

EMERITUS LAWSUITS: MUCH ADO ABOUT NOTHING?

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I. INTRODUCTION

It has been said that university politics are as vicious as they are because the stakes are so low.¹ Nowhere is this comment more apt than when it comes to lawsuits involving emeritus status.² The equivalent of window dressing, the topic hardly seems worth grousing about, much less suing over.³ Nevertheless, such disputes are beginning to show up in court.⁴ And given the rapid graying of the academy,⁵ it seems certain more are on the way. Accordingly, this article takes a closer look at an issue that schools (and their lawyers) would do well to notice.

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¹ This observation, most often attributed to Henry Kissinger, also has been credited to Daniel Patrick Moynihan, Laurence J. Peter, George Bernard Shaw, C.P. Snow, and Mark Twain. Frizbane Manley, Comment, *Continuing My Crusade*, INSIDE HIGHER ED, Nov. 5, 2007, <http://www.insidehighered.com/views/2007/11/05/segal> (responding to Carolyn Foster Segal, *Faculty Theft*, INSIDE HIGHER ED, Nov. 5, 2007, <http://www.insidehighered.com/views/2007/11/05/segal>). In all likelihood, however, it was coined sometime in the early 1950s by Professor Wallace S. Sayre of Columbia University. THE YALE BOOK OF QUOTATIONS 670 (Fred R. Shapiro ed., 2006).

² In this article, the terms “emeritus” (male form of the singular) and “emeriti” (plural form) are used, while the term “emerita” (female form of the singular) is not due to how infrequently it is heard in everyday speech. See, e.g., ELWOOD N. CHAPMAN & MARION E. HAYNES, COMFORT ZONES: PLANNING YOUR FUTURE 193 (4th ed. 1997) (“When a college professor retires, he or she is often given the designation of professor emeritus.”), and *Persons at Degree-Granting Institutions*, GEOTIMES, Sept. 2003, at 25, 25 (“Only 30 women professors in the geosciences in the United States have *emeritus* status, while 1062 males hold *emeritus* status.”).

³ It also makes for poor poetry. See Raymond Roseliep, *Professor Emeritus*, 18 C. ENG. 267, 267 (1957).

⁴ Prior to 1976, there were no such cases. Today, there are slightly more than a dozen, with nearly half having been decided in the last decade. See *infra* Part III. Of course, this figure understates matters, for it includes only reported cases.

⁵ The aging of America’s faculty has been extensively documented. See, e.g., Haskel D. Harrison & Matthew J. Hargrove, *Aging Faculty: Workforce Challenges and Issues Facing Higher Education*, BUS. PERSPS., Fall/Winter 2006, at 20; Editorial, *The Ivory Tower Grays*, 3 NATURE CHEMICAL BIOLOGY 69 (2007); Marcella Bombardieri, *Graying of US Academia Stirrs Debate*, BOSTON GLOBE, Dec. 27, 2006, at A1; Piper Fogg, *Advancing in Age*, CHRON. HIGHER EDUC., June 3, 2005, at A6; Kelly Simmons, *University Brain Drain: Who’ll Take Boomers’ Place?*, ATLANTA J.-CONST., Oct. 30, 2005, at E1.

II. BACKGROUND

In 1990, the Educational Resources Information Center (“ERIC”) of the Clearinghouse on Higher Education, in cooperation with the Association for the Study of Higher Education (“ASHE”), published the first comprehensive report on emeritus status.⁶ It was prompted by the coming end of compulsory retirement of tenured faculty, which occurred by congressional mandate on January 1, 1994.⁷ The ERIC-ASHE authors were convinced this change would wreak havoc on the academy, and believed that expanded use of the emeritus rank could help ease the pain.⁸ Of course, the expected crisis did not occur.⁹

In 2000, Michael C. Petrowsky, an economics professor at Glendale Community College in Arizona, conducted his own survey.¹⁰ Unlike the ERIC-ASHE researchers who had focused on senior colleges, Petrowsky limited himself to junior colleges.¹¹ Still, both studies came to the same conclusion: with rare exception,¹² emeritus status is purely symbolic and confers the same mea-

⁶ See JAMES E. MAUCH ET AL., *THE EMERITUS PROFESSOR: OLD RANK—NEW MEANING* (1990) [hereinafter *OLD RANK*]. Despite its exhaustive nature, the report drew only minor notice. See Kevin L. Keenan, Book Review, *JOURNALISM EDUCATOR*, Summer 1991, at 81 (calling it “a valuable contribution”), and Albert Somit, *From Professor of Political Science to Professor Emeritus*, 25 *PS: POL. SCI. & POL.* 717, 719 (1992) (praising its suggestion that those who retire but remain active be referred to as “working emeritus”). The authors later issued a brief follow-up that reconfirmed their earlier findings. See JAMES E. MAUCH ET AL., *EMERITUS RANK IN MAJOR RESEARCH UNIVERSITIES: RETIREE PERQUISITES AND PRIVILEGES* (1993).

⁷ The details surrounding the “uncapping” of this statutory exemption for faculty members have been recounted many times. See, e.g., Marianne C. DelPo, *Too Old to Die Young, Too Young to Die Now: Are Early Retirement Incentives in Higher Education Necessary, Legal, and Ethical?*, 30 *SETON HALL L. REV.* 827 (2000); Marc L. Kesselman, *Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada*, 17 *COMP. LAB. L.J.* 206 (1995); Aloysius Siow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 *J.L. ECON. & ORG.* 152 (1998).

⁸ *OLD RANK*, *supra* note 6, at iv-v. Others also fretted about the possible effects. See, e.g., Anthony R. Baldwin et al., *Senior Law Faculty Attitudes Toward Retirement*, 41 *J. LEGAL EDUC.* 395 (1991); John H. Burton, Jr., *Tenured Faculty and the ‘Uncapped’ Age Discrimination in Employment Act*, 5 *YALE L. & POL’Y REV.* 450 (1987); Charles B. Craver, *Implications of the Elimination of Mandatory Retirement for Professors*, 16 *J.C. & U.L.* 343 (1990); Ralph D. Mawdsley, *Age Discrimination in Education: A New Amendment and New Problems*, 38 *EDUC. L. REP.* 387 (1987); Note, *Questioning Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Faculty Under the ADEA*, 105 *HARV. L. REV.* 889 (1992).

⁹ See Courtney Leatherman, *End of Mandatory Retirement Has Led to Few Problems — Yet, Studies Find*, *CHRON. HIGHER EDUC.*, May 29, 1998, at A14. In fact, at some schools the opposite problem arose, as too many senior faculty members opted to retire. See Piper Fogg, *Early Exit: Taking Generous Retirement Incentives, Professors Call It Quits*, *CHRON. HIGHER EDUC.*, June 21, 2002, at A10. For a further discussion, see VALERIE MARTIN CONLEY, *AM. ASS’N OF UNIV. PROFESSORS, SURVEY OF CHANGES IN FACULTY RETIREMENT POLICIES 2007* (2007).

