



National Association of College and University Attorneys
Presents:

**Yes We Can: Approaches to Post-Tenure
Faculty Review**

Webinar

March 16, 2023

12:00 PM – 1:30 PM Eastern
11:00 AM – 12:30 PM Central
10:00 AM – 11:30 AM Mountain
9:00 AM – 10:30 AM Pacific

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Yes We Can: Approaches to Post-Tenure Faculty Review



Elizabeth Bullock is Senior Vice Chancellor for Legal Affairs and General Counsel at the University of Denver. In this role, she serves as the University’s chief legal officer and leads the Office of General Counsel and its team of attorneys. She provides strategic legal guidance, consultation and support to the chancellor, trustees, and senior administrators, on topics including employment law, faculty and student affairs, institutional policies, Title IX, institutional governance, nonprofit laws, and other laws and regulations.

Elizabeth previously served as general counsel at the University of Tulsa and associate attorney at Harvard University. She has also practiced as associate attorney at the Jenner & Block LLP in Washington, D.C. and served as a law clerk for the Honorable Stephanie K. Seymour of the U.S. Court of Appeals for the Tenth Circuit. Elizabeth received her J.D. from Yale Law School and a B.A. from the University of Notre Dame.



Alexandra A. Mitropoulos (“Allie”) advises and represents colleges, universities and other non-profits on policy, compliance, and risk management issues. Allie has particular experience in the areas of campus safety and security, Title IX, the Clery Act, employment based immigration, state, federal and international data privacy regulations, the Family Educational Rights and Privacy Act (FERPA), student affairs, faculty misconduct, and complex contracts. She defends colleges and universities in an array of litigation matters in both state and federal court and conducts investigations regarding policy violations and harassment based on sex, race, and disability. In addition, Allie provides advice on policies and procedures, and conducts training. In addition to her role at the firm, Allie also serves as Deputy General Counsel at Berklee College of Music in Boston.

Materials

Substantially Compiled by Alan Grose, Law Fellow, NACUA

Resources

NACUA Resource Page

[Resource Page on Tenure](#)

NACUA Materials

[Managing Faculty Misconduct: When Good Educators Do Bad Things](#)

Ellen Babbitt, W. Scott Cole, Kate L. Nash
Spring 2022 CLE Workshop

[Faculty Termination Without Litigation? It's EEEEEasy](#)

Meredith Green, Jesh Humphrey
2022 Annual Conference

NACUA Webinar

[Addressing Faculty Misconduct](#)

Naomi Haslitt, Barbara Lee, Jan Alan Neiger
March 19, 2019

Relevant Resources

[Ending Mandatory Retirement for Faculty: The Consequences for Higher Education](#)

National Research Council
1991

[Post-Tenure Review: An AAUP Response](#)

American Association of University Professors
1999

[1940 Statement of Principles on Academic Freedom and Tenure](#)

American Association of University Professors

Recent Relevant Cases Involving Tenured Faculty

Race and National Origin Discrimination; Sex Discrimination in Employment

Leech v. Miss. Coll. (S.D. Miss. Jan. 17, 2023)

Order granting-in-part and denying-in-part Defendant's Motion for Partial Dismissal. Plaintiff, a former instructor at the Mississippi College School of Law who was on a presumptively renewable contract with the tenure-like protections of ABA Standard 405(c), brought multiple claims against the College, alleging a pattern of harassment and discrimination by an Associate Dean and ultimately constructive discharge. Plaintiff alleged that she complained of the treatment and that multiple instructors raised concerns about their experiences with 405(c) contracts during the ABA's seven-year assessment visit. She further alleged that the College then offered a 405(c) contract to an African American instructor but offered her only a non-renewable, non-405(c) contract. As a threshold matter, the court dismissed plaintiff's disparate impact, race-based hostile work environment, and age discrimination claims for lack of administrative exhaustion because they exceeded the scope of her EEOC charge of discrimination. It dismissed her Equal Pay Act claim for failure to identify a similarly situated male comparator. The court, however, permitted her to proceed on her IIED claim, finding that she had sufficiently alleged a "pattern of deliberate, repeated harassment." Plaintiff's Title VII retaliation and contract claims were not at issue in this motion.

Academic Freedom & Employee Speech; Retaliation; Due Process

Bhattacharya v. The Bd. of Regents of Se. Mo. State Univ. (E.D. Mo. Dec. 22, 2022)

Memorandum and Order granting Defendants' Motion to Dismiss. Plaintiff, a tenured professor of mechanical engineering at Southeast Missouri State University, brought multiple First Amendment, Due Process, and state-law claims against the University after it reassigned him from teaching to clerical duties and initiated a review process to determine whether he neglected his professional responsibilities following multiple complaints from students and faculty about his professionalism. Plaintiff alleged that the complaints and review were retaliation for his vocal opposition to the University's reorganization of its engineering programs. In dismissing plaintiff's First Amendment claims, the court held that because the statements he asserted were the basis of the alleged retaliation were of very little public concern, and were made in the course of his usual duties at the University, he failed to plead that he had engaged in protected speech. Turning to his Due Process claims, the court held that plaintiff's argument that the University's policies were unconstitutionally vague failed because (1) his own pleadings showed that he had received multiple communications notifying him of his problematic conduct and (2) his claims were otherwise not ripe for consideration because he was still employed by the University. The court declined to exercise supplemental jurisdiction over plaintiff's state-law claims.

First Amendment & Free Speech; Academic Freedom & Employee Speech; Retaliation

Update: Stern v. Leath (M.D. Ala. Mar. 31, 2022, Updated Nov. 15, 2022)

Memorandum Opinion and Order granting-in-part and denying-in-part Defendant's Motion for Summary Judgment. Plaintiff, a tenured associate professor and former chair of the Department of Economics at Auburn University, brought First Amendment retaliation claims against two deans, the Provost, and the President, after he was removed as department chair and did not receive pay increases following his criticisms of the University in University Senate meetings and in the national press for an alleged clustering of student-athletes in the public administration major. The court granted summary judgment to the defendants on some of plaintiff's claims, finding that large-scale institutional decisions,

such as whether to house the Department within the College of Arts and Sciences, were not adverse employment actions and that plaintiff's opposition to these decisions was not protected speech because they concerned matters of institutional efficiency. The court, however, found that plaintiff's criticisms of the public affairs major were protected speech because they concerned matters of public concern beyond the scope of his duties in the Department of Economics and because they were made in the press or in the University Senate, which is "a public forum open for anyone to ask questions of a presenter." [Update \(Nov. 15, 2022\): A jury awarded plaintiff \\$645,837.00 in compensatory and punitive damages.](#)

First Amendment & Free Speech; Academic Freedom & Employee Speech

[**Seals v. Leath \(M.D. Ala. Nov. 3, 2022\)**](#)

Memorandum Opinion and Order granting-in-part and denying-in-part Defendants' Motion for Summary Judgment. Plaintiff, a tenured professor and former Graduate Program Officer (GPO) in the Department of Economics at Auburn University, brought First Amendment retaliation claims against multiple University officials asserting that he was removed as GPO and suffered various other alleged injuries after he criticized the University on campus and in the press regarding an alleged disproportionate clustering of student-athletes in a major that plaintiff and others argued was not academically rigorous and should be discontinued. After finding that many of plaintiff's alleged retaliatory actions were time-barred or unactionable, the court dismissed his claim that his low merit raise for 2019 was retaliatory, finding no evidence in the record to suggest that the low score assigned in his annual review by the interim department chair was based on anything other than plaintiff's research output. The court, however, permitted plaintiff's retaliation claim to proceed based on allegations that the dean removed him as GPO based on suspicions that he was involved with a story in the *Chronicle of Higher Education*.

