC complaint, his wife Rosanne lost her position as a full-time instructor. Robbins, *supra*. She, too, filed an EEOC complaint. *Id.* While the hiring and firing of the dean are university functions, the hiring and firing of associate and assistant deans tends to be a law school function. *See, e.g.*, Hall v. Kutztown Univ., No. 96-4516, 1998 U.S. Dist. LEXIS 138, at *1–2 (E.D. Pa. Jan. 12, 1998); Debra Cassens Weiss, *Law Prof Files Suit Claiming Duquesne Discriminated in Appointment of Interim Dean*, ABA J. (July 7, 2010), http://www.abajournal.com/news/article/law_prof_files_suit_claiming_duquesne_discriminated_in_appointment_of_inter/. In a case that did not result in a published opinion, Raymond Ku, the associate dean for academic affairs at Case Western Reserve University's law school, sued Dean Lawrence E. Mitchell for retaliation, claiming that Mitchell stripped Ku of his position after Ku blew the whistle on Mitchell's sexual predations. *See* Doug Brown, *Sex, Politics and Revenge: Lawrence Mitchell Was Supposed to Bring Stability to Case Western Reserve University's Law School, Not Treat It as His Personal Pickup Playground*, CLEVE. SCENE (May 7, 2014), https://www.clevescene.com/cleveland/sex-politics-and-revenge-lawrence-mitchell-was-supposed-to-bring-stability-to-case-western-reserve-universitys-law-school-not-treat-it-as/Content?oid=4307875; Rachel Dissell, *Case Law Professor Sues Dean Lawrence Mitchell and University, Says He Was Retaliated Against for Reporting Sexual Harassment of Students and Staff*, CLEVELAND.COM (Oct. 23, 2013), http://www.cleveland.com/court-justice/index.ssf/2013/10/case_law_professor_sues_dean_l.html. As a result of Ku's allegations, Mitchell was forced to resign. *See* Brown, *supra*.

[267] *See, e.g.*, Gregory M. Saltzman, *Dismissals, Layoffs, and Tenure Denials in Colleges and Universities*, NEA ALMANAC OF HIGHER EDUC., at 62 (2008).

[268] Basial v. Duquesne Univ. of Holy Ghost, 420 A.2d 578 (Pa. Super. Ct. 1980).

[269] *Id.* at 581–82 (citation omitted) (foonote omitted). The plaintiffs, consisting of eight of the school's 14 faculty members eventually got their way. *Id.* at 579.

> At the end of this month [June 1981], the resignation of Ronald R. Davenport as Dean of the Duquesne University School of Law will become effective. It is undeniable that the past several years of his tenure as Dean have been plagued with conflict and controversy. His supporters contend that his administration was one of the most progressive in the history of the law school while his opponents adamantly believe that it was one of most

Depending on the circumstances, a dean who is fired or forced to resign may or may not retain his or her position as a faculty member.[270] This issue was exhaustively litigated in *Cahn v. Antioch University*.[271] Edgar S. Cahn and Jean C. Cahn were the founders and co-deans of the Antioch School of Law in Washington, D.C.[272] When its parent institution, Antioch University in Yellow Springs, Ohio, experienced a financial crisis, it ordered the law school to send any monies it was holding or received to Ohio.[273] The Cahns, believing their fiduciary duty was to the law school, refused to do so.[274] As a result, on November 13, 1979, "the Cahns received a letter from William Birenbaum, president of the University, terminating their employment by Antioch University 'in any role whatsoever.'"[275] Insisting that they were still faculty members, the Cahns sued.[276] Although the courts agreed, they held the pair could not recover because of a mistake they had made at trial:

> The Cahns' claim for lost salary is predicated on the terms of their employment contracts with the University. The evidence at trial showed that they were initially appointed to the positions of deans and professors of law but that their subsequent reappointments made no mention of their professorial status. Nevertheless, as the court found, appellants "functioned" as members of the faculty from the beginning. The critical question which the court had to determine was whether their appointments as deans and professors were divisible. . . . The trial court apparently interpreted the contract to give the Cahns an option to act as professors, but a duty to act as deans. . . . The court's denial of their claim for salary [which was based on their failure to teach during the 1979-80 school year] was nevertheless correct, but for a different reason: the Cahns did not prove

stifling and stagnant periods. The result is that Dean Davenport leaves behind a law school, although essentially intact and with much potential, in dire need of substantial internal rehabilitation and rejuvenation.

Paul S. McGrath, Jr., *Editor's Note*, 16 JURIS MAG., no. 2 (Winter 1981), https://issuu.com/jurismagazine/docs/vol16no2.

[270] Cahn v. Antioch University, 482 A.2d 120, 123 (D.C. 1984).

[271] *Id*.

[272] *Id*. at 122.

[273] *Id*. at 125.

[274] *Id*. at 122. The courts subsequently held that the Cahns had been wrong to withhold the funds. *See In re* Antioch U., 418 A.2d 105, 108 (D.C. 1980), *amended by* 482 A.2d 133, 134 (D.C. 1984).

[275] *Cahn*, 482 A.2d at 122.

[276] *Id*.

what damages, in the form of lost faculty salary, they were entitled to receive.[277]

Unlike the Cahns, Dean Alfred Avins was allowed to keep both his professorship and his seat on the law school's board of trustees when he resigned.[278] In 1971, Avins had founded the Delaware School of Law.[279] In 1974, he agreed to resign as dean because it had become clear that the ABA would never accredit the school until two conditions were met: 1) Avins was replaced; and, 2) the school became affiliated with a university.[280] Following Avins's resignation, the school's board of trustees, having been rebuffed by the University of Delaware, agreed to merge with Widener University, a private institution in Chester, Pennsylvania.[281] A short time later, the ABA granted accreditation.[282]

Avins objected to the merger and tried to stop it in the courts.[283] In 1978, with Avins showing no signs of giving up, the school revoked his tenure and did not reappoint him to the board.[284] Avins then began litigating these issues, and continued to do so well into the 1980's.[285]

By the time he was fired, Avins had started the District of Columbia Law School (1977; after the District of Columbia Law School was unable to obtain licensing power, Avins founded the Northern Virginia Law School in Alexandria, Virginia).[286] Several years later, he opened his third law school, which he dubbed the Southeastern Massachusetts-Rhode Island-Avins Law School (1981; its name was shortened in 1986 to the Southern New England School

[277] *Id*. at 129, 130. The Cahns did not have tenure as faculty members, but instead were subject to annual reappointment. *Id.* at 123. As a result, Birenbaum's letter served as notification of their non-reappointment for the 1980-81 school year, a fact the Cahns did not contest. *See id*. at 129 n.17 ("The Cahns are not asking to be reinstated to the faculty. Their arguments concerning reappointment are directed only to the amount of damages for lost salary [from their termination in November 1979 to the end of their teaching contract in May 1980].").

[278] Avins v. Widener Coll., Inc., 421 F. Supp. 858, 859 (D. Del. 1976).

[279] *Id*.

[280] *Id*. at 859–860; Avins v. White, 627 F.2d 637, 641 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1980); Avins v. Moll, 610 F. Supp. 308, 313 (E.D. Pa. 1984), *aff'd*, 774 F.2d 1150 (3d Cir. 1985).

[281] *Avins*, 421 F. Supp. at 859, 860.

[282] *Moll*, 610 F. Supp. at 313.

[283] *Id*.

[284] *White*, 627 F.2d at 641; *Moll*, 610 F. Supp. at 313.

[285] *See White*, 627 F.2d at 640, *cert. denied*, 449 U.S. 982 (1980); *Moll*, 610 F. Supp. at 312, *aff'd*, 774 F.2d 1150 (3d Cir. 1985); Avins v. Hannum, 497 F. Supp. 930, 932 (E.D. Pa. 1980); Plechner v. Widener Coll., Inc., 418 F. Supp. 1282, 1285 (E.D. Pa. 1976), *aff'd*, 569 F.2d 1250 (3d Cir. 1977) (noting that Avins was an intervenor in this lawsuit); *Avins*, 421 F. Supp. at 859; Avins v. Weeks, 433 N.Y.S.2d 114, 114 (App. Div. 1980).

[286] *Moll*, 610 F. Supp. at 313.

of Law).[287] While running these schools, Avins continued his litigious ways, suing numerous parties for diverse reasons, without success.[288]

Yet another dean who was allowed to keep his professorship when he resigned was Sujit Choudhry.[289] In 2015, Tyann Sorrell, Choudhry's executive assistant, accused him of sexual harassment.[290] Following a university investigation, Choudhry's salary was reduced by ten percent for one year; he also was ordered to "write a letter of apology to [Sorrell]" and attend sensitivity training.[291] When Sorrell subsequently sued the university, Choudhry resigned as dean.[292] A short time later, the university decided to open a new investigation into Choudhry's behavior.[293] In response, Choudhry sought an injunction, claiming that his constitutional rights were being violated.[294] He also accused the university of engaging in racial discrimination (due to his South Asian ancestry).[295] Finding itself bound by comity, the district court declined to issue the injunction:

> Choudhry moves for a preliminary injunction to stop the university from completing the pending disciplinary proceedings. Such proceedings, Choudhry argues, will cause him further, irreparable harm if allowed to continue. In opposition, the university advances two arguments. First, it argues abstention is proper under *Younger v. Harris*. Second, it contends Choudhry has not established entitlement to an injunction. Because *Younger* abstention is appropriate, the second argument need not be addressed.[296]

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[287] *Id.*; *see History*, UMASS LAW, http://www.umassd.edu/law/about/mission/history/ (last visited Oct. 22, 2017).

[288] *See, e.g.*, Avins v. Va. Council of Higher Educ., 489 U.S. 1090 (1989) (denying certiorari); Northern Va. Law Sch., Inc. v. Southern New Eng. Sch. of L., Inc., 485 U.S. 1007 (1988) (denying certiorari); Avins v. City of Alexandria, No. 94-1337, 1994 U.S. App. LEXIS 10883 (4th Cir. May 17, 1994).

[289] *See* Sam Levin, *UC Berkeley Dean in Sexual Harassment Case Keeps Tenure and Avoids Charges*, GUARDIAN (Apr. 18, 2017), https://www.theguardian.com/us-news/2017/apr/18/uc-berkeley-sexual-harassment-dean-sujit-choudhry-deal.

[290] *Id.*

[291] *See* Robin Wilson, *Berkley Is Under Fire, Again, for How It Handled Sexual Harassment*, CHRONICLE OF HIGHER EDUC. (Mar. 10, 2016) http://www.chronicle.com/article/Berkeley-Is-Under-Fire-Again/235653.

[292] *See* Levin, *supra* note 289.

[293] *See Harassment Accuser Condemns UC Berkeley Deal*, U.S. NEWS (Apr. 15, 2017) https://www.usnews.com/news/best-states/california/articles/2017-04-14/uc-berkeley-settles-suits-over-law-dean-sexual-allegations.

[294] Choudhry v. Regents of the Univ. of Cal., No. 16-CV-05281-RS, 2016 U.S. Dist. LEXIS 155745, at *7 (N.D. Cal. Nov. 9, 2016).

[295] *Id.*

[296] *Id.* at 7–8 (citation omitted). One week after the court's ruling, Choudhry dismissed his lawsuit without prejudice. *See* Anderson Lanham, *Former UC Berkeley School of Law Dean Drops Racial Discrimination Lawsuit Against University*, DAILY CALIFORNIAN, http://www.dail

In *Rohan v. American Bar Association*,[297] Patrick J. Rohan, the former dean of St. John's University's law school, took a different approach: rather than suing the school, he sued the ABA.[298] According to Rohan, it was the ABA's threat of non-reaccreditation unless he was removed as dean that had forced him to resign.[299] Finding no factual basis for this assertion, the district court dismissed his lawsuit.[300] On appeal, the Second Circuit affirmed:

> In light of the explicit assertion by [ABA site evaluation team chair Claude R.] Sowle that Rohan's dismissal from the deanship was not even suggested at the exit interview [with the university's president], and [secretary Barbara] Morris' more complete summary of the discussion concerning Rohan without any mention of actions against Rohan, the affidavits of Rohan and [and his attorney Boris] Kostelanetz do not establish a triable issue of fact that the [university] administration's subsequent actions regarding Rohan resulted from apprehension concerning reaccreditation that were generated by the exit [sic] interview. Nor do Rohan's vague speculations about "further phone communications between University President [Donald J.] Harrington and ABA representatives just after the Team left town" fill the void.[301]

IV. WORKING CONDITIONS

Compared to other workers (including faculty members in other disciplines), law professors have highly desirable working conditions.[302] Nevertheless, some law professors[303] have found

ycal.org/2016/11/17/sujit-choudhry-drops-racial-discrimination-lawsuit-university/ (last updated Nov. 18, 2016).

[297] *See* Rohan v. Am. Bar Ass'n., No. 93 CV 1338, 1995 U.S. Dist. LEXIS 21944 (E.D.N.Y. May 31, 1995), *aff'd*, No. 95-7601, 1996 U.S. App. LEXIS 2903 (2d Cir. Feb. 21, 1996).

[298] *See Rohan*, 1995 U.S. Dist. LEXIS 21944 at *1.

[299] *See id*. at *9.

[300] *See id*. at *30.

[301] *See* 1996 U.S. App. LEXIS 2903 at *4–5.

[302] For a detailed list of the occupational advantages enjoyed by law professors, see BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 39–53 (2012). *See also* Mike Stetz, *10 Best Legal Jobs*, 2 LAW & STATESMEN, Feb. 4, 2016, at 8, 10, http://www.nationaljurist.com/lawyer-statesman/best-law-jobs (describing law professors as having the second-best jobs in law, just behind judges, because they "have significant autonomy, low workloads and minimal time demands.").