¹⁰ See MICHAEL C. PETROWSKY, *A SURVEY OF FACULTY AND ADMINISTRATOR EMERITUS PROGRAMS AT COMMUNITY COLLEGES: ELIGIBILITY, COVERAGE, AND BENEFITS* (2000). Petrowsky undertook this project in response to a request from Gene Eastin, the president of the Maricopa County Community College District. See *id.* at i.

¹¹ See *id.*

¹² For such an example, see *In re Albright College*, 249 A.2d 833, 835 (Pa. Super. Ct. 1968) (president emeritus permitted to remain in university housing).

ger benefits – such as library access and a university identification card – as are given to those who retire without the rank.¹³

Despite the foregoing, faculty members put great stock in the title.¹⁴ This is not surprising, of course, given the hierarchical nature of an academician's career. Thus, emeritus status is viewed as the capstone of one's career,¹⁵ and its denial has long been seen as a black mark.¹⁶

¹³ See OLD RANK, *supra* note 6, at 42-45; PETROWSKY, *supra* note 10, at 9-10. Since the appearance of these works, many schools have begun operating "emeritus centers" that contain meeting, planning, and research space. Belying their names, these facilities are open to all retired faculty on equal terms. See Piper Fogg, *Gray Expectations: Emeritus Centers Bring Retired Professors Back to Campus*, CHRON. HIGHER EDUC., Feb. 7, 2003, at A8. For an early call for such entities, see Alexander Silverman, *Emeritus House*, 120 SCI. 278 (1954).

¹⁴ See, e.g., *Baylor Univ. v. Coley*, 221 S.W.3d 599, 603 (Tex. 2007) (retiring assistant professor expresses regret that only associate and full professors are eligible for emeritus status at her institution); Jay Parini, *Living Up to the Meaning of 'Emeritus,'* CHRON. HIGHER EDUC., May 12, 2000, at A68 ("[E]meritus status is a goal worth aiming for."); Germaine Warkentin, *Do You Have Emeritus/Emerita Status?*, RALUT REP., Dec. 2006, at 2, available at http://www.ralut.utoronto.ca/newsletter/rep6_4.pdf ("Professor Emeritus/a is a historic title; the honour is not negligible, and the status may not be either, as those still active who are required to submit their CVs for conferences and grants are certainly aware."). See also James A. Metcalf, Letter to the Editor, *Realistic Penalties for Plagiarism*, CHRON. HIGHER EDUC., Feb. 22, 2002, at B22 (advocating that professors who plagiarize be "denied emeritus status upon retirement").

The importance the academy attaches to emeritus status also can be seen in the announcements that typically accompany its bestowal. A recent press release issued by the University of the Virgin Islands, for example, stated:

UVI Provost Dr. Gwen-Marie Moolenaar applauded the honor Dr. Leipzig received and emphasized its significance. "It is not an easy route to emeritus status," she said. "At UVI, emeritus status has been conferred on such intellectual giants as former president Dr. Orville Kean, Dr. Marilyn Krigger and Dr. Charles W. Turnbull, governor, for their outstanding contributions. We are therefore very proud that Dr. John Leipzig has received such recognition from his former institution [University of Alaska-Fairbanks] and is bringing his considerable academic talents to UVI. Our students will certainly benefit from his presence here."

News Release, Univ. of the V.I., UVI's Chancellor John Leipzig Receives Professor Emeritus Status (June 9, 2003), available at <http://www.uvi.edu/pub-relations/pressRelease/re102177.html>.

¹⁵ See, e.g., EVANS L. ANDERSON, *POSITIVE REFLECTIONS ON MY LIFE: PRE-SCHOOL TO PROFESSOR EMERITUS (1914-PRESENT)* (Vantage Press 2004) (2002); T. M. CHARLTON, *PROFESSOR EMERITUS (1991)*; ERNEST M. FUNK, *OZARK FARM BOY TO UNIVERSITY PROFESSOR EMERITUS: AN AUTOBIOGRAPHY* (rev. 1990).

¹⁶ A number of notable academicians have been refused emeritus status, including art historian Margarete Bieber (Columbia University, 1948) and mathematician Ellen Hayes (Wellesley College, 1916). While Bieber was a victim of misogyny and anti-semitism, see William M. Calder III, Book Review, 111 AM. J. ARCHAEOLOGY 803, 803 (2007) (reviewing STEPHEN L. DYSON, *IN PURSUIT OF ANCIENT PASTS: A HISTORY OF CLASSICAL ARCHAEOLOGY IN THE NINETEENTH AND TWENTIETH CENTURIES* (2006)), Hayes was punished for her nettlesome personality. See PATRICIA CLARK KENSCHAFT, *CHANGE IS POSSIBLE: STORIES OF WOMEN AND MINORITIES IN MATHEMATICS* 46 (2005).

The most prominent academician to be denied the rank remains German philosopher Martin Heidegger:

In 1933, Heidegger was appointed the rector of the University of Freiburg. At this time, he also joined the National Socialist Party. One year later, Heidegger would resign as rector due to disputes with faculty and local Nazi officials. Heidegger continued his involvement with the National Socialist Party until 1945, although the degree of his involvement is still under debate.

III. CASE LAW

A. *Recipient Suits*

As the ERIC-ASHE report explains, at times “the emeritus professor rank is used as an incentive to encourage faculty to retire and cease participating in the functions of the institution.”¹⁷ Getting a particular individual out the door is always a tricky piece of business, however, and can easily lead to bruised feelings. From there, it is but a short step to the courthouse.

In *Avins v. Widener College, Inc.*,¹⁸ for example, Alfred Avins, the founding dean of the Delaware Law School, clashed repeatedly with its board of trustees over a planned merger with Widener College.¹⁹ Eventually, he was asked to step aside, which he did in exchange for various honoraria, including the title “dean emeritus.”²⁰

Despite this deal, Avins continued to campaign against affiliation.²¹ Hoping to stop him, the law school threatened to dismiss Avins from the faculty for insubordination.²² Instead of capitulating, however, Avins sued Widener for

Despite the urgings of Marcuse and others, Heidegger never publicly apologized for his involvement with National Socialism. With the de-nazification hearing in 1945, Heidegger was banned from lecturing and teaching at any university by the French Military Government, and furthermore ruled that the university refuse Heidegger Emeritus status and pension him off, stripping him of his professorship. Though he continued to write and speak, he suffered a nervous breakdown in 1946. He applied for, and was granted, emeritus status, providing that he would refrain from teaching. In 1947 he published *On Humanism* to distinguish his phenomenology from French existentialism. By 1950, Heidegger was reinstated to his teaching position, and, one year later, he was made professor Emeritus by the Baden government.