Retaliation; Sex Discrimination in Employment; First Amendment & Free Speech

[**Burton v. Bd. of Regents of the Univ. of Wis. Sys. \(7th Cir. Nov. 15, 2022\)**](#)

Order affirming summary judgment in favor of the University. Plaintiff, a former tenured associate professor of criminal justice at the University of Wisconsin-Platteville, brought Title VII and First Amendment retaliation claims after she was terminated for (1) disclosing private information by secretly recording meetings and posting the recordings or transcripts online; and (2) disrespectful, harassing, and intimidating behavior toward colleagues, despite two formal letters directing her to desist. In affirming summary judgment in favor of the University, the Seventh Circuit held that even though plaintiff had asserted that she had opposed discriminatory practices, "the University can lawfully discipline her for expressing a Title VII grievance in a way that egregiously violates neutral professional rules or norms." Turning to her First Amendment retaliation claim, the court held (1) that she had not offered evidence that the University's stated grounds for her termination were pretextual, and (2) that despite her assertion that her complaints about the University's sexual harassment policy were on her own initiative and that she was entitled to academic freedom, unsolicited reports of misconduct that go "above and beyond" the employee's duties can still be a part of the job and, thus, not protected by the First Amendment.

Employment Separation, RIFs, ERIPs & Retrenchment; Tenure

[**Hansbrough v. The Coll. Of Saint Rose \(N.Y. App. Div. Oct. 20, 2022\)**](#)

Opinion and Order modifying the order and judgment of the New York Supreme Court and dismissing petitioners' contract action with prejudice. Petitioners, tenured music professors at the College of Saint

Rose who were terminated pursuant to a retrenchment process that had been initiated after respondents were unable to mitigate financial exigency by depleting cash reserves or utilizing unrestricted endowment funds, brought an Article 78 proceeding against the College, alleging that the College breached a contract by terminating their employment. Overturning a lower court determination that the College departed from procedural requirements and acted arbitrarily and capriciously, the appellate court found that the College neither engaged in procedural missteps nor acted without a rational basis. Rather, the College followed the procedures set forth in the retrenchment process, and respondents were entitled both to judicial deference for their interpretation of the termination preference and to dismissal with prejudice.

Employee Discipline & Due Process

Porter v. Sergent (E.D. Ky. Sep. 28, 2022)

Opinion and Order granting defendants' motions for summary judgment. Plaintiff, a former tenured professor of psychology at Berea College, brought discrimination, retaliation, and contract claims against the College after it terminated him for publishing a survey about a series of "hypothetical" scenarios mirroring a recent Title IX investigation that found his department chair responsible for creating a hostile work environment for three female colleagues. Plaintiff also brought defamation, false light, and retaliation claims against Dr. F. Tyler Sergent, a faculty advisor of the Student Government Association (SGA), after he warned student leaders not to enter the controversy by awarding plaintiff a student service award. In granting summary judgment to the College on plaintiff's discrimination and retaliation claims, the court held (1) that an allegedly discriminatory Facebook posting by a colleague cannot be attributed to the College and (2) plaintiff failed either to present a suitable comparator or to demonstrate that the College's reasons for his termination were pretextual. Turning to plaintiff's contract claims, the court held that the College fulfilled the procedural requirements outlined in its Faculty Manual in both his suspension and termination. In granting summary judgment in favor of Sergent on plaintiff's defamation and false light claims, the court held that because Sergent was an SGA advisor who provided relevant information to student leaders, he was shielded by the qualified privilege of common interest. It dismissed plaintiff's retaliation claim against Sergent, holding that plaintiff insufficiently alleged that he engaged in a protected activity.

Family and Medical Leave Act (FMLA); Retaliation; Disability Discrimination

Turner v. Bd. of Supervisors of the Univ. of La. Sys. (E.D. La. Sep. 27, 2022)

Order & Reasons granting Defendants' Motion for Summary Judgment. Plaintiff, a former tenured English professor at Nicholls State University, brought interference and retaliations claims under the Family Medical Leave Act (FMLA) and a state-law disability discrimination claim against the University and multiple officials, alleging that following her diagnosis with irritable bowel syndrome and approval for intermittent FMLA leave, the University nevertheless required her to submit doctor's notes for each absence and reassigned her to the Writing Lab allegedly as a way to force her to retire. In granting summary judgment to the University on plaintiff's FMLA interference claim, the court held that the University was entitled to request the doctor's notes because plaintiff also sought pay for her absences from accrued paid sick leave. Turning to her retaliation claim, it held that she failed to show an adverse action because she had already announced her retirement, and the reassignment to the Writing Lab was a measure to allow her to finish the academic year. In awarding summary judgment to the University on plaintiff's state-law disability discrimination claim, the court held that although a genuine dispute remained as to whether in-person instruction was an essential function of plaintiff's job,

plaintiff's desired accommodation to teach online was not reasonable because it would have required reassigning adjunct instructors who were already scheduled to teach online.

Title IX & Student Sexual Misconduct; Employee Sexual Misconduct; Retaliation

[Verdu v. The Trs. of Princeton Univ. \(3rd Cir. Sep. 27, 2022\)](#)

Opinion affirming dismissal. Plaintiff, a former tenured professor at Princeton University, brought Title IX and Title VII claims against the Board of Trustees after the University (1) found him responsible for the sexual harassment of a graduate student and suspended him for a year and (2) terminated him after a subsequent investigation found he had lied to investigators about a romantic relationship with another graduate student whose dissertation he was supervising. In affirming dismissal of plaintiff's Title IX claims, the Third Circuit held (1) that his erroneous outcome and selective enforcement claims failed both because he failed to show that the University investigated him because of his sex and because he ultimately admitted to violating the University's policy on romantic relationships within a teacher-student relationship and (2) that his retaliation claim failed because he had not alleged that he had engaged in activity protected under Title IX. Turning to his Title VII claims, the court held that (1) his disparate treatment claim failed because his accuser is not similarly situated and (2) his hostile work environment claim failed because his allegation that the subsequent investigation resulted from a grudge held against him by a former colleague failed to allege discrimination based on membership in a protected class.