[303] Law school faculties tend not to be unionized, meaning that most law professors have to sue on their own. Law school faculties that are unionized normally insist on being their own bargaining unit, citing differences in pay, teaching schedules, and tenure procedures as reasons for not wanting to be included in a campus-wide unit. *See*, *e.g.*, Tr. of Bos. Univ. v. NLRB, 575 F.2d 301, 302 (1st Cir. 1978), *vacated and remanded on other grounds*, 445 U.S. 912, 912 (1980);

reasons to sue.[304]

A. Pay

Most pay disputes involve a law professor who claims to have been paid less than his or her colleagues.[305] In order to make out a prima facie pay case, the plaintiff must identify a "comparator" who was paid more.[306] Doing so can be quite difficult. In *Houston v. Texas Southern University*,[307] for example, Crisarla S. Houston was appointed associate dean of legal writing at the end of the 2006-07 school year.[308] Although she spent the summer of 2007 getting ready

New York Univ. v. NLRB, 364 F. Supp. 160, 162–63 (S.D.N.Y. 1973); *In re* Univ. of Kan. Faculty, 581 P.2d 817, 820 (Kan. Ct. App. 1978); Regents of Univ. of Minn. v. Pub. Emp't Relations Bd., No. 408812, 1977 WL 25233, at *1 (Minn. Dist. Ct. Sep. 26, 1977); Am. Ass'n of Univ. of Neb. Chapter v. Bd. of Regents of Univ. of Neb., 253 N.W.2d 1, 3 (Neb. 1977).
In *Lifter v. Cleveland State University*, Sheldon Gelman, a law professor at Cleveland State University, convinced his law school's faculty to form a union. 202 F.Supp.3d 779, 781 (N.D. Ohio Aug. 17, 2016), 202 F.Supp.3d 779, 781 (N.D. Ohio Aug. 17, 2016), *aff'd*, 2017 WL 4005116 (6th Cir. Sept. 12, 2017). According to the plaintiffs, Dean Craig M. Boise responded by financially punishing Gelman and eliminating the position held by Gelman's wife, Jean B. Lifter, who was the assistant dean for academic affairs. *Id.* at 791. The district court, however, accepted the school's explanation that Gelman had written little and done no community service and that Lifter had been downsized due to a budget crunch caused by a drop in law school applications. *Id.* at 789. On appeal, the Sixth Circuit agreed. *See* 2017 WL 40051162, at *1.).

[304] In a case having more to do with his political principles than his actual working conditions, Royce de R. Barondes, a law professor at the University of Missouri, sued to overturn a state law that prohibits him from bringing guns onto campus. *See* Barondes v. Wolfe, 184 F. Supp.3d 741, 742 (W.D. Mo. 2016) (remanding dispute to state court).

[305] In 2013, Lucy A. Marsh, a law professor at the University of Denver, lodged an equal pay complaint with the EEOC. *EEOC Files Lawsuit over Pay Disparities for Women at DU Law School*, DENVER POST [hereinafter *EEOC Lawsuit*], http://www.denverpost.com/2016/10/01/eeoc-lawsuit-pay-disparities-du-law-school/ (last updated June 22, 2017). Following an investigation, the EEOC concluded that the law school was underpaying *all* of its senior female faculty members. As a result, it is now pursuing a lawsuit on their behalf. *Id.* ("Among nine full-time female full professors, the average annual salary was nearly $20,000 less than the full-time male professors—a finding the suit claims is statistically significant."). Similarly, in July 2017 the ABA publicly censured Texas Southern University's law school for pervasive gender discrimination, including faculty pay. Stephanie Francis Ward, *Texas Southern's Law School Receives ABA Public Censure After Sex Discrimination Allegations*, ABA J. (July 20, 2017), http://www.abajournal.com/news/article/texas_southerns_law_school_receives_aba_public_censure_involving_equal_oppo/. The investigation began after Faith J. Jackson, the school's associate dean for internal affairs, sued the school for gender discrimination. *See* Complaint at 11, Jackson v. Tex. S. Univ., Case No. 4:16-cv-01123, 2017 U.S. Dist. LEXIS 59323 (S.D. Tex. Apr. 19, 2017); *see also* Ward, *supra* (reporting that Jackson and the school agreed to mediation).

[306] *See* Traster v. Ohio N. Univ., No. 3:13-cv-1323, 2015 U.S. Dist. LEXIS 181908 at *6 (N.D. Ohio Jan. 20, 2015).

[307] Houston v. Tex. S. Univ., No. H–08–3163, 2011 U.S. Dist. LEXIS 758 (S.D. Tex. Jan. 5, 2011).

[308] *Id.* at *3.

for her new position, she was not paid for the time she put in.[309] When she complained that all of the school's other associate deans, who were men, had been paid for their summer work, her relationship with the dean began to deteriorate.[310] After accepting an offer to join the law faculty at Florida A&M University, Houston sued.[311] The district court rejected her claim:

> Houston argues that male professors who were associate deans working over the summer are similarly situated to her. She alleged that she was not paid for the work required to prepare to assume her new duties in the fall, while male professors who were associate deans were paid for summer work. According to [Dean McKen V.] Carrington, Houston has misunderstood the policy and practice. "[T]he opportunity to perform work in the summer semester occurs during the latter portion of a professor's contract period, and does not precede the professor's contracted time period." Although Houston has presented evidence that other professors compensated as associate deans are paid for summer work, she has presented no evidence to controvert the university's evidence that no professor receives compensation for preparatory work before the start of a contract for the associate-dean position. Houston has not created a genuine issue of material fact as to the existence of similarly situated male coworkers. Houston's Equal Pay Act claim is dismissed.[312]

Even if a suitable comparator exists, the plaintiff is not guaranteed victory. In *Broderick v. Catholic University of America*,[313] for example, the school had a longstanding policy of paying its clerical faculty less than its lay faculty.[314] When Joseph A. Broderick and David J. K. Granfield, two law professors who also were priests, challenged this rule, they lost because the First Amendment protects religious organizations from governmental interference.[315] In

[309] *See id.* at *5–6.

[310] *See id.* at *6–7.

[311] *Id.* at *8–9.

[312] *Id.* at *12–13 (citation omitted). Although the court also dismissed Houston's sex discrimination claim, it found that she had presented enough evidence to proceed on her retaliation claim. *Id.* at *20–21 ("[A]fter she complained to [Charlene] Evans, [the university's ombudsperson, Carrington punished Houston in various ways] including giving her the largest writing section in the spring semester, refusing to back her in a dispute with another writing professor, and issuing a written reprimand.").

[313] Broderick v. Catholic Univ. of Am., 365 F. Supp. 147 (D.D.C. 1973), *aff'd*, Granfield v. Catholic Univ. of America, 530 F.2d 1035 (D.C. Cir. 1976).

[314] *Broderick*, 365 F. Supp. at 149.

[315] *See Granfield*, 530 F.2d at 1047 (D.C. Cir. 1976).

explaining this fact, the D.C. Circuit wrote: "The wisdom—or lack thereof—of the salary policy in question must be resolved within the confines of the religious body involved."[316]

In *Redlich v. Albany Law School of Union University*,[317] Allen Redlich suffered a stroke that paralyzed the left side of his body.[318] Although he was able to keep teaching, Redlich claimed that following his stroke he was discriminated against by the school.[319] In particular, he alleged that he received smaller annual pay raises than comparable tenured faculty members.[320] Finding no factual basis for his argument, the district court rejected it:

> The defendant has articulated a valid non-discriminatory reason for its employment decisions regarding the incremental salary increases of the plaintiff. Each Dean followed a long-standing procedure. The Albany Law School Board of Trustees set the school's preliminary budget, which included a pool of money to be utilized for faculty salaries. The Dean then determined each faculty member's salary based on an assessment of factors. The factors were set forth in the Faculty Handbook, and included: merit, length of service, rank, seniority, regional living costs, inflation, salaries at comparable schools, and the ability of the institution to pay. Chief among the factors was merit, which included teaching, scholarship, and community service. The Deans who determined the plaintiff's salary during the relevant time period cited a need for better preparation for class, the employment of improved teaching techniques, weak student evaluations, inadequate community service involvement, and insufficient scholarship production. Deans [Martin H.] Belsky and [John T.] Baker ranked the plaintiff in the lower third of all faculty for each year, and his salary increases were in accordance with their assessment of the plaintiff. Thus, the defendant has presented a reasonable non-discriminatory basis for the employment decisions taken with regard to the plaintiff.[321]

A lack of proof also explains the result in *Smith v. Florida*

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316 *Id*.
317 Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100 (N.D.N.Y. 1995).
318 *Id.* at 102.
319 *Id.*
320 *Id.*
321 *Id*. at 108 (citations omitted).

Agricultural & Mechanical University Board of Trustees.[322] Jennifer M. Smith claimed that she was being paid less than her male colleagues and had been denied promotions due to her gender.[323] After a hotly contested trial, the jury returned a favor in the school's favor.[324] When Smith moved for a new trial, the district court denied her request:

> Professor Smith still insists that she was right—that she was paid less than male professors because of gender and that she was denied promotions based on gender or in retaliation for complaining of gender discrimination. The answer is that the jury found the facts to the contrary. The jury found that when Ms. Smith was originally hired, her salary was set without regard to gender. The jury found that her salary was lower than that of male professors with equivalent jobs, but that the reason was not gender. The jury found that when Professor Smith was not promoted, gender and retaliation were not among the reasons. The evidence supporting the verdict was easily sufficient.[325]

With the right evidence, however, a plaintiff can win a pay disparity suit. In *Harrington v. Harris*,[326] for example, three white law professors at Texas Southern University—Eugene M. Harrington, Thomas Kleven, and Martin L. Levy—claimed they were denied pay raises because of their race.[327] They also alleged that black faculty members were making, on average, $3,000 more than white faculty members.[328] In upholding a jury verdict for the plaintiffs, the Fifth Circuit observed:

> After thoroughly reviewing the relevant portions of the record, as well as the arguments of the parties, we hold that Plaintiffs offered sufficient evidence to allow a reasonable jury to conclude that [Dean Caliph] Johnson intentionally discriminated against Plaintiffs on the basis of race when he

[322] Smith v. Fla. Agric. & Mech. Univ. Bd. of Tr., No. 4:14CV540, 2015 U.S. Dist. LEXIS 179544 at *2 (N.D. Fla. Sept. 19, 2015), *aff'd*, 687 F. App'x 888 (11th Cir. 2017).

[323] *Smith*, 2015 U.S. Dist. LEXIS 179544 at *1–2. *See also* Sean Rossman, *Second FAMU Law Professor Sues for Gender Discrimination*, TALLAHASSEE DEMOCRAT (Aug. 13, 2014), http://www.tallahassee.com/story/news/2014/08/12/another-professor-sues-famu-sex-discrimination/13960079/ (reporting that one month after Smith filed her lawsuit, her colleague Barbara L. Bernier brought a similar lawsuit against the school. Bernier's suit did not result in a published opinion).

[324] *See Smith*, 2015 U.S. Dist. LEXIS 179544 at *2.

[325] *Id.* at *2–3.

[326] Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997).

[327] *Id.* at 362.

[328] *Id.* at 363–64.

> evaluated them for merit pay increases. While the evidence offered by Plaintiffs is purely circumstantial, such evidence, if believed by the jury, can give rise to a claim for intentional race discrimination under [42 U.S.C.] § 1981. For these reasons, we find no reversible error and the judgment of the magistrate judge on this issue is affirmed.[329]

Not all pay disputes involve claims of unequal treatment. In *McDonald v. Hagins*,[330] an Indiana University professor identified in the opinion as "McDonald" got into a pay dispute with a student named "Hagins."[331] According to McDonald, a University rule made professors personally liable for unpaid tuition.[332] When Hagins did not pay his tuition for the 1844 and 1845 terms, the University forced McDonald to come up with the missing money.[333] To recoup this expense, McDonald sued Hagins.[334] Hagins defended on the ground that every Indiana county was allowed to send two students to the University free of charge, and Jennings County had picked him as one of its two representatives.[335] Finding this argument to be sound, the Indiana Supreme Court ruled in Hagins's favor:

> According to the laws of the State, each county has a right to send two students to the Indiana University free of all charges for tuition; and the principal question presented by this case is, whether the right extends to the law department of the institution as well as to the other departments. We can see no reason why it does not. The law branch of the University is as much a part of it as any of the others; and a student of the law class, like a student of any of the other classes, is a student of the University.[336]

B. Benefits

In addition to their salaries, law professors typically receive health

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[329] *Id*. at 368.
[330] McDonald v. Hagins, 7 Blackf. 525 (Ind. 1845).
[331] *Id.* at 525.
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id*. at 525–26. The case makes more sense once one knows that the plaintiff was David McDonald, the university's first law dean. *See David McDonald (1842-1847)*, MAURER SCH. OF L.: IND. UNIV., http://www.repository.law.indiana.edu/mcdonald/ (last visited Oct. 23, 2017); THEOPHILUS A. WYLIE, INDIANA UNIVERSITY: ITS HISTORY FROM 1820, WHEN FOUNDED, TO 1890 311–12 (1890) (describing William B. Hagins' biography and indicating that Hagins did graduate).

insurance and access to a retirement plan.[337] A number of lawsuits have arisen from these programs.

In *Candeub v. Blue Cross Blue Shield of Michigan*,[338] for example, Adam Candeub, a law professor at Michigan State University, and his wife sued when the law school's health insurer refused to cover their midwife costs.[339] After examining the policy, the court found the couple entitled to partial reimbursement:

> Applying the plain meaning of the Plan provisions, the court has found that plaintiffs' claim for prenatal and postnatal benefits must be upheld, as Rider CNM provides that such services are covered and does not establish any exclusion. Defendant's reliance on the fact that the nurse midwives were not "credentialed" with the insurance company does not provide a basis for denying coverage, as credentialing is not a prerequisite to coverage under the Plan documents. By contrast, Rider CNM excludes coverage for delivery services that are not rendered in an inpatient hospital setting or at an accredited birthing center. As the Greenhouse Birthing Center is admittedly not an inpatient hospital setting or an accredited birthing center, plaintiffs' claim for delivery benefits must fail.[340]

In *Rein v. Standard Insurance Co.*,[341] Jan E. Rein, a law professor at the University of the Pacific, was denied long-term disability benefits by her law school's insurer.[342] In challenging this decision, Rein asked the court to engage in a *de novo* review.[343] The court, however, found that the proper standard was "abuse of discretion" because "the plan at issue in this case unambiguously confers discretionary authority upon Standard to determine benefit eligibility and interpret the plan."[344]

Similarly, in *Life Insurance Co. of North America v. Combe*,[345] David A. Combe, a law professor and librarian at Tulane University, sued his law school's long-term disability insurer because it was sending him his monthly checks at the end, rather than the

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[337] *See, e.g.*, *Benefits*, BOS. COLL., http://www.bc.edu/offices/hr/resources/handbook/hbk-benefits.html#rp (last visited Oct. 23, 2017).