The European Graduate School, *Martin Heidegger*, <http://www.egs.edu/resources/heidegger.html> (last visited Oct. 11, 2008). For a further discussion, see GREGORY BRUCE SMITH, MARTIN HEIDEGGER: PATHS TAKEN, PATHS OPENED 27-31(2007).

In an incident strikingly similar to Heidegger's, Barrows Dunham, a tenured professor of philosophy, was dismissed from Temple University in 1953 after he admitted to being a member of the Communist Party from 1938 to 1945 but refused to testify before the House Un-American Activities Committee. See *Dunham v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 432 A.2d 993, 995 (Pa. Super. Ct. 1981). A generation later, efforts began to rehabilitate his reputation. See *id.* at 995-96. Upset at this prospect, Jordan Gollub, a Temple undergraduate, published an op-ed in *The Medium*, the school's newspaper, calling Dunham a traitor. *Id.* at 995. Dunham then sued both Temple and Gollub for libel, but lost on a pleading technicality. *Id.* Despite this lawsuit, the university restored Dunham's pension and awarded him emeritus status. *Barrows Dunham '26 *33*, PRINCETON ALUMNI WKLY., June 5, 1996, at 55, available at <http://webscript.princeton.edu/~paw/memorials/memdisplay.php?id=3350>.

¹⁷ OLD RANK, *supra* note 6, at xvii.

¹⁸ *Avins v. Widener Coll., Inc.*, 421 F. Supp. 858 (D. Del. 1976).

¹⁹ *Id.* at 860.

²⁰ *Id.* at 859 nn.1-2.

²¹ These protests ultimately proved futile:

In July 1975, Delaware Law School, Inc. entered into an agreement dated June 1, 1975 with Widener College, Inc. by which an affiliation was to be accomplished via a corporate sale involving the purchase by Widener of the one and only outstanding share of Delaware Law School stock, thereby making the law school a wholly-owned subsidiary of Widener. The name of the law school was then changed to the Delaware Law School of Widener College, Inc.

Id. at 859-60 (footnote omitted). For a further discussion, see *Plechner v. Widener Coll., Inc.*, 418 F. Supp. 1282, 1294 (E.D. Pa. 1976), *aff'd*, 569 F.2d 1250, 1253 (3d Cir. 1977).

²² *Avins*, 421 F. Supp. at 860.

improper retaliation and asked the court to enjoin Widener from stripping him of his dean emeritus title.²³ Finding this request to be premature, the court declined to do so.²⁴

In *Karlen v. New York University*,²⁵ a book advertisement that described the author (law professor Delmar Karlen) as a “professor emeritus” became a contested piece of evidence in his forced retirement lawsuit.²⁶ According to Karlen, the advertisement had been placed by a third party without his knowledge or consent, and therefore could not be used against him.²⁷ After considering the issue, the court agreed.²⁸

*Kreith v. University of Colorado*²⁹ concerned professor of mechanical engineering Frank Kreith, who was on the fence about whether to accept a full-time job with the government.³⁰ Ultimately, he decided to leave the university after being promised he would be made an emeritus professor.³¹ Less than a month later, Kreith changed his mind and tried to withdraw his resignation.³² When the university refused to let him do so, he sued.³³

In his complaint, Kreith claimed that his resignation, which had been communicated only as far as the dean when he changed his mind, could not become effective until it was accepted by the board of regents.³⁴ Thus, he felt his withdrawal was timely.³⁵ In holding otherwise, the court wrote:

Resignation and retirement, however, are distinguishable from appointment or hiring. Implicit in the hiring of faculty are decisions of educational policy concern-

²³ *Id.* at 859.

²⁴ *Id.* at 862. Avins subsequently was dismissed from the law school, a decision that touched off years of litigation. See *Avins v. Moll*, 610 F. Supp. 308, 312 (E.D. Pa. 1984), *aff'd mem.*, 774 F.2d 1150 (3d Cir. 1985). In the meantime, he founded two new law schools (Northern Virginia, now defunct, and Southern New England, which remains unaccredited by the American Bar Association). See DEBBIE HAGAN, *AGAINST THE TIDE* 222-24 (2004); Robert H. Williams, *Legal Scholar Alfred Avins Dies at Age 64*, WASH. POST, June 11, 1999, at B6.

²⁵ *Karlen v. N.Y. Univ.*, 464 F. Supp. 704 (S.D.N.Y. 1979).

²⁶ The underlying events occurred between 1972 and 1977, *id.* at 706, when mandatory retirement policies were still legal. See *supra* note 7 and accompanying text.

²⁷ *Karlen*, 464 F. Supp. at 708. The court does not say which one of Karlen’s nearly two dozen books appeared in the advertisement. See *id.*

²⁸ *Id.* Because the lawsuit settled, the question of Karlen’s status was never resolved. Subsequently, however, he did refer to himself as “professor emeritus,” see, e.g., Delmar Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 121 n.** (1979), and his obituary identified him as such. See Obituary, *Delmar Karlen*, 76, *N.Y.U. Law Professor*, N.Y. TIMES, Jan. 2, 1989, at 28.

²⁹ *Kreith v. Univ. of Colo.*, 689 P.2d 718 (Colo. Ct. App. 1984).

³⁰ In 1977, the Solar Energy Research Institute (“SERI”), now known as the National Renewable Energy Laboratory (“NREL”), opened in Golden, Colorado. See National Renewable Energy Laboratory, NREL: Overview, <http://www.nrel.gov/overview/> (last visited Aug. 27, 2008). Because solar engineering was Kreith’s specialty, he took a one-year unpaid leave from the university to serve as SERI’s chief researcher. *Kreith*, 689 P.2d at 718-19. At the end of this period, Kreith took another unpaid leave. *Id.* at 719. When he asked for a third unpaid leave, however, the university balked. *Id.*

³¹ *Kreith*, 689 P.2d at 719.

³² *Id.*

³³ *Id.* at 719.

³⁴ *Id.*

³⁵ *Id.*

ing the future of the institution. Acceptance of offers of resignation or retirement do not have a similar impact upon institutional policy except as they necessitate the employment of replacement faculty. Since the appointment of future faculty resides in the exclusive power of the board of regents, continuity of policy is assured.³⁶

*Nash v. Trustees of Boston University*³⁷ concerned Paul Nash, who was in his seventh year as Chairman of the Department of Humanistic Education and Human Services at Boston University (“BU”) when the administration decided to disband the program.³⁸ As a result, he began looking for another job and soon found one with the Rhode Island School of Design (“RISD”).³⁹ He approached BU and negotiated an early retirement package consisting of “a lump-sum payment of \$88,230, the office of Professor Emeritus, and the right to arrange for an adjunct teaching position in the School of Education. . . .”⁴⁰

BU, knowing that Nash had been testing the market, had asked him about his prospects at RISD, to which he replied: “That’s out of the question; I kept them waiting too long; they are talking to another candidate.”⁴¹ When BU discovered this was a lie, it repudiated the agreement.⁴² Although Nash challenged its right to do so, the courts had no trouble siding with BU.⁴³

³⁶ *Id.* After losing his case, Kreith continued his solar energy research and in 2005 had an award named in his honor. See American Society of Mechanical Engineers, Frank Kreith Energy Award, http://www.asme.org/Governance/Honors/SocietyAwards/Frank_Kreith_Energy_Award.cfm (last visited Aug. 25, 2008) (“The award was established by the Solar Energy and Advance[d] Energy [Systems] Division to honor Dr. Frank Kreith’s contributions to the fields of heat transfer and solar energy.”).