Freedom of Information & Public Record Laws

[Rushing v. Se. La. Univ., et al. \(La. App. Sep. 16, 2022\)](#)

Opinion affirming the trial court decision in favor of the University. Plaintiff, a former tenured professor at Southeastern Louisiana University, sued the University and multiple officials alleging violations of Louisiana's Open Meetings Law, asserting that the Faculty Senate had not published notice for or minutes from several meetings in 2018 and that the Faculty Senate improperly omitted his proposals from its September 26, 2018, meeting agenda and lacked cause to remove him from its meeting on October 3, 2018. After reviewing testimony that described plaintiff's behavior in the meetings as "antics" that were "severely unprofessional" and "very threatening," the court of appeals found no error in the trial court's decision not to void actions taken at the meetings. It similarly held that the trial court had not abused its discretion in declining to grant relief even though it had found technical violations of the Open Meetings Law requirements for notice of meetings.

Due Process; Tort Litigation

[Gooden v. Walton \(E.D. Pa. Sep. 13, 2022\)](#)

Memorandum Opinion granting-in-part and denying-in-part Defendants' Motions to Dismiss. Plaintiff, a tenured chemistry professor at Cheyney University whose research concerned possible treatments for the herpes virus and cancer, brought multiple claims against two sets of defendants: (1) the University, its President, Aaron Walton, and other officials, and (2) Epcot Crenshaw Inc., a science and technology company, and its CEO, Charles Smith. Plaintiff alleged (1) that between Fall 2019 and Spring 2020, without notice, Walton leased the laboratory space where he taught and conducted his personal research to Epcot, and (2) that Smith, who knew of his research, changed the locks and prevented him from recovering his equipment and data. Though the court found many of plaintiff's claims insufficiently pled or barred by sovereign immunity, it permitted his due process claim to proceed against Walton, finding that plaintiff was contractually entitled to use the lab, that Walton knew it contained his intellectual property, and that his grievance was not properly processed. The court also permitted

plaintiff to proceed on his negligence claim against Walton and University related to the loss of his personal research. Finally, the court permitted plaintiff's claim against Epcot and Smith to proceed for alleged intentional interference with his contract to teach and conduct research at Cheyney.

First Amendment & Free Speech; Retaliation

[Porter v. Bd. of Trs. of N.C. State Univ. \(E.D.N.C. June 17, 2022\)](#)

Opinion and Order granting Defendants' Motion to Dismiss. Plaintiff, a tenured professor in the College of Education at North Carolina State University, brought First Amendment retaliation claims against the University, University officials, and multiple colleagues after he was removed from the Higher Education Program Area, required to teach an additional course, and not invited to join a newly formed Higher Education Access, Equity, and Justice program area, when he failed to address concerns about his lack of collegiality in criticisms of the School's efforts to promote diversity, equity, and inclusion. In dismissing plaintiff's retaliation claim, the court held that plaintiff failed to demonstrate that he suffered a materially adverse employment action because he remained a tenured professor, his pay was not diminished, and the chance that he might suffer future damages because he might not be able to attract new advisees was speculative. The court also found that plaintiff was unable to establish a causal connection between these actions and his alleged protected speech because the last instance of protected speech was eleven months before he was removed from the Program Area and because he had not plausibly alleged that his protected speech was the reason why he was described in a department Climate Study as a "bully" or why his colleagues had complained that his interactions were unprofessional and disrespectful.

Age Discrimination

[Barrow v. Kan. State Univ. \(D. Kan. June 9, 2022\)](#)

Memorandum and Order granting Defendants' Motions to Dismiss. Plaintiff, a tenured faculty member at Kansas State University, brought age discrimination and constitutional claims against the University and multiple officials in their individual and official capacities after the University accepted her written notice of her plan to retire and declined her subsequent request to postpone by a year. In dismissing plaintiff's federal claims, the court held that the University is protected by sovereign immunity and that the individual plaintiffs are entitled to qualified immunity in their individual capacities. The court further held that plaintiff's procedural due process rights in challenging the University's decision not to revise her notice of retirement were satisfied by the University's grievance process. The court then declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims.

Sex Discrimination in Employment

[Palade v. Bd. of Trs. of the Univ. of Ark. Sys. \(Ark June 2, 2022\)](#) [Link no longer available]

Opinion affirming dismissal. Plaintiffs, tenured faculty members in the University of Arkansas System, on behalf of themselves and a putative class, sued the System's Board and individual Trustees in state court reasserting state law claims that had been dismissed in a federal action filed after the Trustees adopted a revised policy on faculty promotion, tenure, and annual reviews. Plaintiffs asserted that the revised policy expanded the potential grounds for discipline or dismissal for cause and that this had chilled their communications. The Trustees countered that the revisions left guarantees of academic freedom in place and were intended to clarify, rather than to expand, the potential grounds for discipline or termination. In affirming dismissal for lack of a justiciable controversy, the court noted that plaintiffs pointed to no faculty member who had been disciplined under the revised policy and failed to allege any facts regarding speech that had been chilled.

Indemnity & Insurance; Employee Sexual Misconduct

[The Bd. of Trs. of the Univ. of Ill. v. Schewe \(Ill. App. May 27, 2022\)](#)

Order affirming partial summary judgment in favor of the defendant. The Board of Trustees of the University of Illinois sought a declaratory judgment that it did not have a duty under its self-insurance plan to defend or to indemnify claims against Paul Schewe, a tenured professor and director of graduate studies in criminology at the University of Illinois Chicago, who is facing a federal civil rights complaint by six former graduate students alleging sexual misconduct and harassment. In affirming partial summary judgment in favor of Schewe on the University's duty to defend, the court first found that at least some of the alleged misconduct occurred when Schewe was acting within the scope of his university duties. The court noted that some of the alleged inappropriate comments were made in his on-campus office and that some of the alleged off-campus inappropriate conducted occurred when he decided to hold class or other meetings on his boat. Additionally, the court noted Schewe's assertion that his duties as director of graduate studies extended well beyond the classroom to include holding events to help students meet and develop networks among their peers. The court next found that at least some of the actions alleged in the students' complaint fell within the definition of an "occurrence" in the University's policy because it is "not a foregone conclusion that [he] intended to injure his students with his words and actions." Rather, his intent is a matter yet to be resolved, which is sufficient to give rise to the duty to defend. The court, however, also affirmed the lower court's holding that the University's duty to indemnify claims was not yet ripe for consideration.

First Amendment & Free Speech; Retaliation

[Weiss v. Perez \(N.D. Cal. May 10, 2022\)](#)

Opinion and Order granting Defendants' Motion to Dismiss and Denying Plaintiff's Motion for a Preliminary Injunction. Plaintiff, a tenured professor of physical anthropology at San Jose State University and Collections Coordinator for the University's collection of skeletal remains and a long-standing critic of efforts to repatriate Native American remains to tribal descendants, sued the University alleging retaliation after it instituted a policy directive aligned with the Native American Graves Protection and Repatriation Act that effectively prevented her from conducting planned research. The court first dismissed plaintiff's claims concerning the policy directive, finding that the Muwekma Ohlone Tribe is a necessary party to the proceeding in order for its interests in the remains to be adequately protected, but that the Tribe cannot be joined because it has sovereign immunity. Turning to plaintiff's First Amendment retaliation claim, the court found that plaintiff failed to allege that she suffered an adverse employment action because she had not shown that her loss of curatorial responsibilities extended to all of the University's collections. Similarly, the court found that plaintiff had not shown that her speech motivated the new policy directive because her views had long been known and subject to criticism. Rather, the court found plaintiff's allegation that the directive followed a specific tweet presented an obvious alternative explanation because that tweet showed her holding a skull from the collection without gloves, which prompted the University to reexamine its compliance protocols.