[338] Candeub v. Blue Cross Blue Shield, 577 F. Supp. 2d 918 (W.D. Mich. 2006).

[339] *Id.* at 921.

[340] *Id*. at 933.

[341] Rein v. Standard Ins. Co., No. 2:09-cv-02348, 2010 WL 3034178 (E.D. Cal. July 30, 2010).

[342] *Id.* at *1.

[343] *Id.*

[344] *Id*. at *2, *3.

[345] Life Ins. Co. of North Am. v. Combe, 334 F. App'x 596 (5th Cir. 2009).

beginning, of each month.[346] Applying the abuse of discretion standard, the Fifth Circuit sided with the insurer:

> We hold that [the] determination to pay benefits in arrears is not an abuse of discretion. Among other reasons, arrears payment is necessary in the determination of whether benefits are actually owed for that month, that is, whether the monthly payment has accrued in full. Moreover, the disability benefits are designed to replace, in part, Combe's salary from Tulane, and such salaries are customarily paid in arrears. Thus, payments are timely so long as they are paid by the end of the month for which they accrue.[347]

In two cases involving retirement contributions, the plaintiffs lost because they failed to keep abreast of their plans' provisions. In *Shuchman v. State Employees Retirement Commission*,[348] Philip Shuchman, a law professor at the University of Connecticut, sued when he was not allowed to purchase retirement credits for his out-of-state teaching.[349] Although Shuchman insisted he had never been told that there was a one-year limitation period, his claim was belied by the evidence:

> The trial court had the benefit of observing the plaintiff and the witnesses and of listening to their testimony. In addition, it had as evidence all of the exhibits introduced by both parties, including fifteen exhibits which were not the subject of any objection. The court had facts from which it could conclude that the plaintiff had actual notice of the provision of General Statutes § 5-177. The factual basis for the court's conclusion is not clearly erroneous. The court did not err in its ruling to introduce the exhibits, nor in concluding that the plaintiff had actual notice of the one-year limitation of General Statutes § 5-177.[350]

Likewise, in *Kadane v. Hofstra University*,[351] David K. Kadane sued the University for failing to inform him that it had stopped paying into his pension plan once he turned sixty-five.[352] Given the case's facts, the district court found Kadane's argument spurious:

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[346] *Id.* at 596.

[347] *Id.* at 598 (reversing the decision).

[348] Shuchman v. State Emp. Ret. Comm'n, 472 A.2d 1290 (Conn. App. Ct. 1984).

[349] *Id.* at 1292.

[350] *Id.* at 1294 (citation omitted). The appeals court also affirmed the trial court's finding that the one-year limitation was constitutional. *Id.* at 1296 ("The statute has a rational basis and does not violate the equal protection clause of either the federal or state constitution.").

[351] Kadane v. Hofstra Univ., 682 F. Supp. 166 (E.D.N.Y. 1988).

[352] *Id.* at 167 (citing 29 U.S.C. §§ 621–34 (1982)).

> Kadane had actual knowledge that these contributions would cease at age 65. . . . Kadane was on the Law School Committee that adopted the benefits under the 1979 Collective Bargaining Agreement for the Law School. The fact that a small change was made in the medical benefits shows that benefits were discussed. It would have been the height of irresponsibility for Kadane not to have reviewed the benefit package as a member of the committee. In addition, these meetings followed a strike in which the cessation of contributions after 65 was the principal issue. Again, Kadane would have had to consciously avoid or to be totally oblivious to events around him and an irresponsible member of the committee not to have been apprised of this issue.
>
> In that same vein, in his testimony at the hearing Kadane, an experienced lawyer, demonstrated that he completely failed to make any effort to educate himself on the subject of the pension plan. It is doubtful that he ever actually read any of the documents related either to the pension plan or his fringe benefits. He never made any inquiries about the University contributions. Further, he did not pick up his pay stubs and Fringe Benefit Reports for nearly two and a half years from June 1982 through December 1984. This behavior in and of itself shows a conscious avoidance and a total lack of diligence or inclination to educate himself and is again tantamount to recklessness.[353]

C. Hostile Environment

Several law professors have brought lawsuits alleging that they were subjected to a hostile environment.[354] These actions have

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[353] *Id.* at 170.

[354] In May 2017, for example, Hillary Lynne Burgess filed a lawsuit in the U.S. District Court for the Western District of Virginia claiming that while she was a visiting associate professor at the Appalachian School of Law, it failed to protect her from a male student who harassed and bullied her. *See* Debra Cassens Weiss, *Law Prof's Suit Says She Suffered PTSD Because Her School Failed to Stop Harassment by Student*, ABA J., May 9, 2017, athttp://www.abajournal.com/news/article/law_prof_sues_school_over_alleged_ptsd_suffered_as_a_result_of_failure_to_s/. The case was dismissed in July 2017 after the parties reached a confidential settlement. *See* Burgess v. Appalachian Regional Law School, Case No. 1:17CV15, Order Closing Case (W.D. Va. entered July 28, 2017). For two other lawsuits that settled without generating published opinions, *see* Martha Neil, *Rotunda Sex-Harass Suit Against George Mason Legal Clinic Exec Is Settled*, ABA. J. (June 8, 2010), http://www.abajournal.com/news /article/rotunda_sex-harass_suit_is_settled/./ (describing a suit by Kyndra M. Rotunda); Paula Reed Ward, *Duquesne U. Settles Bias Suit by Ex-Faculty Member*, PITT. POST-GAZETTE (Nov. 19, 2010), http://www.post-gazette.com/local/city/2010/11/19/Duquesne-

included a range of claims, with the crux being some type of discrimination.[355]

In *Smith v. Curators of the Univ. of Mo.*,[356] for example, Pamela J. Smith filed a complaint accusing various defendants of discrimination, intentional as well as negligent infliction of emotional distress, invasion of privacy, negligence, and "violation of protected property interest in tenure."[357] After doing so, however, she refused all attempts by the defendants and their lawyers to move the case forward.[358] As a result, the District Court sanctioned Smith and ordered her to pay the defendants' attorneys' fees.[359]

In *Martin v. Howard Univ.*,[360] Dawn V. Martin proved to be the exact opposite of Smith. For thirteen years, she litigated numerous claims stemming from her brief (1996-98) career as a law professor.[361] The crux of her complaint was that the law school had failed to do enough to protect her from Leonard Harrison, a homeless person who sent her letters, left her voice mail messages, and tried to visit her office, all in the delusional belief that she was his wife.[362] Martin also

University-settles-bias-lawsuit-by-ex-faculty-member/stories/201011190187 (describing a suit by Alice L. Stewart).

While undergoing reaccreditation in 2003-04, Northern Kentucky University's law school was accused of pervasive racism and sexism. *See* David A. Elder, *"Hostile Environment" Charges and the ABA/AALS Accreditation/Membership Imbroglio, Post-Modernism's "No Country for Old Men": Why Defamed Law Professors Should "Not Go Gentle into That Good Night"*, 6 RUTGERS J. L. & PUB. POL'Y 434, 442–43 (2009). Although no lawsuits were filed, the charges left many bruised feelings. A long account of the matter was written by one of the school's senior faculty members. *See id.* Elder concludes his piece by calling on law professors to sue the ABA and the AALS: "Maybe in the future other faculty charged arbitrarily with creating a 'pervasive hostile environment' will sue—and the ABA-AALS arbitrary and political goose-step on this issue will be shown for what it is, an essentially lawless process." *Id.* at 620 (footnote omitted).

[355] Joel R. Cornwell, a law professor at John Marshall Law School, is presently pursuing such a claim. Debra Cassens Weiss, *Law Prof Barred from Campus for Alleged Angry Comments Claims an ADA Violation*, ABA J. (Jan. 9, 2014), http://www.abajournal.com/news/article/law_prof_barred_from_campus_for_alleged_angry_comments_claims_an_ada_violat/. According to his complaint, the law school has discriminated against him because he has Asperger's Syndrome. *Id.* To date, Cornwell's claim has not resulted in a published opinion. However, in *John Marshall L. Sch. v. National Union Fire Ins. Co. of Pitt.*, the court held that Cornwell's claim is covered by the law school's employment practices liability insurance policy. 223 F. Supp. 3d 733, 739 (N.D. Ill. 2016).

[356] Smith v. Curators of the Univ. of Mo., No. 08-4230-CV-C, 2009 U.S. Dist. LEXIS 20307 (W.D. Mo. Mar. 13, 2009).

[357] *Id.* at *13 n.2.

[358] *Id.* at *13.

[359] *Id.* at *15. Two months later, with Smith still refusing to cooperate, the case was dismissed for lack of prosecution. *See* Smith v. Curators of the U. of Mo., No. 08-4230-CV-C (W.D. Mo. May 27, 2009).

[360] Martin v. Howard Univ., No. 99-1175, 1999 WL 1295339 (D.C. Cir. Dec. 16, 1999).

[361] *See id.* at *1.

[362] *Id.* at *5.

claimed that when she complained to the law school about Harrison, it retaliated by terminating her employment.[363]

Although some of Martin's allegations were dismissed prior to trial, most survived and were submitted to the jury.[364] It found that the university had no liability.[365] When the District Court refused to set aside the verdict, Martin appealed to the D.C. Circuit, which affirmed because the jury's verdict "was amply supported by the evidence."[366]

In *Goring v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. College*,[367] Darlene C. Goring claimed she had been subjected to a hostile work environment because she was not promoted to full professor when she was given tenure (she was promoted later); was not adequately supported by the administration when she had a problem with a student group; and was retaliated against when she opposed the dean on a hiring matter.[368] Finding no evidence to support any of these claims, the district court granted the school's motion for summary judgment.[369] On appeal, the Fifth Circuit affirmed in a sharply-worded opinion that blasted Goring for her "lack of clarity and organization," "scattershot aggregation of facts," and "futile[]" and "meritless" arguments.[370]

Lastly, in *McClendon v. Dougherty*,[371] Kellen McClendon, a law professor at Duquesne University, sued after he twice failed to become the law school's dean.[372] According to McClendon, an African-American, his lack of success was due to the racial animus of Provost Ralph L. Pearson.[373] During the school's 2004 search, Pearson, the chair of the search committee, had referred to McClendon as a "token" and cast the deciding vote against his candidacy.[374] When Pearson was again named search chair in 2009, McClendon decided

[363] *Id.* at *1.

[364] *Id.* at *9.

[365] Martin v. Howard Univ., 275 F. App'x 2, 5–6 (D.C. Cir. 2008).

[366] *Id.* at 7. Not content to let matters rest, Martin spent several more years pursuing her claims before finally giving up. *See* Martin v. Howard Univ., No. 10-7142, 2011 U.S. App. LEXIS 9634, at *1 (D.C. Cir. May 9, 2011), *cert. denied*, 565 U.S. 1174, *reh'g denied*, 565 U.S. 1276 (2012).

[367] *Goring v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. College*, 932 F. Supp. 2d 642 (M.D. La. 2010).

[368] *Id.* at 654.

[369] *Id.* at 656.

[370] Goring v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. College, 414 F. App'x 630, 631, 632, 633 (5th Cir. Feb. 4, 2011).

[371] McClendon v. Dougherty, No. 2:10-cv-1339, 2011 U.S. Dist. LEXIS 15381 (W.D. Pa. Feb. 15, 2011).

[372] *Id.* at *2.

[373] *Id.* at *3–4.

[374] *Id.*

it would be futile to re-apply.[375] In dismissing McClendon's hostile work environment claim, the District Court wrote:

> After viewing these facts in the light most favorable to Plaintiff, and considering the totality of the circumstances, including the limited number of racially charged incidents that occurred throughout Plaintiff's years of employment at Duquesne, the Court finds that the claimed harassment was hardly sufficiently severe or pervasive so as to create a hostile working environment. Plaintiff's claim of hostile work environment is thus dismissed, with prejudice.[376]

D. Outside Employment

Many law professors supplement their salaries by doing outside work. Although there are risks,[377] such engagements can be quite

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[375] *Id.* at *17.

[376] *Id.* at *27. Although the court dismissed McClendon's hostile work environment claim, it allowed him to continue pursuing his discrimination and retaliation claims. *See* McClendon v. Dougherty, No, 2:10-cv-1339, 2011 U.S. Dist LEXIS 82698, at *12 (W.D. Pa. July 28, 2011). In 2012, the case was dismissed after the parties reached an undisclosed settlement. *See* McClendon v. Dougherty, No. 2:10-cv-01339, at 17 (W.D. Pa. Feb. 15, 2011), https://www.gpo.gov/fdsys/pkg/USCOURTS-pawd-2_10-cv-01339/pdf/USCOURTS-pawd-2_10-cv-01339-0.pdf (noting the order granting stipulation of dismissal with prejudice).

In a separate lawsuit, Associate Dean Vanessa S. Browne-Barbour, a black woman, made allegations similar to McClendon's. *See* Debra Cassens Weiss, *Law Prof Files Suit Claiming Duquesne Discriminates in Appointment of Interim Dean*, ABA J., (July 7, 2010), http://www.abajournal.com/news/article/law_prof_files_suit_claiming_duquesne_discriminated_in_appointment_of_inter/.

[377] Law professors who "moonlight" must be careful not to run afoul of Interpretation 402-2, which requires faculty members to devote substantially all of their time during the school year to their academic duties. *See* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017 28, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf ("Regularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under . . . Standard [402: Size of Full-Time Faculty].").