³⁷ *Nash v. Trs. of Boston Univ.*, 946 F.2d 960 (1st Cir. 1991).

³⁸ *Id.* at 961.

³⁹ *Id.*

⁴⁰ *Id.* at 962.

⁴¹ *Id.*

⁴² *Id.* at 962-63.

⁴³ *Id.* at 967 (“The district court correctly ruled the early retirement agreement unenforceable under the Massachusetts common law doctrine of fraud in the inducement.”).

In an attempt to place himself in a better light, Nash argued that BU’s refusal to guarantee him continued employment had forced him to play fast and loose with the rules. See *Nash v. Trs. of Boston Univ.*, 776 F. Supp. 73, 75 (D.R.I. 1990). The district court did not warm to this explanation:

In finding as I have, I am not insensitive to the dilemma which engulfed Professor Nash when HEHS was discontinued; the loss of his department and the teaching of his discipline, which he had developed over many long years of scholarly study and research, was a traumatic assault. He cannot be faulted for seeking to secure his future, especially in the factual setting revealed here. On the other hand, no outsider can question Dr. Silber’s conclusion that HEHS was not contributing to the academic dimensions of Boston University; he had every right to advocate that the course be abolished and when it was, the August 1 letter to Professor Nash [informing him of the closure] was entirely appropriate. However, if the University did, indeed, intend to retain Professor Nash, at a minimum, Dr. Silber, Meng or Westling might have put it in writing and given such document to Nash. In spite of this, the cold mandate of the law forecloses any consideration of such failure—the fact remains, when Nash received the letter of August 1, he still was under contract to Boston University for a remaining term of one year. It was illegal for him to engage in deception to enrich his own position at the expense of the university.

Id. at 84.

In *Pace University v. New York City Commission on Human Rights*,⁴⁴ Bette S.J. Mittleman was denied tenure as a professor of business management because she lacked a terminal degree and had a weak publication record.⁴⁵ Claiming sex discrimination, she filed a complaint with the local human rights commission.⁴⁶

In the meantime, Mittleman continued to teach at Pace as an adjunct.⁴⁷ In an effort to resolve the situation amicably, Pace made a settlement offer to Mittleman that included a “promise to give ‘favorable consideration to granting her the rank of Adjunct Professor Emeritus’ in place of ‘Adjunct Lecturer.’”⁴⁸ Although Mittleman found this aspect of the offer acceptable, disagreement over other issues scuttled the deal.⁴⁹ Subsequently, the New York State Court of Appeals, overruling both the commission and an intermediate appellate court, held that Pace had properly terminated Mittleman.⁵⁰

In *Ruggieri v. Harrington*,⁵¹ St. John’s University found itself in a troubled relationship with Catherine Ruggieri, the dean of St. Vincent’s College (one of its undergraduate divisions).⁵² To resolve the problem, in 1995 it negotiated a buy-out agreement, one provision of which required that Ruggieri be named “dean emeritus” in 1998, when she reached twenty-five years of service with the university.⁵³

Two months after her anniversary date, Ruggieri, who in the interim had attended law school,⁵⁴ brought a multi-count lawsuit against the university.⁵⁵ Among her many grievances, she claimed the university had breached the buy-out by failing to give her new title sufficient publicity when it became effective.⁵⁶ Disagreeing with this assessment, the court wrote:

It is undisputed that on February 14, 1995, Herbert Schwartzmann, St. John’s general counsel, issued a memorandum addressed to the “University Community” containing the exact language [required by the buy-out]. By issuing the memorandum, and thereby prospectively bestowing Ruggieri the title of Dean Emeritus, defendants precisely complied with the terms of the Agreement. Although Ruggieri argues now that the Memorandum Agreement further required the University to issue subsequent announcements in June 1998 when the title became effective or to hold a celebratory

⁴⁴ *Pace Univ. v. N.Y. City Comm’n on Human Rights*, 611 N.Y.S.2d 835 (N.Y. App. Div. 1994), *rev’d*, 647 N.E.2d 1273 (N.Y. 1995).

⁴⁵ *Id.* at 838.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 838-39.

⁵⁰ *Pace*, 647 N.E.2d 1273, 1274-75 (N.Y. 1995).

⁵¹ *Ruggieri v. Harrington*, 146 F. Supp. 2d 202 (E.D.N.Y. 2001).

⁵² *Id.* at 206.

⁵³ *Id.* at 206-07. The remainder of the agreement required St. John’s to pay Ruggieri a lump sum, give her a one-year paid leave, provide her with a private office, and appoint her to a senior search committee. *Id.* at 207.

⁵⁴ *Id.* at 207-08, 212 (“In the spring of 1994, Ruggieri applied to, and was accepted by, Brooklyn Law School’s evening division [F]inishing her law degree in the spring of 1998.”).

⁵⁵ *Id.* at 206.

⁵⁶ *Id.* at 221-22.

convocation in her honor, her claim is belied by the plain language of the agreement.⁵⁷

Lastly, in *Allen v. University of Washington School of Medicine*,⁵⁸ Margaret Allen, an associate professor of cardiothoracic surgery, alleged she was the victim of a hostile work environment.⁵⁹ Following mediation, the two sides reached a settlement that called for Allen to be made an emeritus professor.⁶⁰ When the university later learned that under university rules Allen was too young for this honor,⁶¹ the school suggested she be called an "affiliate professor."⁶²

The parties then hit another stumbling block, for they could not agree on the new title's meaning.⁶³ To break this logjam, the parties submitted the issue to arbitration.⁶⁴ The arbitrator rejected both sides' proposed interpretations⁶⁵ and ruled that:

As an Affiliate Professor, Dr. Allen will not be entitled to participate as faculty in the business of the School of Medicine, which means that she will not have any official relationship with faculty, students or staff of the School of Medicine or have access to the facilities of the School of Medicine, other than as a member of the public. However, Dr. Allen may enter into scientific collaborations with School of Medicine faculty members, fellows and staff, if such persons choose to do so, when such collaborations do not involve any contractual, grant, sponsorship, or other legal relationship between Dr. Allen and the University of Washington School of Medicine.⁶⁶

⁵⁷ *Id.*

⁵⁸ *Allen v. Univ. of Wash. Sch. Of Med.*, No. 46782-4-I, 2001 WL 1085338 (Wash. Ct. App. Sept. 17, 2001).

⁵⁹ *Id.* at *1.