Race and National Origin Discrimination; Retaliation

[Henderson v. Pa. State Univ. \(M.D. Pa. Mar. 21, 2022\)](#)

Memorandum Opinion granting-in-part and denying-in-part Defendant's Motion to Dismiss. Plaintiff, a tenured associate professor of Political Science and Africana Studies at Penn State University who is African American, brought discrimination, hostile work environment, and retaliation claims after the

University declined to promote him to full professor and imposed sanctions on him for his “public denunciations of colleagues,” including “a two-year ban from participation on departmental committees, a ban from all departmental meetings and events, a prohibition on teaching during the 2019-2020 school year, and a requirement that [he] take remedial teaching courses to improve his classroom performance.” The court dismissed plaintiff’s claims under §1981 because the University is a state actor, but it allowed him leave to raise his claims under §1983. The court permitted plaintiff’s failure-to-promote claim to proceed, finding that “the role of full professor is not a specific vacancy” that was denied to him in a discrete act in 2017 when his department chair indicated she would not recommend him for promotion. Though the court similarly held that plaintiff’s hostile work environment claim was not time barred under the continuing violations doctrine, it found that his allegations were conclusory and had insufficiently pled pervasive or severe discrimination. In granting plaintiff leave to amend this claim, the court observed that plaintiff “must ‘put some meat on the bones’ of his allegations in order to support his claim that racism and racial biases permeate” the University.

Tenure; Faculty & Staff; Grants, Contracts, & Sponsored Research

[Monaco v. N.Y. Univ. \(N.Y. Sup. Ct. Feb. 22, 2022\)](#) [Link no longer available]

Order modifying the trial court’s award of summary judgment in favor of the defendant. Plaintiffs, two tenured professors at New York University School of Medicine, brought breach of contract and promissory estoppel claims after their salaries were reduced when the University adopted a “Required Extramural Funding Policy” (REF Policy), which required faculty to secure extramural funding to cover 60% of their research salaries and permitted the University to reduce their salaries by 20% each year if they did not secure at least 20% of their salaries in grants for two years. Plaintiffs challenged the salary reductions under the REF Policy, asserting that they were barred by a statement on “The Case for Academic Tenure” adopted by the University’s Trustees in 1940 and incorporated in the Faculty Handbook that tenure is a means to the end of “a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability.” The trial court granted summary judgment in favor of the University. In reviewing plaintiffs’ argument that the term “economic security” was ambiguous, the court found that it was prefatory and too vague to entail an enforceable promise. The court also rejected plaintiffs’ assertion that the reductions departed from the University’s disciplinary procedures, noting that “the REF Policy is not disciplinary because it provides not only for salary decreases, but also for salary increases.” The court, however, modified the summary judgment order to the extent of granting it to plaintiff Professor Samuels, finding that his salary was governed by a 2001 letter of appointment that did provide a salary guarantee.

Employee Sexual Misconduct; Employee Discipline & Due Process

[Chaudhuri v. The Regents of The Univ. of Cal. \(Cal. App. Feb. 1, 2022\)](#)

Opinion affirming denial of Plaintiff’s petition for a writ of prohibition. Plaintiff, a tenured professor and chair of the Department of Obstetrics and Gynecology at UCLA, challenged the imposition of disciplinary actions recommended by the University’s Committee on Privilege & Tenure in the wake of a determination by a University Title IX Complaint Review Officer finding him responsible for violating the UC Policy on Sexual Harassment and finding probable cause that he violated the Faculty Code of Conduct. In reviewing the Committee’s administrative process, the trial court found the evidence in the Committee’s record insufficient and issued a writ blocking the imposition of sanctions. When the University scheduled a new evidentiary hearing, plaintiff challenged, arguing that a second hearing was barred by the writ and violated his due process rights. The court affirmed the trial court’s holding that the writ applied only to imposition of sanctions based on the record as it then existed. In reviewing

plaintiff's due process claims, the court found that plaintiff's property interest in employment with the University did not trigger strict scrutiny of the University's administrative processes and that the University's renewed proceeding is rationally related to its asserted "obligation to address sexual misconduct in its community and the debilitating effect that such misconduct has on its victims and the university's mission."

Constitutional Issues; Fourth Amendment & Search and Seizure

Goydos v. Rutgers, State Univ. (D. N.J. Oct. 29, 2021)

Memorandum Opinion granting-in-part and denying-in-part Defendants' Motion to Dismiss. Plaintiff, a former tenured professor at Rutgers University who was eventually arrested and indicted for serious crimes that came to light as a result of a workplace investigation, brought a civil action against Rutgers, challenging the constitutionality of defendants' actions in connection with the internal workplace investigation. Though the court dismissed plaintiff's First Amendment and due process claims, the court allowed several of plaintiff's other constitutional claims to proceed. Notably, early efforts to image plaintiff's computer implicated Fourth Amendment privacy claims. Though acknowledging that the U.S. Supreme Court has made clear that investigations into workplace misconduct may not violate the Fourth Amendment, the facts as pled, and construed in the light most favorable to plaintiff, sufficiently alleged that there were no reasonable grounds for suspecting workplace misconduct in the first instance that Rutgers imaged plaintiff's computer. The court also allowed plaintiff's 5th Amendment claim to proceed based on allegations that Rutgers "demand[ed]" he appear for a deposition-like interview in connection with the internal investigation, and that he was compelled via threat of termination to testify and answer incriminating questions.

Sexual Misconduct; Employee Sexual Misconduct; Faculty & Staff; Tenure; Constitutional Issues; First Amendment & Free Speech; Retaliation

Trudeau v. University of North Texas (5th Cir. July 9, 2021)

Per curiam opinion affirming the decision of the district court in favor of the defendant. Plaintiff, a tenured associate professor at the University of North Texas (UNT), brought Title IX retaliation, First Amendment, and due process claims against UNT and several individual defendants after the university sanctioned him for sexual harassment. The district court properly dismissed plaintiff's Title IX retaliation claim because plaintiff failed to allege that UNT sanctioned plaintiff because of his participation in the Title IX investigation or for any other protected activity. Plaintiff also failed to state a First Amendment claim because he neither alleged that assigned reading on eroticism was the reason for his discipline, nor that his comments about students' sex lives, in-class nudity, or other similar topics involved matters of public concern. Finally, the court properly dismissed plaintiff's due process claim because he did not identify a property interest created by contract that memorialized any of the procedural protections he alleged were due.