Another worry is being accused of the unauthorized practice of law ("UPL"). In *Dietrich Corp. v. King Resources Co.*, the district court found that Ted J. Fiflis, a law professor at the University of Colorado who was admitted only in Illinois, had violated Colorado's UPL rules while serving as the plaintiff's accounting malpractice expert. Dietrich Corp. v. King Resources Co., 596 F.2d 422, 423 (10th Cir. 1979). In reversing this decision, the Tenth Circuit wrote:

> Law firms have always hired unlicensed student law clerks, paralegals and persons who have completed their legal education but are awaiting admission to the bar, before or after taking a bar examination or fulfilling residency requirements. Virtually every lawyer has served in such a situation and performed services to or through other attorneys for some period prior to his or her own admission to practice in the state where such services were rendered. No one has treated this activity as the unauthorized practice of law, because the licensed attorneys alone remain responsible to the clients, there are no court appearances as attorney, and no holding out of the unlicensed person as an [i]ndependent giver of legal advice.

lucrative.[378]

Certain types of outside work are much more likely to cause a problem than other types.[379] This is particularly true where a law professor represents an unpopular client or takes on the local political establishment.[380] In *Trister v. University of Mississippi*,[381] for example, Michael B. Trister and George M. Strickler, Jr. sued when they were prohibited from continuing to work with the North Mississippi Rural Legal Services Program.[382] The organization had drawn the ire of the university's chancellor after it filed a school desegregation lawsuit.[383]

The federal district court dismissed Trister and Strickler's complaint, but the Fifth Circuit reversed:

> We do not, however, agree with the [district court] that the "evidence in this case shows without dispute that to permit plaintiffs to work part-time for Legal Services and part-time as associate professors of law would be detrimental to some extent to the quality of instruction received by the students." Not only does the evidence not show this without dispute, but the evidence in fact strongly suggests that the opposite is true. . . . In any event, the record here shows without contradiction that these plaintiffs had engaged in work with the Legal Services Program throughout the preceding school year and that their instructional efforts had not been hampered as a result. There was also testimony that while

Id. at 426. Outside work also carries with it potential conflicts of interest. In *Wagner v. Fed. Election Commission*, Wendy E. Wagner, a University of Texas law professor, challenged a rule that prohibited federal contractors from making political donations. 793 F.3d 1, 4 (D.C. Cir. 2015). Because her contract with the Administrative Conference of the United States had ended by the time the merits were reached, her claim was dismissed as moot. *Id.* at 4. In an attempt to avoid this result, Wagner argued that she expected to receive additional contracts in the future. *See id.* at 4 n.1. The court found this possibility "too speculative to sustain a concrete interest in this litigation." *See id.* (citations omitted); *see also generally* Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345 (2001) (discussing these matters further).

[378] *See* Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421, 424 (2001).

[379] *See* Little, *supra* note 377, at 360.

[380] In 1998, the Louisiana Supreme Court muzzled all of the state's law school clinics after Tulane University's environmental law clinic opposed construction of a petrochemical plant. S. Christian Leadership Conference, La. Chapter v. Supreme Court of La., 61 F. Supp. 2d 499, 501 (E.D. La. 1999). Although the restrictions were challenged in federal court by an assortment of parties, including five law professors, they were found to be constitutional. *See id.* at 514.

[381] Trister v. Univ. of Miss., 420 F.2d 499 (5th Cir. 1969).

[382] *Id.* at 500.

[383] *Id.* at 501.

> the bulk of law school instruction should be given by full- time professors, some outside involvement in actual practice tended to improve the teaching ability of professors. More important, however, is the fact that there were other members of the faculty of the University of Mississippi College of Law who engaged in part-time instruction and part-time or full-time practice of law. It appears clear that the only reason for making a decision adverse to appellants was that they wished to continue to represent clients who tended to be unpopular. This is a distinction that cannot be constitutionally upheld. The University may well decide not to employ any part-time professors, and it may decide to forbid the practice of law to every member of its faculty. What the University as an agency of the State must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent. Such a distinction is an abuse of discretion which denies to plaintiffs the equal protection of the law guaranteed to them by the *Fourteenth Amendment*.
>
> The judgment appealed from is reversed. Upon remand the district court is directed to grant to appellants injunctive and declaratory relief consistent with the views here expressed.[384]

In *Atkinson v. Board of Trustees of University of Arkansas*,[385] the University of Arkansas at Fayetteville law faculty challenged an appropriations bill that included a provision (§ 17) that prevented its professors, associate professors, and instructors from engaging in outside work (due to a drafting oversight, the law failed to mention distinguished professors, assistant professors, and lecturers).[386] In an unpublished opinion, the trial court dismissed the complaint, concluding that the law was valid and applied to *all* of the state's law professors, regardless of rank.[387]

On appeal, the Arkansas Supreme Court, relying on *Trister*, struck down the provision.[388] Although recognizing that the statute likely was passed, as alleged by the plaintiffs, in retaliation for the public interest litigation undertaken by Professors James W. Gallman and Morton Gitelman, it found it unnecessary to wade into their battles.[389] Instead, it held that because § 17 applied to only some of

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[384] *Id*. at 503–04.
[385] Atkinson v. Bd. of Tr. of Univ. of Ark., 559 S.W.2d 473 (Ark. 1977) (en banc).
[386] *Id.* at 474 (citations omitted).
[387] *Id.* at 477.
[388] *Id.* at 475, 476 (citing *Trister*, 420 F.2d. at 502).
[389] *Atkinson*, 559 S.W.2d at 476.

the state's law professors, it violated their equal protection rights.[390] The Court concluded its opinion, however, by throwing a sop to the legislature:

> Perhaps we should make it clear that we are not saying that a valid act on this subject cannot be enacted by the General Assembly, nor that the legislature cannot make logical classifications; indeed, our views are to the contrary. Certainly, the object or purpose of such legislation, i.e., to require law school personnel to devote full time to the duties for which they were employed, fosters a policy which cannot be said to be without merit, for when an individual accepts a position, he owes an obligation to fully perform the duties required, without hindrance from outside activities. Various agencies of government (and private businesses) prohibit outside employment, considering either that such employment interferes with satisfactory performance of the main occupation, or else presents a conflict of interests with the duties of the principal position.[391]

As with practicing attorneys, law professors sometimes have trouble getting paid for their outside work.[392] In *Morse v. Republican Party of Virginia*,[393] for example, Eben Moglen, a law professor at Columbia University, together with three law professors from the University of Virginia—Pamela S. Karlan, David R. Ortiz, and George A. Rutherglen—won a Voting Rights Act case.[394] When they moved for attorneys' fees, at rates ranging from $275 to $325 an hour, the defendants objected and insisted they were only entitled to the hourly rates that are customary in Charlottesville, Virginia.[395] The district court agreed:

> Defendants argue that Mr. Moglen is not entitled to

[390] *Id.* at 475, 476.

[391] *Id*. at 477.

[392] The best-known example involves Richard A. Daynard, a law professor at Northeastern University, who spent years chasing the fees he claimed he had been orally promised by two law firms (one in Mississippi and the other in South Carolina) for helping them sue the tobacco industry. *See* Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F. Supp. 2d 9, 10 (D. Mass. 2001). Daynard's pursuit of his money is chronicled by the following decisions: Daynard v. MRRM, P.A., 335 F. Supp. 2d 156 (D. Mass. 2004); Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 284 F. Supp. 2d 204 (D. Mass. 2003); Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 188 F. Supp. 2d 115 (D. Mass. 2002); Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 184 F. Supp. 2d 55 (D. Mass. 2001), *rev'd*, 290 F.3d 42 (1st Cir.), *cert. denied sub nom*. Scruggs v. Daynard, 537 U.S. 1029 (2002).

[393] Morse v. Republican Party of Virginia, 972 F. Supp. 355 (W.D. Va. 1997).

[394] *Id.* at 361.

[395] *Id.* at 363.

> compensation at a rate equal to that of plaintiffs' other attorneys because "he has no special expertise" in voting rights law. Moreover, defendants criticize plaintiffs' retention of Mr. Moglen because "[h]is remote location add[ed] an extra burden of effort and expenses for coordination of efforts." Plaintiffs do not address the issue of Mr. Moglen's experience, and instead explain that at the time Mr. Moglen performed the bulk of his work, he and Ms. Karlan were visiting professors at Harvard, thus minimizing any extra burden. . . . [A]lthough Mr. Moglen may not be an expert in voting rights matters, his experience with regard to appellate matters is evident and justifies an hourly fee equal to that of Messrs. Rutherglen and Ortiz. Accordingly, Mr. Moglen will be awarded fees at a rate of $175 per hour.[396]

Law professors who do outside work typically do not have overhead expenses.[397] Some courts have reduced their fee awards to reflect this fact.[398]

E. Retirement

Even in retirement, some law professors have found grounds for complaint. In *Spark v. Catholic University of America*,[399] for example, Eli M. Spark sued after the school forced him to retire when he turned sixty-five.[400] According to Spark, although the school's

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[396] *Id*. at 365. In addition to reducing the quartet's billing rates, the court subjected them to "an across-the-board cut of ten percent . . . to minimize and hopefully eliminate any duplication and overstaffing occasioned by the retention of Ms. Karlan and Messrs. Rutherglen, Ortiz, and Moglen." *Id*. at 368.

[397] David I Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 168–69 (1985).

[398] *See*, *e.g.*, Reed v. Cleveland Bd. of Ed., 607 F.2d 737, 748 (6th Cir. 1979) ("Since Professor Mearns is a full-time member of the faculty of a law school in Cleveland [Case Western Reserve University] and does not have the overhead of a private law office, we conclude that $50 per hour will provide fair and reasonable compensation for his services in this [school desegregation] case and is commensurate with the $65 rate allowed [Daniel R.] McCarthy[, a practicing Cleveland attorney]. Accordingly, Professor Edward [A.] Mearns[, Jr.] is allowed a fee of $39,150."). *But see* Johnson v. Snyder, 470 F. Supp. 972, 975 (N.D. Ohio 1979) ("In view of the circumstances of the case, the fact that plaintiff was represented by one attorney who is a law school faculty member [Professor James M. Klein of the University of Toledo] and one attorney who is employed by the Fair Housing Center does not require a diminution of the fee award.").

[399] Spark v. Catholic University of America, 510 F.2d 1277 (D.C. Cir. 1975).

[400] *Id.* at 1279. Until 1982, most universities required retirement at sixty-five. Richard C. Larson & Mauricio Gomez Diaz, *Nonfixed Retirement Age for University Professors: Modeling Its Effects on New Faculty Hires*, SERV. SCIENCE, Mar. 2012, at 69, 69 (2012). In 1982, Congress raised the age to 70. *Id.* at 69, 70. In 1986, mandatory retirement was outlawed for most workers, but not for professors. *Id.* at 70. In 1994, however, the statute was extended to faculty

custom was to allow professors to work until the age of seventy, he had been denied this courtesy in retaliation for accusing the dean of lowering the school's admission standards.[401] Finding federal jurisdiction lacking, the district court granted the school's motion for summary judgment.[402] On appeal, the D.C. Circuit affirmed: "We also note that appellant is contemporaneously pursuing a contract action in the Superior Court for the District of Columbia. While we have not relied upon that fact in the disposition of the instant appeal, it appears that appellant is not without a forum for his claims."[403]

Similarly, in *Karlen v. New York University*,[404] Delmar Karlen, a law professor at New York University, sued when the school lowered its retirement age from sixty-eight to sixty-five.[405] In response, the school argued that financial exigency had forced it to act.[406] It also claimed that Karlen had waived his right to sue by his subsequent acts.[407] Finding the facts sufficiently contested, the district court denied the school's motion to dismiss:

> [E]ven if the plaintiff cannot disprove the university's claim of financial exigency, he can still state a claim upon which relief could be granted by alleging that the defendant's action in lowering the mandatory retirement age was a bad faith response to its economic condition. The plaintiff has so alleged. He asserts that this bad faith was demonstrated by the university's "continuing to hire new faculty members at an undiminished if not accelerating pace" at the same time as it was forcing its older faculty members to retire prematurely. Since there are issues of material fact which exist as to the question of bad faith, this question must be left for later determination.
>
> The defendant asserts that the plaintiff, by both his conduct and statements, waived any right he may have had to contest the university's decision to lower the mandatory retirement age. The Court cannot, as a matter of law, agree. We can see nothing in the plaintiff's acceptance of four apparently routine

members. *See* Marc L. Kesselman, Comment, *Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada*, 17 COMP. LAB. L. 206, 206 (1995).

401 *Spark*, 510 F.2d at 1279.

402 *Id.*

403 *Id.* at 1283.

404 Karlen v. New York Univ., 464 F. Supp. 704 (S.D.N.Y. 1979).

405 *Id.* at 706.

406 *Id.* at 707.

407 *Id.* at 708.

> salary increases, or in his receipt, without objection, of four letters notifying him of his continuing employment as a tenured professor (neither of which required the plaintiff to sign any form or acknowledge any agreement), which could constitute an implied waiver. . . .
>
> Nor can consent be implied from the use of the title "Professor Emeritus of New York University" in connection with a description of the plaintiff in an advertisement for his new book, a use which plaintiff asserts he never authorized, or from the failure of the plaintiff to utilize what are apparently discretionary internal university grievance procedures, which he asserts would have been futile. Whether the plaintiff did in fact actually or impliedly consent to the change in the retirement age remains a disputed question of fact which cannot be determined at this time.[408]

In *Samad v. Jenkins*,[409] Stanley A. Samad, a law professor at the University of Akron, agreed to retire when administrators threatened to revoke his tenure following a series of disputes between Samad and the school.[410] Samad sued, however, when the school refused to award him the title of "professor emeritus."[411] The district court granted the school's motion for summary judgment and the Sixth Circuit affirmed:

> The University has not, in any way, failed to live up to its agreement. We specifically reject plaintiff's argument that he was denied his property rights when he was not granted emeritus status. Such status can be afforded only if the Law School faculty votes favorably to do so. The Settlement Letter of February 14, 1984 makes no mention that the school must put Samad's name to a vote. In fact, the implication is clearly to the contrary. Finally, we do not believe that plaintiff possesses a property right, in the absence of such a Settlement Letter, to force the faculty to vote. Accordingly, we affirm the decision of the district court holding that plaintiff has failed to assert a viable § 1983 claim based upon the fourteenth amendment.[412]

A more tangible benefit was at stake in *Mattis v. State Universities*

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[408] *Id*. at 707–08.
[409] Samad v. Jenkins, 845 F.2d 660 (6th Cir. 1988).
[410] *Id.* at 661.
[411] *Id.* at 662.
[412] *Id*. at 663.