⁶⁰ *Id.*

⁶¹ At the time of the settlement, Allen was 51. See Warren King, *Top Surgeon Settles Bias Suit with UW: Founder of the Heart-Transplant Program Gets \$750,000, Resigns*, SEATTLE TIMES, July 7, 2000, at A1. To be eligible for emeritus status at Washington, an individual had to be at least 62. *Allen*, 2001 WL 1085338, at *1.

⁶² *Allen*, 2001 WL 1085338, at *1.

⁶³ *Id.* at *2.

⁶⁴ *Id.*

⁶⁵ While the university pushed for a narrow definition, Allen argued for an expansive one:

Because Emeritus Professor implies retirement and Affiliate Professor does not, the School of Medicine sought to define the consequences of the title in paragraph 5 of the finalized settlement agreement, as follows:

'As an Affiliate Professor, Dr. Allen will not be entitled to participate as faculty in the business of the School of Medicine or be entitled to access to students, faculty, facilities or staff of the School of Medicine.'

Clerk's Papers at 286.

Dr. Allen rejected the University's definition and proposed her own version of paragraph 5:

(b) It is understood and agreed that the titles of 'Affiliate Professor' and 'Emeritus Professor' do not bestow upon Dr. Allen any rights or privileges of employment with the School of Medicine.

(c) It is further understood and agreed that Dr. Allen may enter into scientific collaborations, research, and grants with or involving School of Medicine faculty members, fellows, and staff, if such persons choose to do so, in accordance with generally accepted applicable rules, regulations, and practices of the University.

Clerk's Papers at 269.

Id. at *1-*2.

⁶⁶ *Id.* at *2.

Unhappy with this result, Allen sought to have the award vacated.⁶⁷ Refusing to substitute its judgment for the arbitrator's, the court let it stand.⁶⁸

B. *Rejectee Suits*

Some academicians, having been turned down for emeritus status, have sought to establish their entitlement to emeritus status through litigation. To date, these actions have failed due to the reluctance of judges to second-guess what largely is a subjective decision.⁶⁹

In *Samad v. Jenkins*,⁷⁰ for example, former dean and current law professor Stanley Samad became involved in a series of disputes with the University of Akron.⁷¹ When the university threatened to terminate him for cause, he agreed to leave in exchange for finishing the school year and being paid for the next one.⁷²

During his final month of teaching, Samad received two letters from the law school.⁷³ While the first merely reminded him of his upcoming departure date, the second warned that if he attempted to stay, "the evidence already gathered for the termination proceeding [against you]" would be "released to help place matters in their proper perspective."⁷⁴ Put out by this heavy-handed threat, Samad filed a federal lawsuit against the university in which he sought damages for defamation, intentional infliction of emotional distress, invasion of privacy, and the impairment of assorted constitutional rights, including his right of free speech.⁷⁵

After the district court summarily dismissed his lawsuit, Samad unsuccessfully appealed.⁷⁶ In the course of its opinion, the Sixth Circuit held that Samad had failed to establish any right to emeritus status:

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 plain-

⁶⁷ *Id.*

⁶⁸ *Id.* at *3.

⁶⁹ As the 1990 ERIC-ASHE report found, being awarded emeritus status often requires meeting both objective and subjective criteria. OLD RANK, *supra* note 6, at 42. With respect to the former, 50% of the surveyed schools required applicants to be tenured while 47% required a minimum number of years of full-time employment. *Id.* Subjective criteria varied widely across (and even within) institutions, with the catch-all phrase "distinguished service" being the most popular (42%). *Id.* Other than the tenure requirement (tenure generally being unavailable at community colleges), Petrowsky's results were similar: 80% of his respondent schools required employees to have been at the institution for a minimum period of time and 57% required distinguished service. PETROWSKY, *supra* note 10, at 7-9.

⁷⁰ *Samad v. Jenkins*, 845 F.2d 660 (6th Cir. 1988).

⁷¹ *Id.* at 661-62.

⁷² *Id.* at 661.

⁷³ *Id.* at 661-62.

⁷⁴ *Id.*

⁷⁵ *Id.* at 662.

⁷⁶ *Id.*

tiff has failed to assert a viable § 1983 claim based upon the fourteenth amendment.⁷⁷

In *Crozier v. Howard*,⁷⁸ University of Central Oklahoma political science professor Leroy Crozier was involuntarily retired when he turned seventy years old.⁷⁹ Believing this constituted impermissible age discrimination, Crozier sued.⁸⁰ Subsequently, he claimed he was being denied emeritus status due to the litigation.⁸¹ Before the court could rule, however, the parties “resolved” this aspect of the case.⁸²

In *Ellis v. State of Illinois*,⁸³ Ruth Ellis, a longtime psychology professor at Northeastern Illinois University, began taking repeated leaves, causing her department to be short-handed.⁸⁴ Just before matters reached a boiling point, Ellis agreed to retire.⁸⁵

Ellis subsequently sued the university, insisting she had been improperly fired.⁸⁶ Alternatively, she argued she had resigned on the condition that she be given emeritus status, which she did not receive.⁸⁷ The court found her position contradicted by the record:

The facts of this case lead to the inescapable conclusion that the Claimant was not discharged, but simply resigned. Additionally, the claim that her resignation was only conditioned upon her status as a professor emeritus is rejected. Neither her letter of resignation nor her conversations with the employees of the university reflect any conditions to her action.⁸⁸

In *Pollis v. New School for Social Research*,⁸⁹ a political science professor named Adamantia Pollis was denied emeritus status upon her retirement.⁹⁰ As

⁷⁷ *Id.* at 663. For a further look at Samad’s career, see *Tribute to Dean Stanley A. Samad, 1920-2000*, 37 AKRON L. REV. ix, ix (2004) (crediting him with “laying the foundation for The University of Akron School of Law as we know it today”).

⁷⁸ *Crozier v. Howard*, No. CIV-91-0666-C, 1992 WL 551251 (W.D. Okla. Mar. 26, 1992), *aff’d*, 11 F.3d 967 (10th Cir. 1993).

⁷⁹ Crozier reached retirement age during the 1989-90 school year but had received permission to stay on until the end of the 1990-91 school year so as to be able to participate in the university’s centennial celebration. *Crozier v. Howard*, 11 F.3d 967, 968 (10th Cir. 1993). Subsequently, his request for an additional one year extension was denied. *Id.*

⁸⁰ *Id.* Oddly enough, Crozier based his suit on the ADEA, even though at the time it specifically permitted mandatory retirement of tenured faculty. See *supra* note 7 and accompanying text. According to Crozier, this aspect of the statute did not apply to him because during his final year at the university, he had been in a non-tenure slot. See *Crozier*, 11 F.3d at 971-72 (upholding the district court’s conclusion that Crozier had remained tenured and subject to involuntary separation).

⁸¹ *Crozier*, 1992 WL 551251, at *1.