Retaliation; Discrimination, Accommodation, & Diversity; Tenure; Faculty & Staff

Khatri v. Bd. of Trs. of the Univ. of Dist. of Columbia (D. D.C. June 11, 2021)

Memorandum Opinion granting-in-part and denying-in-part Defendant's Motion to Dismiss. Plaintiff, a tenured physics professor at the University of the District of Columbia (UDC), brought *pro se* claims against UDC when it declined to rehire him in 2018 after laying him off in 2015. He alleged that these actions were taken in retaliation for plaintiff having challenged "purportedly illegal hiring practices" between 1999 and 2014 and for filing various EEOC charges related to the UDC layoffs. Affording latitude to plaintiff as a *pro se* litigant, the court allowed a number of plaintiff's claims to proceed, based

on minimal findings that plaintiff sufficiently pled the basic elements of retaliation. Most notably in the analysis, the court was persuaded by plaintiff’s argument that because he was tenured, “years” or “even decades” could elapse between an alleged protected activity and an adverse action without breaking a causal chain. This reasoning led the court to conclude that a protected activity undertaken in 1999, and alleged adverse actions in 2015 and 2018, could serve as the basis for a viable retaliation claim.

Constitutional Issues; Due Process

Arana-Santiago v. Tapia-Maldonado (D. P.R. June 3, 2021)

Opinion and order granting Defendants’ Motion to Dismiss. Plaintiff, a former tenured professor at the University of Puerto Rico, alleged that the University abridged his rights to due process and equal protection by terminating plaintiff’s employment after a sexual misconduct investigation, despite the examining officer’s recommendation that the charges be dropped. The University satisfied constitutional due process requirements by notifying plaintiff of the charges and attendant sanctioning possibilities and holding a multi-year procedural process. It was immaterial to the due process analysis that the examining officer recommended that the institution drop the charges. Additionally, the court dismissed plaintiff’s equal protection claim because plaintiff did not allege that he was treated differently from other employees outside of his protected class. Having dismissed these claims and others over which the court has original jurisdiction, the court declined to exercise its discretionary jurisdiction over the remaining state law claims.

Employee Sexual Misconduct; Faculty & Staff; Sexual Misconduct; Constitutional Issues; Due Process

Flor v. Bd. of Regents of Univ. of N.M. (D. N.M. May 13, 2021) [Link no longer available]

Memorandum Opinion and Order granting-in-part and denying-in-part Defendant’s Motion to Dismiss. Plaintiff, a tenured professor at the University of New Mexico, brought a due process action against the University after he was suspended for one year without pay based on substantiated findings of *quid pro quo* sexual harassment and retaliation. Individual defendants were entitled to qualified immunity because plaintiff did not identify a clearly established constitutional right to be represented by counsel, cross examine his accuser, or challenge the Office of Equal Opportunity’s determination during his post-deprivation hearing. However, the court allowed plaintiff’s claims to proceed insofar as he sought a declaratory judgment that the sanctioning and appeal processes were “unconstitutional, improper, and violative of Plaintiff’s rights” and that OGC’s representation of the University in the sanctioning and review process created a conflict of interest that deprived plaintiff of constitutional due process.

Faculty & Staff; Tenure

Greene v. Mone (Wis. App. April 13, 2021) [Link no longer available]

Per curiam opinion affirming the decision of the district court. Plaintiff, a tenured faculty member at the University of Milwaukee, brought an action to challenge a faculty panel’s unanimous recommendation, and the Chancellor’s ultimate decision, to terminate him for cause based on insufficient teaching and scholarship, disability discrimination, and a lack of professionalism. In affirming the district court, the appellate court concluded that sufficient evidence on record supported the panel’s finding of just cause for plaintiff’s termination. This evidence included a disproportionate number of student complaints regarding plaintiff, plaintiff’s failure to complete routine administrative tasks such as entering grades and updating syllabi by required deadlines, and plaintiff’s disregard for and noncompliance with approved academic accommodations plans for students with qualifying disabilities.

Compliance & Risk Management; Tort Litigation

[Leibman v. St. Francis Coll., 2021 NY Slip Op 31025\(U\) \(N.Y. Sup. Ct. March 23, 2021\)](#)

Decision and Order granting Defendant’s Motion to Dismiss. Plaintiff, a tenured professor, brought a tort and contract action against St. Francis College based on various disagreements with the administration about his role in advancing interests related to a federally funded program, and separate allegations regarding purported harassment. Plaintiff’s complaint was too speculative and conclusory to support a showing of “extreme and outrageous” conduct necessary to support an IIED claim. Plaintiff’s remaining tort claim failed because he did not allege that malicious intent was the sole motivation for his alleged mistreatment.

Discrimination, Accommodation, & Diversity; Gender Identity & Sexual Orientation Discrimination

[Jones v. Bd. of Trs. of Ala. A&M Univ. \(N.D. Ala. Mar. 9, 2021\)](#) [Link no longer available]

Memorandum Opinion granting-in-part and denying-in-part Defendants’ Motion to Dismiss. Plaintiff is a former tenured professor at Alabama A&M University who alleged that the University and several individual defendants discriminated against him based on his sexual orientation in violation of Title VII and Section 1983. The University terminated plaintiff for using University resources to view obscene materials. Qualified immunity barred plaintiff’s Section 1983 claims against the individual defendants because they were acting within their discretionary authority when they decided to terminate plaintiff, and because plaintiff could not show that defendants violated his clearly established constitutional rights. However, plaintiff adequately stated a Title VII claim against the University because he alleged that the University supported a heterosexual employee throughout a criminal investigation, but during plaintiff’s investigation, the University locked him out of his office and placed him on leave without warning, and that the University violated its own procedures when it terminated him.

Retaliation; Sex Discrimination; Disability Discrimination; Discrimination, Accommodation, & Diversity; First Amendment & Free Speech; Due Process; Constitutional Issues

[Henige v. Bd. of Regents of Univ. of Wis. Sys., et al. \(E.D. Wis. Feb. 11, 2021\)](#)

Decision and order granting Defendants’ Motion to Dismiss. Plaintiff is a former tenured professor at the University of Wisconsin-Whitewater (UWW). He alleged that UWW and several individual defendants retaliated against him for protected expression in violation of his First Amendment rights, violated his due process rights, and discriminated against him based on his sex and disability when it terminated his employment. As an initial matter, plaintiff’s First Amendment claims against the Board of Regents and individual defendants failed because the Board is not a person under Section 1983, and sovereign immunity barred the claims against the individual defendants in their official capacities. Additionally, plaintiff was not speaking as a private citizen when he questioned whether his department could meet accreditation standards and criticized his colleagues, so his speech was not protected under the First Amendment. Plaintiff’s due process claim also failed because he received sufficient notice, had an opportunity to be heard at a disciplinary hearing, and was afforded an adequate post-deprivation process to challenge the adverse decision. Plaintiff’s allegation that UWW allowed reports of sexual harassment to proceed through the investigation and discipline process did not amount to harassment or create a hostile work environment. Finally, plaintiff’s disability discrimination claim failed because plaintiff could not show that UWW was unreasonable when it granted his accommodation request with a condition that plaintiff did not request.