Retirement System.[413] Brian E. Mattis, a law professor at Southern Illinois University, decided to retire when he was fifty-five.[414] Under the state's pension rules, employees under sixty were subject to a financial penalty unless they made an early retirement option ("ERO") payment to the State Universities Retirement System ("SURS").[415] Based on his age and salary, Mattis's ERO charge came to $122,928.60.[416] He was spared from having to personally make this payment when his law school stepped in and made it for him.[417]

Several months later, Mattis received his first pension check.[418] Although he had been expecting approximately $3,500, the check was for $2,815.98.[419] The shortfall was due to the State's decision not to credit Mattis for the ERO payment.[420] In response, Mattis filed an administrative complaint against SURS.[421] When his claim was denied, Mattis sued SURS.[422] In short order, the circuit court granted summary judgment to SURS, the appellate court reversed, and the Illinois Supreme Court declined to hear SURS's appeal.[423]

The case then returned to the circuit court.[424] In the meantime, the Illinois Legislature, alarmed by Mattis's claim, amended the state's pension law to make it clear that ERO payments were not to be used in calculating pension benefits.[425] The law also added a new provision (Rule 5) that applied only to Mattis.[426] Under it, Mattis's payment was capped at approximately $3,090 a month.[427]

Finding the new law unconstitutional, the circuit court remanded the case to SURS.[428] It reluctantly agreed to turn over to Mattis the full value of his ERO payment, plus interest (a total of $152,984.37), and also increase his monthly checks to $3,333.67.[429] These decisions were confirmed by the circuit court, which also granted Mattis more

[413] Mattis v. State Univ. Ret. Sys., 816 N.E.2d 303 (Ill. 2004).
[414] *Id.* at 306.
[415] *Id.*
[416] *Id.*
[417] *Id.*
[418] *Id.* at 307.
[419] *Id.*
[420] *Id.*
[421] *Id.*
[422] *Id.* at 307, 308.
[423] *See* Mattis v. State Univ. Ret. Sys., 695 N.E.2d 566 (Ill. App. Ct. 1998), *appeal denied*, 705 N.E.2d 439 (Ill. 1998).
[424] *Mattis*, 816 N.E.2d at 309 (citation omitted).
[425] *Id.* (citations omitted).
[426] *Id.* at 310.
[427] *Id.*
[428] *Id.* at 311.
[429] *Id.*

than $300,000 in attorneys' fees and costs.[430]

Rather than ending matters, both SURS and Mattis filed cross-appeals.[431] Following consolidation and transfer, the Illinois Supreme Court held that SURS had been right all along.[432] It therefore remanded the case, direction that the circuit court "order SURS to recalculate Mattis' annuity under the new Rule 5."[433] This provoked a vigorous dissent from Justice Rarick:

> We had the opportunity to review the appellate court's decision in this case six years ago. We declined to do so. Defendants' petition for leave to appeal was denied, the mandate of the appellate court issued, and the cause was remanded to the circuit court for further proceedings. Considerable effort was subsequently expended by the parties, the circuit court and the General Assembly based on the appellate court's interpretation of the law. Given all that has transpired during the intervening six years, subjecting the appellate court's judgment to review on the merits at this late date offends basic principles of judicial stability.[434]

Lastly, in *Rose v. Whittier Law School*,[435] I. Nelson Rose claimed he had been fooled into retiring:

> As a means of alleviating the financial strain caused by the ABA's action [of placing the school on probation for low bar examination rates], Whittier decided to reduce the size of the Law School faculty. It offered its 20 full-time tenured law professors "a one time incentive for tenure buyout," offering to buy out a professor's tenure agreement in exchange for a lump sum payment equal to one year's salary . . . .
>
> Whittier's administrators imposed a deadline of November 1, 2006, for tenured professors to accept the buyout offer. The administrators told faculty members that the deadline was solely for budgetary reasons. In fact, the November 1 deadline was chosen in part so that the tenured professors' decision to accept the buyout offer would have to be made before the summer bar examination results were known. Whittier's

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[430] *Id.* at 312.

[431] *Id.* at 312.

[432] *Id.* at 306, 317 (reversing the circuit court's decision that favored Mattis' interpretation of the retirement annuity, and reversing the circuit court's order awarding attorney fees and costs).

[433] *Id.* at 318.

[434] *Id.* (Rarick, J., dissenting).

[435] Rose v. Whittier Coll., No. B226983, 2011 WL 5223146 (Cal. Ct. App. 2011).

> administrators knew that if a higher percentage of the Law School's recent graduates passed the bar exam, fewer tenured professors would accept the buyout offer.
>
> Whittier's administrators met with the Law School's tenured faculty in September and October 2006. During those meetings, the Law School dean, Neil [H.] Cogan (Cogan), and Whittier's chief financial officer, Janice [A.] Legoza (Legoza), told tenured professors that if they did not accept the buyout offer, they would face a 50 to 100 percent increase in workload, teaching five or six courses a year instead of the standard three or four. Cogan and Legoza also told faculty members that their salaries would be frozen for the indefinite future if they did not accept the buyout offer. On at least two occasions, Cogan threatened tenured professors with the possibility that tenure agreements could be abrogated based upon financial exigency.
>
> Rose accepted the buyout offer in November 2006. A few weeks later, the California bar examination results were published. The pass rate for the Law School's graduates was 20 percentage points higher than the previous year's, and were the best results posted by the Law School in 17 years. In July 2007, one month after Rose's departure from the Law School, tenured professors who had not accepted Whittier's buyout offer and who remained at the Law School were given a three percent raise. No tenured professor who rejected the buyout offer experienced an increased course load.[436]

When he realized he had been hoodwinked, Rose sued for fraud and negligent misrepresentation.[437] Following a bench trial, Rose was awarded $350,000 in compensatory damages and $500,000 in punitive damages.[438] On appeal, the compensatory damages were found to be reasonable but the punitive damages were thrown out because the trial court had failed to consider Whittier's "ability to pay" them.[439]

V. SCHOLARSHIP

On more than one occasion, law professors have gone to court over

[436] *Rose*, 2011 WL 5223146, at *1–2.
[437] *Id.* at *2.
[438] *Id.*
[439] *Id.* at *8 (citing Kenly v. Ukegawa, 19 Cal. Rptr. 2d 771, 776 (Cal. Ct. App. 1993)).

their scholarship.[440] The most common reason for such suits is the refusal of a government agency to turn over its records, thereby impeding the plaintiff's scholarship.[441]

[440] Some readers may be surprised to find that I have omitted from this section Clark v. West, 86 N.E. 1 (N.Y. 1908), better known as the "case of the drunken law professor." *Today in History: Clark v. West*, CONTRACTSPROF BLOG (Nov. 10, 2005), http://lawprofessors.typepad.com/contractsprof_blog/2005/11/today_in_histor_6.html. Although William L. Clark, Jr. had been a law professor at Washington & Lee University, by the time he signed the book contract giving rise to his famous lawsuit he had been dismissed for intoxication. *See* Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1, 14 n.87 (2010).

Because it did not result in a published opinion, I have not included Samuel Hoffman's $6 million lawsuit against Patrick J. Rohan and the West Publishing Company. Hoffman, a professor at Brooklyn Law School, sued when Rohan, the dean of St. John's University's law school, was credited as the author of various practice commentaries in *McKinney's Consolidated Laws of New York Annotated*. Hoffman had penned the pieces in 1967; when a new edition of *McKinney's* was released in 1981, Hoffman lost his byline through what the defendants claimed was an oversight. *See* Joseph P. Fried, *Professor of Law Sues Dean over Credit for His Writings*, N.Y. TIMES, Jan. 31, 1983, B3. The parties eventually reached what they termed an "'amicable resolution.'" *See further Lawsuit Settled over Legal Books*, N.Y. TIMES, Jan. 17, 1984, § B, at 3. A lawsuit brought by L. Lawrence Lessig III, a Harvard University law professor, also received substantial media coverage but did not lead to a published opinion. *See* Beth Winegarner, *Harvard Law Prof Settles Copyright Feud over YouTube Video*, LAW360 (Feb. 28, 2014), https://www.law360.com/articles/514491/harvard-law-prof-settles-copyright-feud-over-youtube-video. Lessig sued when a lecture he had posted on YouTube was deleted because the song at the beginning of his presentation was copyrighted. *Id.* ("Under the deal, Liberation Music has conceded that Lessig's use of the band Phoenix's 'Lizstomania' in the lecture, which later was posted on YouTube, was protected under fair use.").

[441] Scholarship is not the only reason for these types of suits. In *Cleary v. FBI,* for example, James P. Cleary, a Drake University law professor, was shot at while driving to the Iowa State Penitentiary to meet with a group of inmates. 811 F.2d 421, 422 (8th Cir. 1987). When the FBI closed its investigation without determining the shooter's identity, Cleary demanded its file. *Id.* Although the FBI turned over certain records, it refused to give Cleary everything it had. *Id.* In response, Cleary sued, but the district court sided with the FBI. *Id.* at 423. On appeal, the Eighth Circuit affirmed:

> We conclude that the information obtained from the persons interviewed by the F.B.I. is exempt from disclosure under the confidential source exemption, and that the identities of the persons interviewed and the F.B.I. agents who conducted the investigation are exempt from disclosure under the unwarranted invasion of personal privacy exemption.

Id. at 424. In a similar case, M. Cherif Bassiouni, a law professor at DePaul University, fought to discover what the government knew about him:

> Professor M. Cherif Bassiouni, a member of DePaul Law School's faculty since 1964, is the head of DePaul's International Human Rights Law Institute and a frequent participant in human-rights activities sponsored by the United States, the European Union, and the United Nations. In 1983 Bassiouni asked the Central Intelligence Agency for copies of all documents that mention him. The agency replied that it had some but would not reveal any details. In 1999 Bassiouni tried again, invoking both the *Freedom of Information Act* and the *Privacy Act.* Again the agency replied that it has documents bearing his name. . . . The district court concluded that the CIA is entitled to keep mum. . . . Bassiouni could have asked the district judge to order the CIA to reveal *in camera* what records (if any) it received from the FBI about Bassiouni between 1970 and 1975 (and has clung to for 30 years), and either purge them from its files or give a statutory justification for keeping them. Yet Bassiouni has never made such a request—not of the CIA, not in the district court, and not in this court. He wants disclosure rather than erasure, and disclosure is the one thing that he cannot have.

Thus, for example, in *Getman v. NLRB*,[442] Julius G. Getman, a law professor at Indiana University, sought the names and home addresses of employees who were eligible to vote in certain union elections.[443] When the agency objected, Getman sued.[444] In an unpublished opinion, the district court found his request proper.[445] On appeal, the D.C. Circuit affirmed:

> We find that, although a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. . . . Appellees represent that any employee who does not wish to undergo an interview may refuse, and that employees have in fact done so in connection with the pilot studies conducted to date.[446]

In *Vaughn v. Rosen*,[447] American University law professor Robert C. Vaughn sued the U.S. Civil Service Commission for access to its records.[448] After years of battle, the courts granted Vaughn almost everything he requested, with the D.C. Circuit writing:

> The present case has been pending in administrative channels and before the courts for over three years. After this long period of time we are in a position to affirm finally a disposition that grants plaintiff most of the records he requested of the Commission.
>
> Congress has ordered that actions brought under the FOIA be "expedited in every way." In light of this Congressional mandate and the delay already experienced by plaintiff, we are ordering that the mandate of this court issue immediately.[449]

Similarly, in *Cooper v. IRS*,[450] Columbia University law professor George Cooper sought attorneys' fees and costs after winning his

Bassiouni v. CIA, 392 F.3d 244, 245, 247–48 (7th Cir. 2004); *see also* Bassiouni v. FBI, No. 02 C 8918, 2004 WL 2066890 (N.D. Ill. Sept. 14, 2004) (noting the same result).

[442] Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

[443] *Id.* at 671.

[444] *Id.* at 672.

[445] Getman v. NLRB, No. 2349-70, 1971 U.S. Dist. LEXIS 14951 at *3 (D.D.C. Jan. 21, 1971).

[446] *Getman*, 450 F.2d at 674–75 (citations omitted).

[447] Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

[448] *Id.* at 1139.

[449] *Id.* at 1147 (citations omitted). A further discussion of the litigation is available. *See generally* Robert G. Vaughn, *The Freedom of Information Act and* Vaughn v. Rosen, 23 AM. U. L. REV. 865 (1974).

[450] Cooper v. IRS, No. 77-920, 1978 U.S. Dist. LEXIS 16831 (D.D.C. June 30, 1978).

lawsuit against the IRS.[451] In finding that he was entitled to $4,074.15, the district court observed, "[T]he record reveals that plaintiff is a law school professor who sought this information as supporting documentation for a law review article. Congress has indicated that such a scholarly interest is to be given great consideration in the determination of a fee award."[452]

In *Junger v. Daley*,[453] Case Western Reserve University law professor Peter D. Junger sued the U.S. Department of Commerce for refusing, on national security grounds, to let him "post on his web site encryption source code that he ha[d] written to demonstrate how computers work."[454] Although the district court sided with the government, on appeal the Sixth Circuit disagreed: "The district court found that encryption source code is not sufficiently expressive to be protected by the First Amendment. . . . Having concluded that the First Amendment protects computer source code, we reverse the district court and remand this case for further consideration of Junger's constitutional claims."[455]

In *Baystate Technologies, Inc. v. Bowers*,[456] University of Tennessee law professor George W. Kuney sought the records in a long-running patent infringement case.[457] Although the parties agreed to give him access, the district court declined his request because the defendant had not taken the formal steps required by the original protective order to unseal the records.[458] On appeal, the Federal Circuit decided that the district court had acted precipitously:

> [T]he parties appear to have little, if any, continued interest in maintaining confidential the documents that Professor Kuney seeks. Further, Professor Kuney alleges that his ability to do scholarly work is dependent on his ability to obtain access to the documents. "[P]ublic monitoring of the judicial system fosters the important values of quality, honesty and respect for the judicial system." We, therefore, deem it proper to return the case to the district court for a balancing of the public and private interests in determining whether to grant or deny Professor Kuney's motions.[459]

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[451] *Id.* at *1.
[452] *Id*. at *4.
[453] Junger v. Daley, 8 F. Supp. 2d 708 (N.D. Ohio 1998), *rev'd*, 209 F.3d 481 (6th Cir. 2000).
[454] *Junger*, 209 F.3d at 483.
[455] *Id*. at 482.
[456] Baystate Techs., Inc. v. Bowers, 283 F. App'x 808 (Fed. Cir. 2008).
[457] *Id.* at 809, 810.
[458] *Id.* at 809, 810.
[459] *Id*. at 810–11 (citations omitted). Kuney eventually did obtain the records and used them

In *Sander v. State Bar of California*,[460] Richard H. Sander, a law professor at the University of California at Los Angeles, sought to obtain admission data from the California bar.[461] Although the trial court decided that the information was confidential, the California Supreme Court ordered it to take a second look:

> Plaintiffs Richard Sander, Joe Hicks, and the [California] First Amendment Coalition requested that the State Bar of California (State Bar) provide them access to information contained in its bar admissions database, including applicants' bar exam scores, law schools attended, grade point averages, Law School Admissions Test scores, and race or ethnicity. Plaintiff Sander sought this information in order to conduct research on racial and ethnic disparities in bar passage rates and law school grades.
>
> The question presented is whether any law requires disclosure of the State Bar's admissions database on bar applicants. We conclude that under the common law right of public access, there is a sufficient public interest in the information contained in the admissions database such that the State Bar is required to provide access to it if the information can be provided in a form that protects the privacy of applicants and if no countervailing interest outweighs the public's interest in disclosure. Because the trial court concluded that there was no legal basis for requiring disclosure of the admissions database, the parties did not litigate, and the trial court did not decide, whether and how the admissions database might be redacted or otherwise modified to protect applicants' privacy and whether any countervailing interests weigh in favor of nondisclosure. Consequently, the Court of Appeal will be directed to remand the case to the trial court.[462]

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to write a book about the case. *See* GEORGE W. KUNEY, BAMBOOZLED? ANATOMY OF A BANKRUPTCY: *BAYSTATE V. BOWERS* AND ITS AFTERMATH 1 (2013).