⁸² *Id.* Unfortunately, the court did not explain the nature of the resolution, although it does not appear that Crozier was given emeritus status. See *id.*

⁸³ *Ellis v. State*, 48 Ill. Ct. Cl. 51 (1996).

⁸⁴ According to Ellis, these leaves were necessary to treat her high blood pressure. *Id.* at 53, 55. However, when her doctor cleared her to return to work, Ellis sought and received another leave. *Id.* at 54.

⁸⁵ *Id.* at 55-56.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* at 55.

⁸⁸ *Id.* at 56-57.

⁸⁹ *Pollis v. New Sch. for Soc. Research*, 930 F. Supp. 899 (S.D.N.Y. 1996), *rev’d*, 132 F.3d 115 (2d Cir. 1997).

⁹⁰ *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115,123-24 (2d Cir. 1997).

a result, she filed a lawsuit under Title VII.⁹¹ Although Pollis proved the school routinely honored its retirees, the court found it had no duty to do so and refused to read anything into its lack of action:

Finally, Pollis argues that an inference of discriminatory intent can be drawn from the fact that she was treated with “callous thoughtlessness bordering on hostility” by the dean and provost of the New School and never granted the status of emeritus professor although that position was given to other professors, including Dr. Mary Henle, upon retirement. Absent some evidence that it was motivated by discriminatory intent, however, bad treatment does not establish a violation of Title VII.⁹²

In *Shovlin v. University of Medicine and Dentistry of New Jersey*,⁹³ Francis Shovlin, professor of endodontics and oral biology at the New Jersey Dental School for thirty-three years, decided to retire and seek emeritus status.⁹⁴ Although backed by his department chair and the university’s appointments and promotions committee, his request quickly ran into trouble.⁹⁵

During the preceding two years, Shovlin had spoken out against various administrators, claiming they were incompetent and had committed numerous dishonest acts.⁹⁶ As a result, consideration of Shovlin’s request for emeritus status was delayed and eventually denied by the university’s board of trustees.⁹⁷

Shovlin then invoked 42 U.S.C. § 1983 to force the university to give him emeritus status.⁹⁸ After a lengthy recounting of the facts, however, the court found his suit baseless:

Upon retirement from his tenured position, plaintiff was an at-will employee of UMDNJ and thus, had only the unilateral expectation of renewal of his adjunct appointment, appointment as Professor Emeritus and the privileges that would accompany it. In the absence of a contractual or statutory entitlement, a public

⁹¹ *Id.* at 117.

⁹² *Id.* at 123-24. In another part of its opinion, however, the Second Circuit did find that Pollis was entitled to damages under the Equal Pay Act. *See id.* at 119-20. Interestingly, the school’s catalog now lists Pollis as “Professor Emerita and Senior Lecturer in Political Science.” *See* THE NEW SCH. FOR SOC. RESEARCH, 65 THE NEW SCHOOL CATALOG 5 (2007-2008), available at <http://www.newschool.edu/uploadedFiles/NSSR/Admissions/NSSRCatalog.pdf>.

⁹³ *Shovlin v. Univ. of Med. and Dentistry of N.J.*, 50 F. Supp. 2d 297 (D.N.J. 1998).

⁹⁴ *Id.* at 300.

⁹⁵ *Id.* at 303-04.

⁹⁶ *Id.* at 300-03.

⁹⁷ *Id.* at 304-08. Prior to voting, the board received a report from Shovlin’s dean which laid out the case for and against his request. *Id.* at 307. Although acknowledging that Shovlin had served as department chair, published, and obtained grants, the dean felt that Shovlin had a “tendency toward anti-intellectual and anti-academic attitudes,” had not always had “the broader institutional welfare” as his “pre-eminent priority,” and had undertaken some acts that were “uninformed by fact, disruptive and disturbing.” *Id.* at 307-08. The dean concluded his report by reminding the board, “Professor Emeritus status should be based on sustained, distinctive, special contributions and performance.” *Id.* at 308.

⁹⁸ Shovlin also sought an adjunct teaching position, use of the school’s facilities for research, and a clear statement that a recent scientific misconduct investigation had fully exonerated him. *Id.* at 300, 309.

employee does not have a due process claim with regard to such employment decisions.⁹⁹

In *Gaby v. Board of Trustees of Community Technical Colleges*,¹⁰⁰ Three Rivers Community Technical College in Norwich, Connecticut, denied science professor Stanley Gaby emeritus status.¹⁰¹ Convinced he was being punished for having been an agitator, Gaby filed a § 1983 lawsuit against the college's board of trustees, president, and chief academic officer.¹⁰² When the district court summarily dismissed his lawsuit, Gaby appealed, but only as to the board of trustees.¹⁰³ This proved to be a fatal error:

The Supreme Court held in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id.* at 71, 109 S.Ct. 2304. The Court noted that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n. 10, 109 S.Ct. 2304 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)). . . .

. . . [Thus,] boards of trustees of state colleges and universities are not subject to suit under § 1983.

Plaintiff concedes in his complaint that the Board of Trustees is an "agency of the State of Connecticut." While Plaintiff argues that his complaint is silent as to whether he sued the Board of Trustees in its "official" or "individual" capacity, it is clear that the Board of Trustees, as an entity, is not a state official. Having failed to pursue his appeal against a state official, plaintiff has no claim under § 1983.¹⁰⁴

The most recent rejectee suit seeking entitlement to emeritus status is *Zelnik v. Fashion Institute of Technology*.¹⁰⁵ Like *Shovlin* and *Gaby*, it also involved a § 1983 complaint for retaliation.¹⁰⁶

Martin Zelnik, an interior design professor at the Fashion Institute of Technology ("FIT") for thirty years, had made numerous contributions to his field and served the school in a variety of leadership positions during his long

⁹⁹ *Id.* at 316.

¹⁰⁰ *Gaby v. Bd. of Trs. of Cmty. Technical Colls.*, 348 F.3d 62 (2d Cir. 2003).

¹⁰¹ *Id.* at 62.

¹⁰² *Id.* The court's decision does not provide any information about Gaby's activities. However, in his brief to the Second Circuit, Gaby explained he had criticized the school on numerous occasions, and in a variety of forums, regarding alleged employment discrimination, mispending of public funds, violations of occupational health and safety regulations, gender discrimination, and fabrication of public records. See Brief of Plaintiff-Appellant with Special Appendix at 6-7, *Gaby v. Bd. of Trs. of Cmty. Technical Colls.*, 348 F.3d 62 (2d Cir. 2003) (No. 03-7023). The board, however, insisted that Gaby had not received emeritus status because, by a wide margin and "for whatever unknown reason," his academic division had refused to give him a positive vote. See Brief for Defendants-Appellees with Addendum at 1, *Gaby v. Bd. of Trs. of Cmty, Technical Colls.*, 348 F.3d 62 (2d Cir. 2003) (No. 03-7023).