Title IX & Student Sexual Misconduct; Sexual Misconduct; Sex Discrimination; Equal Protection; Constitutional Issues

Dickerson v. Bd. of Trs. of Metro. State Univ. of Denver (D. Colo. Feb. 10, 2021)

Opinion and Order granting Defendant's Motion to Dismiss and for Summary Judgment. Plaintiff is the former Director of International Business Programs at Metropolitan State University of Denver (MSUD). He alleged that MSUD discriminated against him based on his sex when it revoked an offer for a tenure track faculty position after several students and employees accused plaintiff of harassment. While MSUD's revocation of its employment offer was an adverse employment action, plaintiff's inappropriate conduct gave MSUD a legitimate, non-discriminatory, and non-pretextual reason for taking that action. Plaintiff's constitutional claims were barred by Eleventh Amendment Immunity because MSUD is an arm of the state of Colorado.

Tenure; Employee Discipline & Due Process; Faculty & Staff; Contracts; Contracts Administration
Winter v. Pa. State Univ. (Pa. Super. Ct. Dec. 30, 2020) [Link no longer available]

Memorandum Opinion affirming the trial court's award of summary judgment for the defendant. Plaintiff is a former tenured professor at Pennsylvania State University's Wilkes-Barre campus who alleged that Penn State breached a contract with him when it terminated his employment. Penn State terminated plaintiff after receiving a report of sexual harassment from a student, conducting an evaluation, and holding a hearing on the matter at which plaintiff was present and represented by counsel. After the hearing, Penn State's president recommended plaintiff's termination. There was no dispute of material fact that Penn State acted in good faith and followed its policies and procedures in terminating plaintiff's employment.



Yes We Can: Approaches to Post-Tenure Faculty Review

March 16, 2023

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Yes We Can: Approaches to Post-Tenure Faculty Review

March 16, 2023

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Yes We Can: Approaches to Post-Tenure Faculty Review

March 16, 2023

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Webinar

Yes We Can: Approaches to Post-Tenure Faculty Review

Elizabeth Bullock, Senior Vice Chancellor for Legal Affairs
and General Counsel, University of Denver

Alexandra Mitropoulos, Senior Counsel, Hirsch Roberts Weinstein LLP

Introduction & Agenda

How did we get here? A History of Post-Tenure Review

Establishing a Post-Tenure Review Process

Meaningful Execution of Your Process

Key Terms

- **Tenure:** A tenured appointment is an indefinite appointment that can be terminated only for cause or under extraordinary circumstances such as financial exigency and program discontinuation. ([AAUP](#))
- **Post-Tenure Review:** The periodic, comprehensive performance review of a faculty member with tenure.




How did we get here? Where are we now?

A history of post-tenure review



Origins of Tenure and Post-tenure Review

**AAUP 1940 Statement of
Principles on Academic
Freedom and Tenure**

- 
-
- **1986: Amendments to Age Discrimination in Employment Act prohibited mandatory retirement for most workers—with exemption for higher education that delayed implementation until January 1, 1994**
 - **1994: Mandatory retirement age for faculty no longer permitted**

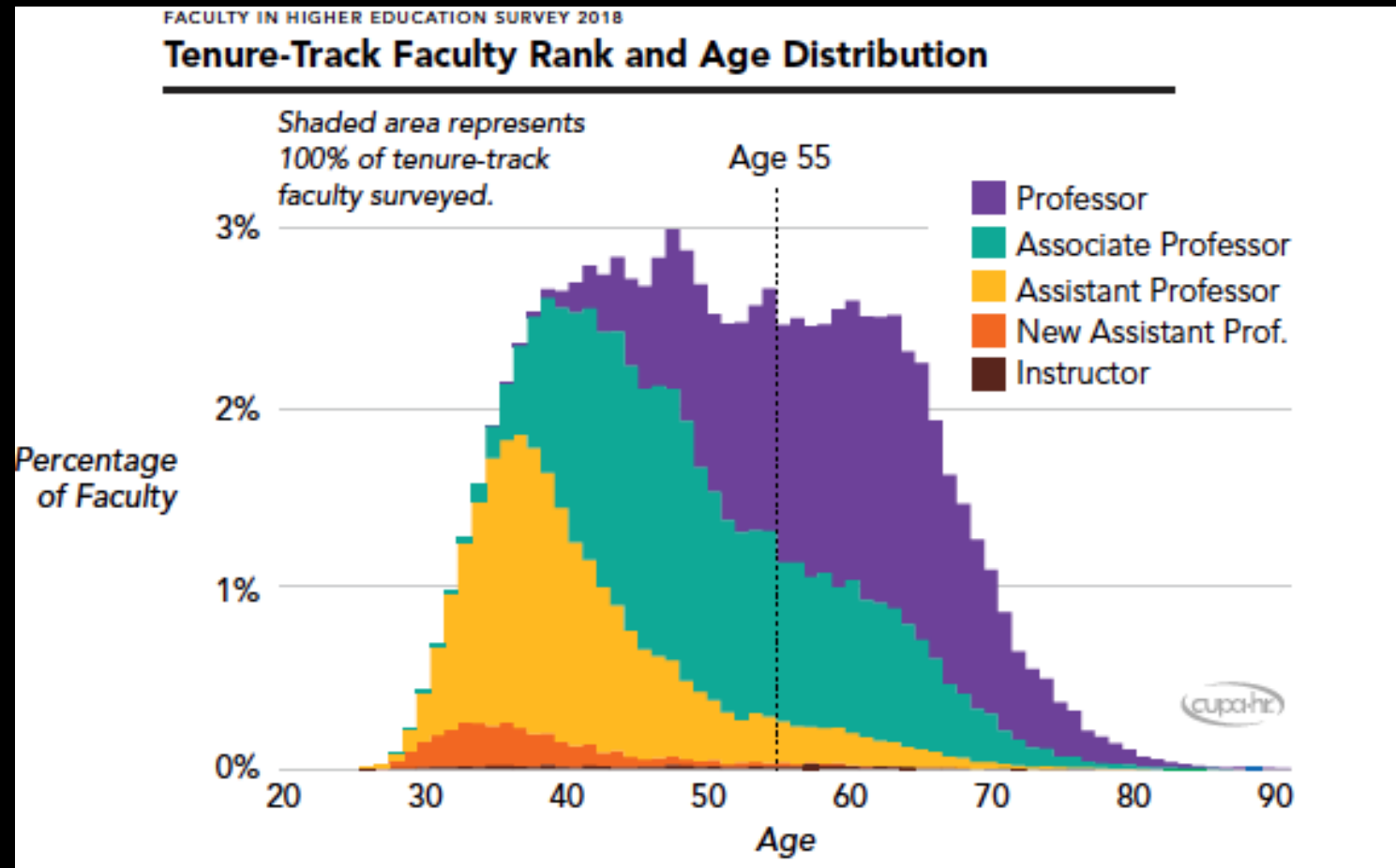
Shifting Toward a System of Review

"At most colleges and universities, **few faculty are likely to work past age 70**. Therefore, eliminating mandatory retirement would not pose a threat to tenure. Colleges and universities can dismiss tenured faculty . . . however, dismissal of faculty members for poor performance is rare now and likely to remain rare.