[460] Sander v. State Bar of Cal., No. CPF08508880, 2010 WL 10903646 (Cal. Super. Ct. Apr. 13, 2010), *rev'd*, 126 Cal. Rptr. 3d 330 (Cal. Ct. App. 2011), *aff'd*, 314 P.3d 488 (Cal. 2013).

[461] *Sander*, 2010 WL 10903646, at *1.

[462] *Sander*, 314 P.3d at 491. In November 2016, the trial court again held that Sander was not entitled to the records. *See* Sander v. State Bar of Cal., No. CPF-08-508880, 2016 WL 6594874, at *5 (Cal. Super. Ct. Nov. 7, 2016).

In a similar case that did not generate a published decision, Robert Steinbuch, a law professor at the University of Arkansas at Little Rock, sued the school to get its admission data so that he could try to determine why minority students were failing the bar exam at twice the rate of white students. *See* Kathryn Rubino, *Law Prof Sues Law School over Admissions Data*, ABOVE

In *Samahon v. FBI*,[463] Villanova University law professor Tuan Samahon sued for information held by the FBI in connection with his research into the 1969 resignation of Justice Abe Fortas from the U.S. Supreme Court.[464] Finding "[t]he Government's categorical denial of Plaintiff's request . . . [to be a] violation of the FOIA [Freedom of Information Act],"[465] the court ruled for Samahon.[466]

Not every scholarship lawsuit has involved a quest for data. In *Avins v. Rutgers, State University of New Jersey*,[467] Memphis State University law professor Alfred Avins sued the *Rutgers Law Review* for rejecting his article on civil rights law.[468] According to Avins, his piece espoused a conservative interpretation of history and "the editors of the Law Review ha[ve] adopted a discriminatory policy of accepting only articles reflecting a 'liberal' jurisprudential outlook in constitutional law."[469] Finding that none of Avins's legal rights had been abridged, the district court granted the journal summary judgment.[470] On appeal, the Third Circuit affirmed: "The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion."[471]

In *McMunigal v. Bloch*,[472] Kevin C. McMunigal, a law professor at Case Western Reserve University, and Kate E. Bloch, a law professor at the University of California-Hastings College of the Law, co-

THE LAW (Nov. 23, 2015), http://abovethelaw.com/2015/11/law-prof-sues-law-school-over-admissions-data/. The case settled when the school agreed to give Steinbuch the records he wanted. *See* Paul Caron, *What Law Prof Learned in Suing His Law School for Admissions Data*, TAXPROF BLOG (Dec. 14, 2016), http://taxprof.typepad.com/taxprof_blog/2016/12/what-law-prof-learned-in-suing-his-law-school-for-admissions-data.html.

[463] Samahon v. Fed. Bureau of Investigation, 40 F. Supp. 3d 498 (E.D. Pa. 2014).

[464] *Id*. at 503.

[465] *Id*. at 530.

[466] *Id*. In another case, however, Samahon had less success. While researching presidential recess appointments, Samahon sought two documents known, respectively, as the Elwood Memorandum and the Goldsmith Memorandum. *See* Samahon v. U. S. Dep't of Just., No. 13–6462, 2015 WL 857358, at *2 (E.D. Pa. 2015). The court ordered an *in camera* inspection of the former but found the latter to be clearly non-disclosable. *Id*. at *26.

[467] Avins v. Rutgers, State Univ. of N.J., 385 F.2d 151 (3d Cir. 1967).

[468] *Avins*, 385 F.2d at 152.

[469] *Id*.

[470] *Id.*

[471] *Id*. at 154; *see also* Aaron D. Twerski, *An Ode to Rejection*, 7 DUQ. L. REV. 258 (1968) (discussing the case further). According to Professor Twerski, "[Avins's] article was subsequently published in 38 Miss. L.J. 179 (1967) and is entitled *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*." *Id*. at 258 n.3.

[472] McMunigal v. Bloch, No. 10-02765, 2010 WL 5399219 (N.D. Cal. Dec. 23, 2010).

authored a criminal law casebook.[473] Their collaboration proved to be a troubled one and they eventually decided to go their separate ways.[474] However, when Bloch refused to sign a formal separation agreement, McMunigal lost the opportunity to have his half of the book published as a revised edition.[475] As a result, McMunigal sued Bloch for a formal partition of their rights.[476] In dismissing his suit, the district court found that it had no power to divide a joint work:

> There is no case law to support the proposition that a court has authority to partition joint copyright ownership. Plaintiff's opposition [to defendant's motion to dismiss] discusses legal authority that tends to establish that a co-owner of property has a right to partition a tenancy-in-common and that co-owners of a copyright are generally treated as tenants in common. This does not establish, however, that a court may partition a jointly held copyright in the absence of a signed transfer. . . . Even if state law governs remedies a co-owner may seek when another co-owner refuses to share profits from a jointly copyrighted work, federal law still governs ownership and transfer of the copyright itself.[477]

In *Rudovsky v. West Publishing Corp.*,[478] Leonard N. Sosnov, a law professor at Widener University, and David Rudovsky, an adjunct law professor at the University of Pennsylvania, co-authored a treatise on Pennsylvania criminal law and procedure.[479] The book was a success, and for several years thereafter the pair prepared annual pocket parts—but they stopped doing so when West reduced their compensation by fifty percent.[480]

To keep the book alive, West began issuing pocket parts prepared by its in-house staff.[481] Although these were shadows of the ones prepared by Sosnov and Rudovsky, West advertised them as having been written by the pair.[482] As a result, Sosnov and Rudovsky sued for defamation and false light.[483]

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[473] *Id* at *1.
[474] *Id* at *2.
[475] *Id*.
[476] *Id*.
[477] *Id*. at *6.
[478] Rudovsky v. West Publ'g Corp., No. 09-cv-00727, 2011 WL 1155159 (E.D. Pa. Mar. 30, 2011).
[479] *Rudovsky*, 2011 WL 1155159, at *1.
[480] *Id.*
[481] *Id.*
[482] *Id.*
[483] *Id.*

Despite West's "'scorched earth' approach to [its] defense,"[484] the jury awarded both Sosnov and Rudovsky $90,000 in actual damages and $2.5 million in punitive damages.[485] At West's request, the court granted remittitur:

> I am satisfied that the only significant issue is the amount of the verdict rendered by the jury. With respect to compensatory damages, their award of $90,000 to each plaintiff strikes me as quite generous, but not so excessive as to warrant interference by the court. That is what we have juries for.
>
> With respect to punitive damages, I do agree that the award of a total of $5 million is undoubtedly excessive. The jury may have been too much influenced by the net worth of the defendants, and undoubtedly was influenced to some extent by the defendants' own evidence at trial, which seemed to show that the defendants have learned nothing from the experience, and would be likely to continue to commit violations of individuals' rights in the future.
>
> Be that as it may, it is the obligation of this Court to make sure that constitutional limitations are not violated. In order to conform to constitutional limitations, punitive damages should not exceed the amount reasonably necessary to punish the wrongdoer for the harm actually caused, and to deter the wrongdoer from repeating such conduct in the future.
>
> Taking into account the nature of the defendants' conduct, the amount of harm caused (as measured by the jury), and the need to provide deterrence, I conclude that the constitutional limit in this case should be set at $110,000 for each plaintiff. When combined with the compensatory damages, this would result in a recovery of $200,000 for each plaintiff.[486]

VI. PHYSICAL INJURIES

I have found three reported cases involving physical injuries to law

[484] *Id*.
[485] *Id.*
[486] *Id*. at *2 (citations omitted).

professors.[487] In *Campbell v. Bradbury*,[488] Kemper B. Campbell, a law professor at the University of Southern California, was severely injured when the cables holding the elevator he was riding in snapped.[489] At the time of the accident, the school held classes in a commercial building known as The Tajo and Campbell had just finished giving a lecture in a classroom on the fourth floor.[490] In upholding a jury award of $35,000 against the building's owner and managers, the California Supreme Court remarked:

> It is claimed that the verdict is excessive. The evidence shows that the plaintiff was a comparatively young attorney and was making an income of nine thousand dollars per year. At the time of the trial he came into the courtroom using two crutches and it was a serious question whether he would ever be able to walk without the aid of crutches. He had suffered great pain and had been unable to transact any business for more than six months at the time the case was tried; was permanently crippled in such fashion as to impair his usefulness as an attorney before a court and jury. The natural effect of his injury was that he would lose some of his clients,

[487] I also have found a number of personal injury actions that did not result in published opinions. *See*, *e.g.*, Complaint ¶¶ 14–15, Pew v. Hofstra Univ., No. CV 11-0036, 2011 WL 146536 (E.D.N.Y. 2011) (demonstrating a suit by Hofstra University law professor Curtis E. Pew involving an accident caused by a school-owned vehicle); Callum Borchers, *Law Professor Sues Over Restroom Fall; Cites Wet Floor, No Towels at Garden*, BOSTON GLOBE, June 3, 2015, at C1 (describing a suit by Harvard University law professor Alan M. Dershowitz, who was injured while attending a Boston Celtics-Miami Heat playoff game); Michelle Keahey, *Law Professor Sues Grocery Store After Slip and Fall Incident*, LA. REC. (Aug. 20, 2013), http://louisianarecord.com/stories/510583690-law-professor-sues-grocery-store-after-slip-and-fall-incident (claiming against Winn-Dixie and its insurer by Southern University law professor Steve V. Barbre); Debra Cassens Weiss, *Law Prof Who Fell from Platform at Awards Ceremony Sues School*, ABA J. (Feb. 28, 2013), http://www.abajournal.com/news/article/law_prof_who_fell_from_platform_at_awards_ceremony_sues_school/ ("A George Washington University law professor claims in a lawsuit that she broke her heel after falling from a lecture platform that was 'unreasonably small in width and depth.' International law professor Dinah [L.] Shelton says she fell while delivering a 2011 lecture at the University of Denver's Sturm College of Law . . . [where she was receiving the] Myres S. McDougal Distinguished Lecturer in International Law award.").

There are no reported opinions stemming from the murders of law professors Mary Joe Frug (New England School of Law, 1991); L. Anthony Sutin and Thomas F. Blackwell (Appalachian School of Law, 2002); and Daniel E. Markel (Florida State University, 2014).

[488] Campbell v. Bradbury, 176 P. 685 (Cal. 1918).

[489] *Id.* at 686.

[490] *See Asks Hundred Thousand, Hurt in Elevator's Fall.*, L.A. DAILY TIMES, Feb. 11, 1915, at 10; *Lawyer Sues for Crash Damages; Kemper B. Campbell Hobbles into Court on Crutches in $109,000 Suit*, L.A. EVENING HERALD, May 3, 1915, at 1. As all sides agreed, the cables snapped because the elevator had been overloaded with passengers. *Lawyer Sues for Crash Damages*, *supra*, at 1. Despite this fact, Campbell argued that the defendants were liable because the elevator lacked emergency brakes and bumpers. *Asks Hundred Thousand*, *supra*, at 10.

> some part of the business already on hand, and that, on becoming able to transact business again, if he ever regained his former income, it would require a long time to do so. . . . In view of the earning capacity of the plaintiff, the nature and character of his injuries, his permanent handicap in re-establishing and conducting his practice, we cannot say that the verdict is excessive.[491]

In *Rothman v. Provident National Bank*,[492] Frederick P. Rothman, a Villanova University law professor, was awarded $1.5 million by a jury for injuries he sustained when he fell on a patch of ice in the defendant's parking lot.[493] As part of his damage claim, Rothman claimed his injuries had left him too weak to continue accepting outside consulting work.[494] In refusing to set aside the verdict, the trial court wrote:

> A review of the record in this case does not indicate that the jury's verdict was improperly influenced. On the contrary, the record reveals ample evidence of the nature and permanency of the plaintiff's disability, in addition to the extent of past medical expenses occasioned by the plaintiff's injuries. Further, there was sufficient testimony regarding lost consultation opportunities from numerous witnesses who were subject to cross-examination by the defendant, in order to support the jury's verdict. Therefore, the defendant's Motion for a New Trial, based on the excessiveness of the verdict, and all of the preceding contentions, is denied.[495]

In *Gerber v. Veltri*,[496] Scott D. Gerber, a law professor at Ohio Northern University, sued Associate Dean Stephen C. Veltri for assault and battery.[497] In rejecting Gerber's claim, the district court wrote:

> This is a case seemingly ripped from the pages of a first-year torts exam, with the added twist that the parties are, in real life, law school professors: Plaintiff *pro se* Scott Gerber, a law professor at Ohio Northern University School of Law ("ONU"), accuses his colleague, Defendant Stephen Veltri, of an assault

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491 *Campbell*, 176 P. at 689–90 (citations omitted).