¹⁰³ *Gaby*, 348 F.3d at 62-63.

¹⁰⁴ *Id.* at 63.

¹⁰⁵ *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 2062 (2007).

¹⁰⁶ Remarkably, despite the numerous similarities, neither *Shovlin* nor *Gaby* is mentioned in the Second Circuit's opinion.

career.¹⁰⁷ Thus, when he retired, his department unanimously nominated him for emeritus status.¹⁰⁸

By this time, however, Zelnik had become a vocal member of the “27th Street Block Association,” an informal neighborhood group that opposed a planned “streetscape” project that FIT was pursuing.¹⁰⁹ Although Zelnik generally favored the project, he objected to its details, in part because he was the co-owner of a commercial building that would be impacted by the plan.¹¹⁰

As a result of his activities with the 27th Street Block Association (which included letters to public officials, participation in a lawsuit, and interviews with the media), FIT’s president refused to act on Zelnik’s nomination for emeritus status.¹¹¹ In a memorandum to the Interior Design department, FIT’s president explained that she “could not in good conscience recommend that the College honor Professor Zelnik at this time.”¹¹² The department responded by re-nominating Zelnik.¹¹³ When this new effort proved equally fruitless, Zelnik sued.¹¹⁴

The district court granted FIT’s motion for summary judgment.¹¹⁵ On appeal, the Second Circuit found that emeritus status at FIT was merely symbolic and therefore ruled that Zelnik could not be aggrieved by its denial:

We hold that the failure to afford Professor Emeritus status to Zelnik was not an adverse action because the benefits of such status, given the record before us, carry little or no value and their deprivation therefore may be classified as *de minimis*. . . .

Insofar as Zelnik claims that the status of professor emeritus carries with it things of intangible value, such as prestige, status, and respect within the FIT and wider academic community, he has failed to adduce any evidence of such matters beyond his conclusory statements.¹¹⁶

Predictably, this outcome infuriated academicians. In a long piece in the *Chronicle of Higher Education*, for example, Carlin Romano, an adjunct professor at the University of Pennsylvania, chided the court for its materialism:

The court’s *ratio decidendi* ended up straight out of *Jerry Maguire*: Show me the money. If it’s not in the paycheck, it ain’t real. . . .

. . . .

The Second Circuit’s mercenary take, while perhaps true to FIT’s internal rules and metaphysics, ends up debasing the very status that it argues has no value, quite a neat logical and jurisprudential trick. Folks in another business shoot horses. We and the courts shouldn’t shoot ours where it hurts—in their self-esteem.¹¹⁷

¹⁰⁷ *Zelnik*, 464 F.3d at 219.

¹⁰⁸ *Id.* at 222.

¹⁰⁹ *Id.* at 220.

¹¹⁰ *Id.* at 219-20.

¹¹¹ *Id.* at 222-23.

¹¹² *Id.* at 223.

¹¹³ *Id.*

¹¹⁴ *Id.* at 223-24.

¹¹⁵ *Zelnik v. Fashion Inst. of Tech.*, No. 03-CV-8210, 2005 WL 4829606 (S.D.N.Y. 2005).

¹¹⁶ *Zelnik*, 464 F.3d at 227-28.

¹¹⁷ Carlin Romano, *The ‘E’ Word*, *CHRON. HIGHER EDUC.*, Dec. 15, 2006, at B15. *See also* Eric A. Chiappinelli, *Second Circuit Quantifies Value of “Professor Emeritus” Status*, *CASES AND MATERIALS ON BUSINESS ENTITIES*, Oct. 23, 2006, http://businessentitiesonline.typepad.com/new_developments/2006/10/second_circuit_.html (“This case is obviously an

IV. CONCLUSION

Once upon a time, those who were unhappy with their emeritus status complained to their family and friends.¹¹⁸ Now, however, they are beginning to turn to the courts. And while the number of cases is still small and judges so far have come down on the side of schools, two lessons are clear:

- 1) Both bitterness and litigation over emeritus status could be entirely eliminated by: (a) doing away with the title; (b) granting it only post-

object lesson to corporate law professors and students contemplating becoming corporate law professors.”).

¹¹⁸ Although they still do so, of course, the internet has made it possible for them to also share their grievances with the world. In a posting on a popular academic web site, for example, Allen W. Hatheway, a retired professor of geological engineering at the University of Missouri-Rolla, let everyone know how he felt about being denied emeritus status:

You are absolutely correct about the generally deplorable tenure-granting process in this country. At UM-Rolla the tenure process, as applied in the School of Mines & Metallurgy, is used, under the direction of the current dean, to terrify and control junior faculty; mainly to teach excessive loads, to raise money for the university, and generally to be kept “in line.” I have been a dissident to this policy and I have suffered early retirement (Dec. 31, 1999; without penalty) and with a tenure buyout as a result of my having filed an age (over 60) discrimination and harassment claim. The situation is ugly and the junior faculty are clearly intimidated. In my own case, I have been denied Emeritus status twice, as punishment, after nearly 20 years of faithful service to the university.

Posting of Allen W. Hatheway to The Chronicle of Higher Education: Colloquy, <http://chronicle.com/colloquy/2001/tenure/16.htm> (Jan. 8, 2001, 10:30 EST).

Professor John H. Gray, formerly of the University of North Dakota, has gone even further, creating his own web site to tell his story:

Normally, I would have received Emeritus status. But that was effectively blocked by my two “colleagues” in Indian studies: two Anglo women. Despite repeated requests, no specific reasons have ever been given by any UND echelon for this refusal to grant me conventional Emeritus status. At UND, the “system” and administrative check-and-balances work only in essentially non-controversial matters. Otherwise, there’s no adherence to “System” or “due process.”

Hunter Gray, *Bigotry and Fear at the University of North Dakota: Social Justice and Academic Freedom Fights*, <http://www.hunterbear.org/UND.htm> (last visited Oct. 11, 2008).

For other examples of emeritus denial stories on the web, see Tim Sampson, *Corrigan Violates Policy He Signed*, CFA FALCON (Cal. Faculty Ass’n at San Francisco State Univ., San Francisco, Cal.), Dec. 2000, at 3, available at <http://www.cfasf.org/news/falcon/200012falcon.pdf> (petition on behalf of San Francisco State University Women Studies Professor Mina Caulfield); *Report of the 1988-89 Senate Committee on Academic Freedom and Responsibility*, ALMANAC (Univ. of Pa., Philadelphia, Pa.), Apr. 17, 1990, at 4, available at <http://www.upenn.edu/almanac/v36pdf/n31/041790.pdf> (reporting on the improper denial of emeritus status to an unnamed University of Pennsylvania professor); Mount Allison Univ., Meeting of the Senate (May 9, 2002), at 60-62, available at <http://www.mta.ca/governance/senate/minutes/may902.min.pdf> (recounting the saga of English professor Michael Thorpe, whose denial of emeritus status by an earlier administration led several of his colleagues to refuse the rank and caused the Canadian Association of University Teachers to convene a Committee of Inquiry); Saint Anselm Coll., *Faculty Senate Minutes*, Nov. 11, 2003, <http://www.anselm.edu/administration/senate/minutes/2003-2004/minutes11-11-03.htm> (discussing the president’s refusal to bring an unnamed professor’s request for emeritus status to the college’s governing board and wondering whether this raised an academic freedom issue); Univ. of Neb.-Omaha Faculty Senate, *2005-2006 Faculty Senate Minutes*, Aug. 17, 2005, http://www.unomaha.edu/facsen/archives/minutes.index/2005-2006/05_8_ms.htm (reporting that the denial of emeritus status to Criminal Justice Professor Sam Walker had been reversed).

humously; or, (c) offering it to all retirees.¹¹⁹ While these approaches may strike some as overly egalitarian,¹²⁰ little is gained by making colleagues who are heading for the exits jostle for what is essentially an empty honor. This is especially true when one factors in the risks of litigation.