In response to larger concerns about faculty performance, **the committee recommends that faculty and administrators work to develop ways to offer faculty feedback on their performance**. Colleges and universities hoping to hire scholars in new fields or to change the balance of faculty research and teaching interests will need to encourage turnover using mechanisms other than performance evaluation and dismissal."

- [National Research Council, *Ending Mandatory Retirement for Faculty: The Consequences for Higher Education* \(1991\)](#)

Today's Reality



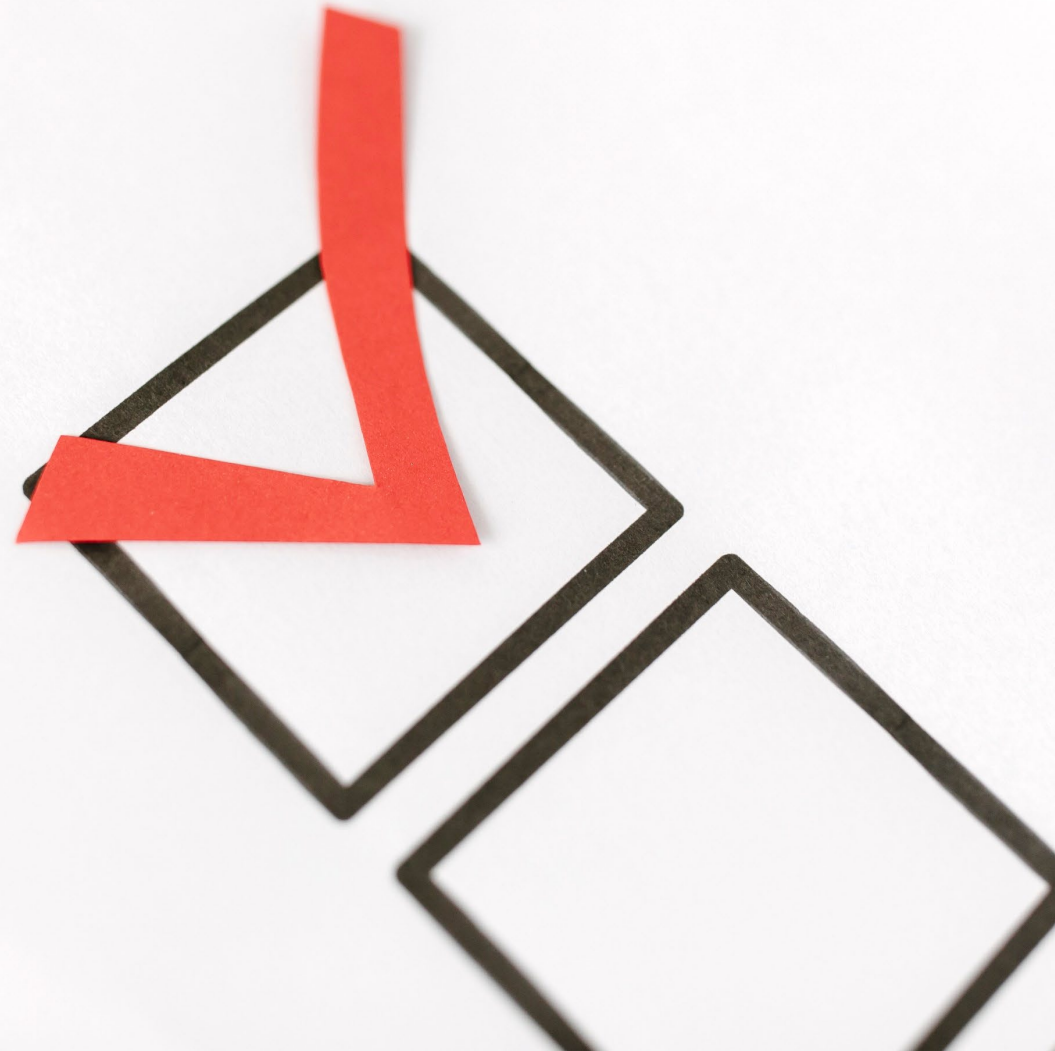
Support for Post-tenure Review

- Gives structured model for evaluation
- Increased accountability to peers, students, institution
- Tool to recognize and reward high achievers
- Enhanced professional development



Support for Post-tenure Review

- Identify and rehabilitate underperformers
- Opportunity to document and build support for dismissing chronically underperformers
- External expectations and perceptions (trustees, politicians, public)



Opposition to Post-tenure Review

"The Association believes that periodic formal institutional evaluation of each post-probationary faculty member **would bring scant benefit, would incur unacceptable costs**, not only in money and time but also in dampening of creativity and of collegial relationships, **and would threaten academic freedom.**

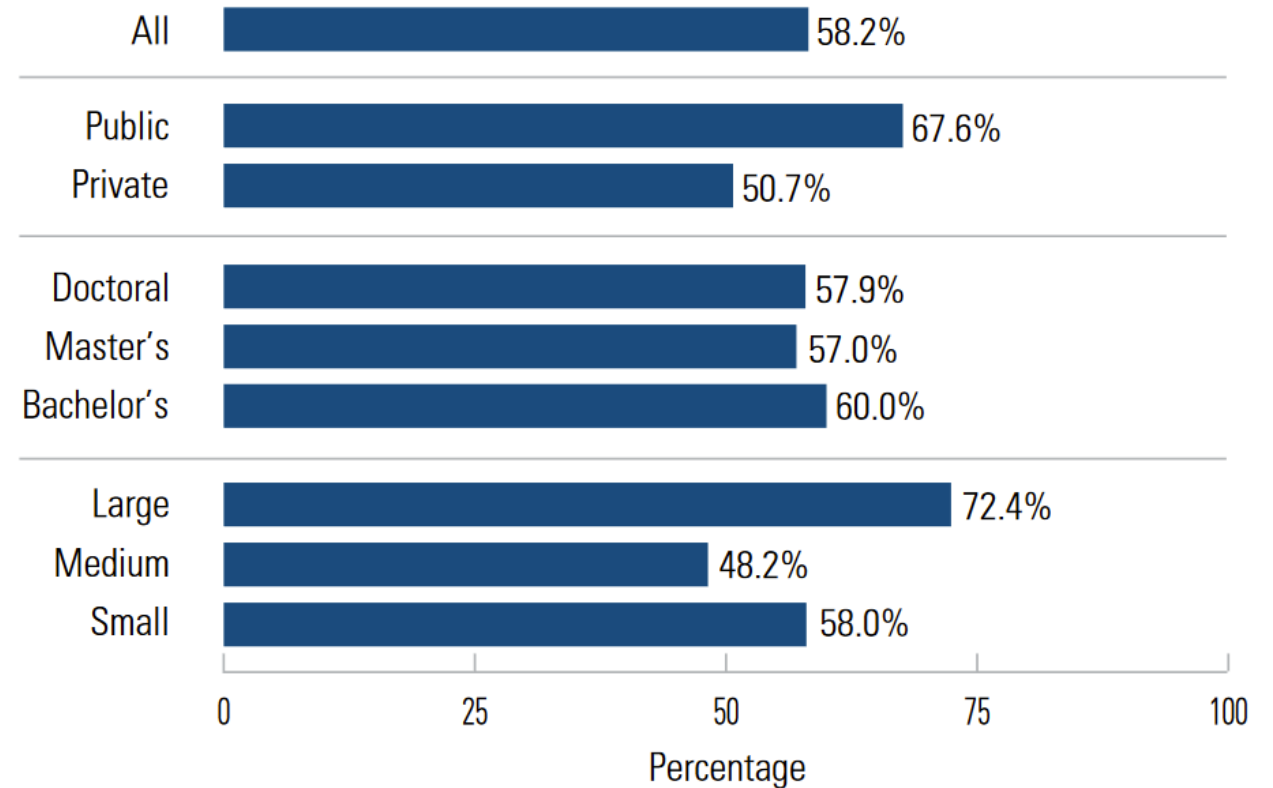
The Association emphasizes that no procedure for evaluation of faculty should be used to weaken or undermine the principles of academic freedom and tenure. **The Association cautions particularly against allowing any general system of evaluation to be used as grounds for dismissal or other disciplinary sanctions."**