492 Rotham v. Provident Nat'l Bank, 7 Phila. 662 (1982).

493 *Id.* at 663, 664.

494 *Id.* at 679.

495 *Id*.

496 Gerber v. Veltri, 203 F. Supp. 3d 846, 848 (N.D. Ohio 2016), *aff'd*, 702 F. App'x 423 (6th Cir. Aug. 17, 2017).

497 *Gerber*, 203 F. Supp. 3d at 848.

> and battery in a law school hallway. The charge: grabbing Gerber's shoulder in a "strong and tight fashion." Veltri admits he "touched" Gerber's shoulder, but merely to direct him to the nearby faculty lounge so the two could speak privately about Gerber's recent confrontation with the law school librarian. After a five-day bench trial and post-trial statements . . . , this Court finds Gerber's story simply doesn't add up. . . .
>
> This Court allowed Gerber substantial leeway in the presentation of evidence out of respect for his pro se status. As a result, this Court heard considerable testimony and received myriad exhibits that bore little (if any) relation to whether an assault and battery occurred on October 8, 2012. These topics include—but are not limited to—the awarding of an annual honorary chair by a faculty committee, ONU's grievance process, reviews of ONU by the American Bar Association and the Occupational Health and Safety Administration, allegations of faculty members, other than Veltri, bullying Gerber, and ONU's internal investigation of the alleged assault and battery in the weeks following October 8. A retelling of this exhaustive evidence would be unproductive and carry this Court far afield from the main plot.[498]

VII. REPUTATIONAL INJURIES

In a number of reported cases, law professors have sought damages for injuries to their reputation.[499] Although they sometimes have

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[498] *Id.* In addition to Veltri, Gerber sued the university for, *inter alia*, breach of contract, retaliation, and mishandling his retirement account (which Gerber insisted had cost him $100,000). *See* Gerber v. Ohio N. Univ., No. 3:14 CV 2763, 2015 U.S. Dist. LEXIS 56767, at *1, *2 (N.D. Ohio, Apr. 30, 2015). All of these claims were dismissed. *See id.* at *40.

[499] There have been a number of high-profile defamation lawsuits that did not result in published opinions. In 1963, for example, Fowler V. Harper, a law professor at Yale University, brought a $500,000 libel claim against the *National Review* after it accused him of supporting Communism. *See Pauling Sues National Review; Charges It Called Him Traitor*, N.Y. TIMES, May 21, 1963, at 10. Although two case cites exist, both are one sentence affirmances. *See* Harper v. Nat'l Review, Inc., 263 N.Y.S.2d 292 (App. Div. 1965); Harper v. Nat'l Review, Inc., 265 N.Y.S.2d 602 (App. Div. 1965); *see also Buckley Pays Widow $13,750 in Libel Case*, L.A. TIMES, Apr. 30, 1966, at 17 (explaining that the case settled shortly after Harper died). In 2002, Gary Minda, a law professor at Brooklyn Law School who was visiting at Stetson University, sued the *St. Petersburg Times* for defamation after it covered his messy but ultimately successful fight to win custody of his born-out-of-wedlock daughter. *See* Leanora Minai, *Professor Files Suit Against Times Publishing, Writer*, ST. PETERSBURG TIMES, July 16, 2002, at 3B. In 2006, the newspaper agreed to pay Minda $55,000. *See Settlement Reached Between Times and Man Who Filed Libel Suit about Column*, ST. PETERSBURG TIMES, Aug. 4,

gone after their co-workers, they usually have sued a third party.[500]

A. Co-Workers

In *Clark v. McBaine*,[501] George L. Clark, a law professor at the University of Missouri, was summarily fired after he clashed with A. Ross Hill, the university's president, over Hill's management style.[502] In an attempt to win back his job, Clark gave a lengthy interview to the *St. Louis Post-Dispatch*.[503]

In response to Clark's interview, James P. McBaine, the law school's dean, together with the other members of the law school faculty, wrote a letter taking Hill's side:

> It has come to our attention that Dr. George L. Clark . . . , lately a professor of law in the University of Missouri School of Law, but who was dismissed recently from this position, is claiming publicly throughout the state and elsewhere that his dismissal by the Board of Curators was improper and unjust.

2006, at 3B. In 2008, Richard J. Peltz, a law professor at the University of Arkansas at Little Rock, sued two students for calling him a racist. *See* Lynnley Browning, *Law Professor Accuses Students of Defamation*, N.Y. TIMES (May 1, 2008), http://www.nytimes.com/2008/05/01/us/01legal.html. Peltz dropped his lawsuit several months later "after the law school agreed to fully investigate the charges against him and after he received a letter affirming that, based on that investigation, he had done nothing racist or inappropriate." Scott Jaschik, *What You Can't Win in Court*, INSIDE HIGHER ED (Nov. 17, 2008), https://www.insidehighered.com/news/2008/11/17/ualr.

In 2009, D. Marvin Jones, a University of Miami law professor, sued the web site *Above the Law* for $44 million after it reported on his arrest for trying to solicit a prostitute. *See* Ben Sheffner, *Law Professor Sues 'Above the Law' blog; Time to Go Back to Complaint-Drafting School*, COPYRIGHTS & CAMPAIGNS (Nov. 2, 2009) http://copyrightsandcampaigns.blogspot.com/2009/11/law-professor-sues-above-law-blog-time.html; David Lat, *Breaking:* Jones v. Minkin *Dismissed!!! (Plaintiff Voluntarily Dismisses Lawsuit Against ATL.)*, ABOVE THE LAW, (Nov. 4, 2009), http://abovethelaw.com/2009/11/breaking-jones-v-minkin-dismissedplaintiff-voluntarily-dismisses-lawsuit-against-atl/. Jones later dropped the suit. *See* Lat, *supra*. Two years later, Jones again was arrested for solicitation. *See* Elinor J. Brecher, *Latest Arrest Was Second for UM Law Professor in Solicitation Case*, SOUTH FLA. SUN-SENTINEL (Oct. 2, 2011), http://articles.sun-sentinel.com/2011-10-02/news/mh-um-law-professor-donald-m-jones-arrested-20111002_1_solicitation-law-professor-affirmative-action-plan.

Lastly, in 2016, Harvard University law professor Alan M. Dershowitz settled a defamation lawsuit he brought against University of Utah law professor Paul G. Cassell, who in pleadings filed in a case in Florida had accused Dershowitz of having sex with a minor. *See* Travis Andersen, *Sex Allegations Against Dershowitz Called 'Mistake'*, BOS. GLOBE (Apr. 9, 2016), https://www.bostonglobe.com/metro/2016/04/08/settlement-reached-alan-dershowitz-defamation-case/.html.

[500] *See also* Minai, *supra* note 499 (noting the action was filed against a newspaper publisher); Lat, *supra* note 499 (noting the action was filed and later dropped against *Above the Law*).

[501] Clark v. McBaine, 252 S.W. 428 (Mo. 1923).

[502] *See id.* at 430, 431.

[503] *See id.* at 430.

> We . . . , of the faculty of law of the University of Missouri, desire to state that in our opinion there was good and sufficient grounds for his dismissal. It is also our belief, based on facts known to us, that Dr. Clark . . . , at the time that this action was taken by the Board of Curators, had ceased to be a useful member of the faculty, and in our opinion was not fitted to continue his associations with the School of Law.[504]

When McBaine's letter was printed in multiple newspapers, Clark sued him and the others for libel and demanded $50,000 in damages.[505] The trial court found for the defendants, as did the Missouri Supreme Court: "The appellant having sought to be reinstated as a teacher in the law faculty . . . , a public position of great responsibility and obvious interest to citizens generally of the State, his fitness and qualifications for that position were subjects for public comment, and . . . as such were privileged."[506]

In *Snead v. Harbaugh*,[507] Harry L. Snead, Jr., a law professor at the University of Richmond, sued Joseph D. Harbaugh, the law school's dean, and other faculty members for defamation and conspiracy to injure his name and reputation.[508] Agreeing with the defendants that Snead's claim was preempted by the state's workers' compensation act, the trial court dismissed the suit.[509] On appeal, the Virginia Supreme Court reversed and remanded:

> The more prevalent view, in those jurisdictions which include intentional torts within the meaning of "accident" for the purpose of workers' compensation, excludes injury to reputation from the penumbra of "injury" for workers' compensation purposes . . . .
>
> We think this is the better-reasoned approach and is consistent with our prior decisions. Therefore, we conclude that the injury to reputation and the damages claimed in Snead's defamation count do not fall within the interpretation

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[504] *Id.* at 431.

[505] *See id.* at 429.

[506] *Id.* at 432 (citations omitted). Because he had forgotten about Clark's claim against Hill, Chief Justice Woodson issued a second opinion:

> This case and *Clark v. McBaine*, are cross-appeals between the same parties, and present precisely the same questions, and both cases were argued and submitted together as one case, but through inadvertence I overlooked that matter, and wrote No. 23186 alone; but the same rulings and judgment is to be entered in this case as in that.

Clark v. Hill, 252 S.W. 433, 433 (Mo. 1923).

[507] Snead v. Harbough, 404 S.E.2d 53 (Va. 1991).

[508] *Id.* at 54.

[509] *Id.* (citations omitted).

and application of "injury" under the Act.[510]

In *Connell v. Ammons*,[511] Lawrence J. Connell, a law professor at Widener University, sued Linda L. Ammons, the law school's dean, for defamation.[512] When Ammons sought a change of venue (from Georgetown to Wilmington, a distance of eighty-five miles), the court refused her request:

> There is no showing by Ammons that there are a lot of witnesses that will have to come to Georgetown to attend the trial. There is no showing by Ammons that compelling the witnesses to attend a trial in Georgetown will present a problem. There is no showing by Ammons that the trial will be lengthy. There is no showing by Ammons that she or any of the other defendants would suffer severe or undue financial hardship in traveling to Georgetown to attend trial. Indeed, as a practical matter, I suspect that Ammons and her attorneys will, as many parties and attorneys do, simply stay in or near Georgetown for the trial, thus eliminating most of the inconvenience to them. Quite simply, any inconvenience is minimal as to Ammons and the other defendants, and is certainly no greater than the inconvenience that Connell faces. Given all of this, I find that Connell's choice of forum should be respected and that it would not be an undue inconvenience for Ammons, or any of the other defendants, to attend trial in Georgetown.[513]

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[510] *Id*. at 55. In a dissent, Justice Carrico argued that Snead's failure "to assign error to the trial court's dismissal of his case on the separate ground that [it] does not state a cause of action" was both fatal and dispositive. *Id.* (Carrico, J., dissenting).

[511] Connell v. Ammons, No. S11C-04-010, 2011 Del. Super. LEXIS 434 (Del. Super. Ct. Sept. 6, 2011).

[512] *Id.* at *1.

[513] *Id*. at *3. In 2012, the parties reached an undisclosed settlement and Connell left the university. *See* Kristin E. Holmes, *Widener Law Professor Settles Suit Against Dean*, PHIL. INQUIRER, Feb. 9, 2012, at B2. By this time, the underlying facts had become well known:

> Lawrence J. Connell, an associate professor at the law school for 26 years, had accused the dean, Linda L. Ammons, of intentionally making false statements that he was a racist and sexist during proceedings to oust him from his post.
>
> Connell is white and Ammons is black.
>
> Lawrence was placed on leave in December 2010, then suspended without pay in August after allegedly retaliating against two students who complained about his classroom conduct.
>
> In one case, during a class on criminal procedure, Connell allegedly used a hypothetical example in which he "decided to shoot" Ammons.
>
> He denied any wrongdoing and stated that Ammons was attempting to fire him because of his conservative political views. Rather than retaliating, his lawyer said, Connell was defending himself when he discussed the accusations in e-mails and raised the possibility of suing.

B. Third Parties

In *Gallman v. Carnes*,[514] James W. Gallman, a law professor at the University of Arkansas at Fayetteville, sued the *Arkansas Gazette* for libel after it published extracts from two confidential reports that had been authored by members of the law school's Committee on Faculty Tenure and Promotion.[515] Both were highly critical of Gallman's teaching and scholarship.[516] Finding that Gallman had failed to make out a *prima facie* case, the trial court granted summary judgment.[517] On appeal, the Arkansas Supreme Court affirmed:

> [The appellant has] not demonstrated that the news article was published by the Gazette with actual malice; i.e. with knowledge of falsity or with a reckless disregard of falsity. It appears to us and we hold in the case at bar that Miss [Ginger] Shiras[, the reporter] met the required investigatory standards as prescribed by the controlling decisions interpreting the First Amendment as to freedom of press.[518]

Even dirtier laundry got aired in *Lassiter v. Lassiter*.[519] Christo Lassiter, a law professor at the University of Cincinnati, sued his former spouse, Sharlene G. Lassiter, a law professor at Northern Kentucky University, after she wrote a book in which she described his years of physical abuse and adultery.[520] Following a bench trial, the district court ruled for the ex-wife:

> The court finds that the defendant met her burden of proof . . . on the truth of the physical assault allegations in her book, but failed to carry her burden on the adultery allegations. However,[] the court concludes the adultery allegations were non-actionable statements of opinion under the criteria established by the Kentucky courts.[521]

The opposite result was reached in *Brummer v. Wey*.[522] While serving as a National Adjudicatory Council panel member,

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Id.

[514] Gallman v. Carnes, 497 S.W.2d 47 (Ark. 1973).

[515] *Id.* at 48.

[516] *Id.*

[517] *Id.*at 49.

[518] *Id.* at 51.

[519] Lassiter v. Lassiter, 456 F. Supp. 2d 876 (E.D. Ky. 2006).

[520] *Lassiter*, 456 F. Supp. 2d at 877, 878.

[521] *Id.* at 879. In affirming this conclusion, the Sixth Circuit wrote: "Rather than issue a detailed opinion, which would serve no useful purpose, we adopt the reasoning of the district court." Lassiter v. Lassiter, 280 F. App'x, 503, 504 (6th Cir. 2008).

[522] Brummer v. Wey, No. 153583/2015, 2016 N.Y. Misc. LEXIS 2029 (N.Y. Sup. Ct. Mar. 1, 2016).