- 2) If an institution insists on awarding emeritus status on a selective basis, it should: (a) have detailed written rules regarding both its conferral¹²¹ and privileges;¹²² (b) apply such rules fairly and consistently;¹²³ and,

¹¹⁹ The 1990 ERIC-ASHE study found that only 21% of 115 schools routinely awarded emeritus status to all retirees, *see* OLD RANK, *supra* note 6, at 40, 42; but Conley's 2007 retirement survey pegged the figure at 47% (based on responses from 567 institutions). *See* CONLEY, *supra* note 9, at 1-2, 12. While these figures may mean that a consensus in favor of automatic emeritus status is emerging, more research would have to be done to be sure.

¹²⁰ Of course, since World War II higher education has become increasingly egalitarian. As a result, we now have students who once would not have been admitted, faculty who once would not have been hired, and curricula that once would not have been taught. For a further discussion, *see* JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 260-362 (2004).

¹²¹ For an example of a well-written emeritus policy, *see* Utah Valley Univ., Policy Office, *Policies and Procedures – Emeritus Status*, available at <http://www.uvu.edu/policies/official-policy/pipeline/show/wfid/1> (last visited Sept. 14, 2008).

¹²² In January 2007, the University of Iowa was forced to defend itself to its state board of regents because the privileges of its emeritus status policy were not clearly laid out:

[T]he state Board of Regents inquired about the university policy for emeritus faculty members following an alleged UI Hospitals and Clinics computer security breach involving UI Hospitals and Clinics administrator emeritus John Colloton. He has office space at the hospital and has a secretary, though he's not an official employee.

. . . UI representatives maintain that emeritus faculty at the university receive no unwarranted benefits.

. . . .

Regent Robert Downer said the UI must have a set policy on the use of UI facilities by those with emeritus status.

"I certainly have no interest in dictating what that policy is, but as a part of our responsibility for overseeing the institutions, I think we should have a policy," he said.

He added that he has no quarrel with emeritus faculty holding personal UI offices if their services are of use to the university.

Susan Johnson, an associate provost, said the UI's emeritus policy is exactly what Downer said he supports—offices awarded based on merit. If such people continue to assist in scholarly research or toil on account of the UI, they deserve a personal office, she said.

Terry McCoy, *UI Defends Emeritus Status*, DAILY IOWAN, Feb. 15, 2007, at 2, available at <http://media.www.dailyiowan.com/media/storage/paper599/news/2007/02/15/Metro/UI.Defends.Emeritus.Status-2721198.shtml>.

¹²³ Recognizing that his institution's emeritus status policy lacked these elements, in 2006 Dean Howard Erlich approached Ithaca College's Humanities and Sciences Faculty Senate:

Howard Erlich addressed the Senate concerning the Emeriti criteria as laid out in the IC Faculty Handbook. He feels that the criteria are vague and can be interpreted in a broad range of ways. He has a concern that, as the number of people requesting or being put forward for emeritus status is likely to increase in the next few years, this may become an issue. Howard requested that the Senate look at the wording in the handbook and put make [sic] some recommendations concerning how these criteria might be clarified in order to make the selection process more uniform.

Ithaca Coll., Humanities and Scis. Faculty Senate, *Humanities and Sciences Senate Meeting Minutes*, Dec. 8, 2006, available at <http://www.ithaca.edu/hssenate/docs/minutes/0607/minutes120806.pdf>. A short time later, Erlich received the following response:

(c) generate and maintain detailed records as applications are processed.¹²⁴ Even with such safeguards, however, the likelihood of litigation will only grow as more faculty members retire.¹²⁵

After considerable discussion of your request concerning the clarification of Faculty Handbook criteria for Emeritus, the Senate proposes the following:

1. That in evaluating an applicant for emeritus, the Dean should be as generous as possible: "Sustained contributions" should be measured by processes already in place, in particular, the on-going seven year reviews of tenured faculty and the yearly reviews used to determine merit pay increases. Departments regularly perform these reviews and these documents are (or should be) kept on file. It is expected that any dereliction of performance that would cause denial of emeritus status to an applicant would be evident in these documents.
2. That the Dean consider forming a committee to evaluate applicants for emeritus within H&S by reviewing these documents.
3. That the issue of the vagueness of the wording in the Faculty Handbook be referred to the Handbook Committee of Faculty Council.

Memorandum from the Humanities and Scis. Faculty Senate to Howard Erlich, Dean, Sch. of Humanities and Scis. (Jan. 1, 2007), *available at* <http://www.ithaca.edu/hssenate/docs/memos/Emeritus2007.pdf>.

¹²⁴ Of course, keeping such records is not enough—there also must be timely communication of the decisions they generate. In February 2007, for example, a senior administrator at the College of Southern Nevada found it necessary to include the following in a memorandum circulated to all faculty:

Much of this month's memo is dedicating [sic] to correcting messages. In italics, I share the message I've heard, and beneath that message is the correction. For your reading ease, I've underlined the essence of the correction.

. . . .

No one gets emeritus status.

People are being given emeritus status. With faculty input, a revised policy on Emeritus Status was adopted this year, and as departments recommended individuals for this status, I have reviewed the recommendations and forwarded each one with my recommendation. To my knowledge, the "pipeline" is clear. Awards of emeritus status are moving forward under the new policy. We have also demarked a special faculty section in the catalog for Emeriti to highlight their status.

Memorandum from Michael D. Richards, Vice President for Academic Affairs, Coll. of S. Nev. to Faculty and Staff in Academic Affairs (Feb. 1, 2007), *available at* http://www.csn.edu/uploadedfiles/Academics/council/February1_2007.pdf.

¹²⁵ This is because, as has been pointed out elsewhere, "Higher education is a labor intensive industry, often decentralized and populated with many who are accustomed to thinking and acting independently—fertile conditions for employment discrimination complaints." Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 STETSON L. REV. 175, 178-79 (1997).