- [AAUP, Post-tenure Review: An AAUP Response \(1999\)](#)

Commonality of Post- tenure Review

*Source: AAUP, 2022 Survey of
Tenure Practices*

FIGURE 8
Institutions that have a post-tenure review program



Source: 2022 AAUP Tenure Survey.

Note: Findings are from four-year institutions with a tenure system.



Developing Post-tenure Review Process

Who wants it?

Administration

Governing Board

Students

PR Pressures

Faculty themselves

Legislative and Board Level Push for Post- Tenure Review

Georgia

- In October 2021, the Georgia Board of Regents made significant changes to the state systems post-tenure review process.

Florida

- In April 2022, Ron DeSantis signed [SB 7044](#), which establishes a new posttenure, five-year review cycle for professors at public institutions.

Creating a Stakeholder-led Team

President

Provost

Deans and
Department
Chairs

Faculty

Human
Resources

Counsel

Considerations for Drafting a Policy

Frequency/timing of review

- How often will you evaluate? Annually? Three Years? Five Years? Seven Years? If the faculty member receives negative annual review(s)?

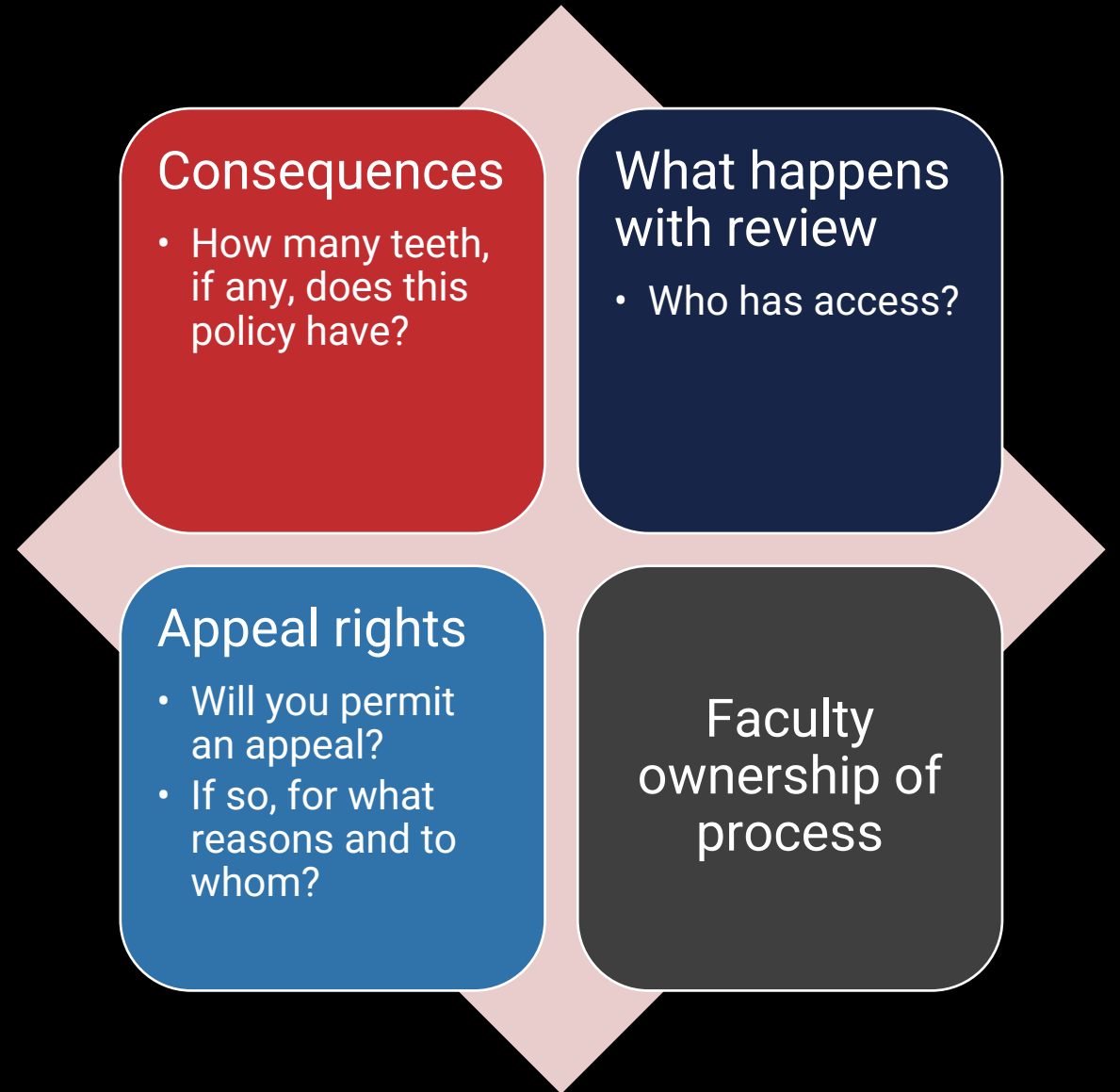
Timeline for evaluation

- Key deadlines and important dates
- Whether to align with other review cycles (e.g., tenure reviews)

Process

- Who will conduct the evaluation? Peer Committee? Department Chair? Provost?
- What are they looking for? Evaluation criteria?
- What are they reviewing?

Considerations for Drafting a Policy



Thinking through the process...

What are your resources?

Who does the review (faculty peers, dep't chair, etc.)

Administrative burdens

Avoiding ambiguity around required steps

Targeting poor performers vs. Review of all



Effectively Implementing Post-tenure Review

We have the policy! ... Now what?

Training

- Writing meaningful and honest reviews; avoiding review inflation
- Documenting performance issues
 - Memos to file, internal email trails, and other contemporaneous records

Setting expectations with faculty

Addressing
faculty
misconduct
and
performance
issues

Disciplinary actions

Remediation resources

Tensions between academic
freedom and actionable
performance issues

What about unionized faculties?



Importance of review even with non-tenured faculty populations



Collective bargaining considerations



Beware of arbitrations!



Questions?

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