Christopher J. Brummer, an African-American law professor at Georgetown University, upheld the Financial Industry Regulatory Authority's decision to permanently bar two African-American stockbrokers.[523] In response, an on-line magazine called *TheBlot* accused Brummer of being an "Uncle Tom," engaging in cuckoldry, and being under investigation for criminal fraud.[524] When Brummer sued the magazine for defamation, it argued its comments were protected by the First Amendment.[525] In denying its motion to dismiss, the New York Supreme Court wrote:

> The argument that the Complaint fails to state causes of action for defamation or defamation per se, because the statements plaintiff relies on are imprecise, ambiguous and "race baiting" or name calling which are not actionable, fails because the terms cited are taken out of context. Racist terms referring to plaintiff, as stated *TheBlot*, together with other statements describing the plaintiff as available for hire, involved in fraud, and affiliated with felons, could reasonably be susceptible to a defamatory connotation. The "articles" refer to plaintiff's alleged affiliation and implication in fraud investigations and the language is sufficiently specific to state a claim of defamation.[526]

In two cases, law professors sued when their characters were attacked while they were engaged in *pro bono* litigation. In *Little v. City of North Miami*,[527] Joseph W. Little, a law professor at the University of Florida, represented a group called Florida Defenders of the Environment ("FDE") in a lawsuit against the State of Florida.[528] The goal of the lawsuit was to stop the State from acquiring a piece of land owned by the City of North Miami.[529] Because the City wanted the deal to go through, it intervened in the lawsuit, which ultimately was won by FDE.[530]

In addition to joining the litigation, the City passed a resolution condemning Little: "[T]he Council of the City of North Miami hereby censures Professor Joseph W. Little for improper use of public funds

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[523] *Id.* at *1.

[524] *Id.* at *2.

[525] *Id.* at *3.

[526] *Id*. at 6–7.

[527] Little v. N. Miami, 624 F. Supp. 768 (S.D. Fla. 1985), *aff'd in part and rev'd in part*, Little v. City of N. Miami, 805 F.2d 962 (11th Cir. 1986).

[528] *See Little*, 805 F.2d at 964.

[529] *Id.*

[530] *See* Florida Def. of the Envtl. Inc. v. Graham, 462 So. 2d 59, 60, 61, 62 (Fla. Dist. Ct. App. 1984), *aff'd*, 481 So. 2d 1196 (Fla. 1985).

to represent private parties in litigation against the State and against the interests of the City of North Miami."[531] Although not spelled out by the resolution, the City believed that Little had a conflict of interest because he was a state employee.[532]

In response, Little filed a ten-count complaint against the City that contained an assortment of federal and state law claims.[533] In granting the City's motion to dismiss, the district court explained:

> The Resolution in the instant case can not be a bill of attainder because it is not a legislative pronouncement with the force of law, nor does it prescribe a penalty or punishment. . . . Since the City in adopting a Resolution has not initiated adversary proceedings, indicted or imposed legal sanctions, Sixth Amendment rights do not attach. Further, an allegation that amounts to nothing more than reputational harm does not establish the deprivation of a liberty or property interest repugnant to the due process clause. Since the Plaintiff's claim is not cognizable under 42 U.S.C. Section 1983, this Court is without subject matter jurisdiction to address the merits of the remaining state claims. Therefore, this case is hereby DISMISSED without prejudice to the Plaintiff to seek redress for the State claims in the appropriate forum—the State court.[534]

On appeal, the Eleventh Circuit upheld the dismissal of Little's Sixth Amendment and bill of attainder claims but reinstated his First Amendment and procedural due process claims: "Because we conclude that the resolution in question can be fairly characterized as 'a decision officially adopted and promulgated' by the City Council of North Miami, we conclude that the minimum requirements for imposing municipal liability have been alleged."[535] In a concurring opinion, District Judge Hoffman predicted Little would lose on the merits.[536]

Likewise, in *Paulsen v. Yarrell*,[537] James W. Paulsen, a law professor at the South Texas College of Law, accused family law attorney Ellen A. Yarrell of impeaching his reputation.[538] The sequence of events giving rise to their dispute can be summarized as

[531] *See Little*, 805 F.2d at 964.
[532] *Id.*
[533] *See id.*
[534] *Little*, 624 F. Supp. at 773–74.
[535] *Little*, 805 F.2d at 967 (citation omitted).
[536] *Id.* at 970 (Hoffman, J., concurring).
[537] Paulsen v. Yarrell, 455 S.W.3d 192 (Tex. App. 2014).
[538] *See id.* at 194.

follows: Yarrell was handling a child custody case involving two gay men;[539] Paulsen, acting as an amicus curiae, sent a letter to the judge hearing the case; Yarrell complained in writing to both the state bar and Paulsen's dean; and Paulsen sued Yarrell for defamation and tortious interference with his employment contract.[540] In an unpublished opinion, the trial court granted Yarrell's motion for partial summary judgment and declined to award attorneys' fee to Paulsen for defeating Yarrell's separate motion to dismiss.[541]

Disagreeing with these rulings, Paulsen and Yarrell both filed interlocutory appeals—Paulsen for not being awarded attorneys' fees and Yarrell for not prevailing on her motion to dismiss.[542] In a highly technical decision, the Texas Court of Appeals dismissed Paulsen's appeal for lack of jurisdiction and affirmed the denial of Yarrell's motion to dismiss.[543]

VIII. TAXES

Like everyone else, law professors have to pay taxes. And like many people, they do not always do so willingly.

From 1913 to 1926, Alfred S. Niles was a law professor at the University of Maryland.[544] Following his death, his administrator claimed that his 1925 and 1926 salaries were non-taxable because of a federal rule that exempted monies paid to state officers.[545] In *Niles v. Commissioner of Internal Revenue*, the Board of Tax Appeals disagreed:

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[539] *See* Berwick v. Wagner, 336 S.W.3d 805, 806, 807 (Tex. Ct. App. 2011), *aff'd,* Berwick v. Wagner, 509 S.W.3d 411, 415 (Tex. Ct. App. 2014). Berwick argued that he should be awarded sole custody because only his sperm had been used to conceive the child; Wagner, represented by Yarrell, sought shared custody on the basis of a California court order that recognized both Berwick and Wagner as having parental rights. *Berwick*, 336 S.W.3d at 807. Following a jury trial, sole custody was awarded to Wagner. *See Berwick*, 509 S.W.3d at 415. What made the case particularly contentious was the fact that after living with Wagner for fourteen years, Berwick announced he was not gay and married a woman. *See* Eugene Volokh, *C.B.W. Has Two Daddies–Even in Houston; and the Gay One Gets Custody, Says the Jury*, WASH. POST (Sept. 22, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/22/c-b-w-has-two-daddies-even-in-houston-and-the-gay-one-gets-custody-says-the-jury/.

[540] *Paulsen*, 455 S.W.3d at 194.

[541] *Id.* at 193, 194.

[542] *Id.* at 194.

[543] *Id.*; *see also* Jess Krochtengel, *Prof Wants Atty on Hook for Complaint About Amicus Brief*, LAW360 (July 26, 2016), https://www.law360.com/articles/821533/prof-wants-atty-on-hook-for-complaint-about-amicus-brief (explaining that the case has been thrown out by the trial court but that Paulsen tried to revive it).

[544] *Biography of Alfred S. Niles*, ARCHIVES OF MD., http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012400/012495/html/12495bio.html (last visited Oct. 28, 2017).

[545] Niles v. Commissioner of Internal Revenue, 20 B.T.A. 949, 949, 952 (B.T.A. 1930), *remanded by* 63 F.2d 1011 (4th Cir. 1932).

> Perhaps no one thing about the manner in which or the circumstances under which the law school of the University of Maryland was conducted during the years 1925 and 1926 discussed in the foregoing opinion is decisive of the question before us. But after giving due consideration to all, and without relying solely on any one fact or circumstance, we are satisfied that during the years in question, in the conduct and direction of the law school of the University of Maryland, no governmental function of the State, essential or otherwise, was performed or discharged which by necessary implication is immune from such interference as Federal taxation of the salary of one of the professors in that law school. Niles was not an officer or employee of the State of Maryland, did not render services as such, and received no compensation for services rendered as such.[546]

A number of other law professors have gone to court to dispute their tax bills. In *Ryman v. Commissioner of Internal Revenue*,[547] for example, Arthur E. Ryman, Jr. was a law professor at Drake University.[548] When he joined the faculty in 1961, he was a member of the Colorado bar but not the Iowa bar.[549] As a result, in 1963 he took and passed the Iowa bar exam.[550] On his 1963 tax return, Ryman deducted his bar admission fee ($126) as well as the cost of a celebratory party he had thrown for himself ($177.17).[551] The Tax Court disallowed both of these items, the former because it was a capital expense and the latter because the party was for personal rather than business purposes:

> Petitioner's testimony would seem to preclude any finding that the expenditure was incurred for the production of income or incurred in his trade or business of being an attorney. When asked if the party was held to advertise his dual status as a law teacher and as a lawyer, petitioner replied: "Well, no, because I had no expectation that I was going to do any substantial practicing or making any substantial money that way. My primary business is as a law teacher and there is a restricted amount of practice that a full-time law teacher can do." Thus, it would seem that the

[546] *Niles*, 20 B.T.A. at 959–60.
[547] Ryman v. Comm'r, 51 T.C. 799 (T.C. 1969).
[548] *See id.* at 799, 800.
[549] *Id.* at 800.
[550] *See id.*
[551] *See id.* at 803–04.

> expenditure could only have been incurred in his status as a law professor.[552]

In *Knapp v. Commissioner of Internal Revenue*,[553] Charles L. Knapp, a law professor at New York University, received $8,250 from the law school's foundation to help pay the cost of his daughters' tuition at the Brearley School and Swarthmore College.[554] On his taxes, Knapp treated the grants as tax-exempt educational scholarships.[555] The government insisted they were taxable income.[556] The Tax Court agreed, as did the Second Circuit:

> The final sentence of Regulation 1.117-3(a) . . . is at the heart of the dispute in this case. That sentence . . . provided for the exclusion from gross income of benefits provided under tuition remission arrangements between educational employers. . . . By exempting only payments by the school attended by the students pursuant to a tuition assistance arrangement, this sentence by implication excludes from the definition of scholarship payments by the employing institution. The payments at issue in the present case are thus not scholarships under the Regulation and are taxable income.[557]

In *Scallen v. Commissioner of Internal Revenue*,[558] Stephen B. Scallen, a law professor at the University of Minnesota, made millions of dollars investing in real estate.[559] He and his wife paid no income tax on these earnings, however, by consistently claiming large net operating losses.[560] Concluding that Scallen had engaged in fraud, the Tax Court ordered the couple to pay nearly $1 million in back taxes and penalties.[561] On appeal, the Eighth Circuit affirmed:

> Appellants . . . assert that there are innocent explanations for all of the . . . irregularities. They contend that the

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[552] *Id*. at 804 n.12.

[553] Knapp v. Comm'r, 90 T.C. 430 (T.C. 1988), *aff'd*, 867 F.2d 749 (2d Cir. 1989), *reh'g denied*, 870 F.2d 93 (2d Cir. 1989).

[554] *Knapp*, 90 T.C. at 432, 433.

[555] *Id.* at 433.

[556] *Id.*

[557] *Knapp*, 867 F.2d at 751–52.

[558] Scallen v. Comm'r, 54 T.C.M. (CCH) 177 (1987), *aff'd*, 877 F.2d 1364 (8th Cir. 1989).

[559] Ministers Life & Cas. Union v. Franklin Park Towers Corp., 239 N.W.2d 207, 208–09 (Minn. 1976) ("Franklin is a holding corporation engaged in the construction and operation of apartment rental units. Its president and sole shareholder, Stephen A. Scallen (Scallen), is an experienced lawyer, holds a faculty position at the University of Minnesota Law School, and has conducted courses and seminars in real estate law. He is an experienced and sophisticated real estate developer and investor, who at the time of trial had interests in over a dozen real estate development projects with mortgage balances in excess of 20 million dollars.").).

[560] *Scallen*, 877 F.2d at 1365.

[561] *See Scallen*, 54 T.C.M. at 209.

> irregularities were the result of honest errors committed by Scallen or his accountant, Donald J. Hamm (Hamm), or were the result of positions taken in good faith with support in the law. They also contend that Scallen's business methods were not designed with an intent to evade the income tax. The Tax Court rejected these contentions. We cannot say that the Tax Court was clearly erroneous in this respect. Our holding in this respect is based on the following considerations.
>
> Scallen is an attorney with extensive experience in income tax matters. He practiced tax law for two years. He taught tax courses at the law school during the tax years in question [1976-81]. He has written at least three legal articles on tax related subjects. The intelligence and sophistication of the taxpayer—especially his knowledge of the tax laws—is an important factor in determining whether he committed fraud.[562]

Lastly, in *Zelinsky v. Tax Appeals Tribunal of the State of New York*,[563] Edward A. Zelinsky, a law professor at Yeshiva University, argued that New York State could not tax him on his full salary because he spent two days a week working at his home in Connecticut.[564] The lower courts disagreed, as did the New York State Court of Appeals:

> Allowing this taxpayer to allocate his income to Connecticut when he stays home to do his work in connection with his teaching activity would enable him to avoid paying taxes that his colleagues who do that work at home in New York—or at the law school—pay. The Constitution does not require that a nonresident who does not opt for the personal convenience of taking work home rather than traveling into work every day be taxed at a higher effective tax rate than one who does. The State need not subsidize such personal convenience, while at the same time discouraging commuting into New York City and facilitating erosion of the tax base.[565]

IX. CONCLUSION

Law professors regularly step out of the classroom and into the

[562] *Scallen*, 877 F.2d at 1370–71 (citations omitted).

[563] Zelinsky v. Tax Appeals Tribunal, 753 N.Y.S.2d 144 (App. Div. 2002), *aff'd*, 801 N.E.2d 840 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004).

[564] *See Zelinsky*, 753 N.Y.S.2d at 145.

[565] *Zelinsky*, 801 N.E.2d 840 at 847.

courtroom to vindicate the rights of others. Every so often, however, as this article has shown, they are there seeking—and sometimes finding—justice for themselves.