

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

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Warning: This newsletter contains references to graphic content.

Superior Court of New Jersey Appellate Division

New Jersey Appellate Court Affords Great Deference to University Procedures for Removal of Tenured Faculty

Applying a deferential standard of review applicable to agency decisions, the Superior Court of New Jersey Appellate Division affirmed Farleigh Dickinson University's Board of Trustees' decision to remove a tenured faculty member.

Tenured Professor Sues University for Terminating His Employment

Farleigh Dickinson University (FDU) hired Chee Ng as an associate professor of finance in its Silberman College of Business in December 1999, granted him tenure in 2003, and promoted him to full professor in 2007, where he remained until he was fired in July 2019.

About two years after his promotion, students complained about Ng's classroom conduct. In spring 2009, 10 students reported Ng made discriminatory comments during class, mistreated students, and had a generally rude demeanor. His behavior allegedly persisted despite supervisors' efforts to curb the behavior.

In fall 2010, seven students sent then-Department Chair Evangelos Djimopoulos a letter complaining about Ng's improper conduct, inappropriate comments about being tenured and out-of-class subjects, and general insensitivity to student questions. In response, Djimopoulos met with Ng three times to discuss the complaints and recommended Ng "modify his approach to classroom management and be more accessible to students" to "avoid similar complaints in the future."

In January 2012, another group of students complained Ng baselessly accused his class of cheating and discouraged them from asking questions during lecture. Later that semester, another student alleged Ng made a discriminatory comment singling out a religious minority. Djimopoulos addressed these complaints in an email to Ng, copying the Associate Dean and Dean Andrew Rosman.

In fall 2013, Djimopoulos met with Ng multiple times to discuss additional student complaints and potential remedies. Djimopoulos memorialized these conversations in emails to Ng, noting Ng's response to the complaints was "completely inadequate."

In 2015, five more students filed complaints alleging discriminatory comments, baseless cheating accusations, and inappropriate classroom demeanor by Ng. After the Associate Dean met with Ng, Rosman sent Ng a memo documenting the recent complaints and the counseling Ng received on classroom demeanor and verbal mistreatment of students. Rosman concluded that "rather than reform . . . [Ng] had become more inappropriate" and his behavior escalated to "such an extreme that it was harmful to FDU."

During summer 2015, Rosman wrote to Ng about the 36 student complaints against Ng to that point, saying they showed a "clear pattern of unprofessional behavior." He notified Ng that "serious sanctions" would be imposed for lack of improvement.

Ng took a sabbatical the next academic year, but complaints resumed upon his return in fall 2016. After FDU investigated a student complaint that Ng called the class "stupid," Rosman warned Ng that further complaints would result in more severe consequences. When nine more students complained about Ng in fall 2017, Rosman forwarded the complaints to Provost Gillian Small.

On March 20, 2018, Small notified Ng that dismissal proceedings had commenced pursuant to the faculty handbook and provided Ng with a statement of charges. The University Grievance Committee (UGC) found adequate cause for dismissal because Ng's actions breached the faculty handbook: "[f]ailure to perform professional responsibilities, either through gross incompetence, gross negligence, or willful disregard of scholarly and professional standards" and "[w]illful acts which directly and seriously subvert the rights and welfare of members of the University community."

However, in May 2019, the UGC recommended a two- to three-year probation period rather than dismissal. Shortly thereafter, FDU President Christopher Capuano rejected the UGC's recommendation, concluding there was adequate cause supporting termination. He forwarded his written recommendation to the Board of Trustees (Board). After

reviewing the entire record, including Ng's submissions, the Board unanimously voted to terminate him, finding that clear and convincing evidence of willful misconduct supported his dismissal.

The Board rejected Ng's arguments that the student complaints were inherently unreliable and specifically found the student complaints — totaling 46 from 2009 to 2017 — to be credible. The Board also noted FDU's multiple attempts to help Ng change his behavior through corrective action.

Ng filed suit against FDU, alleging it breached the faculty handbook's terms and failed to establish adequate cause for his termination by clear and convincing evidence. However, the trial court granted FDU's motion for summary judgment, finding the handbook gave the Board authority to make final decisions about terminating a tenured professor and that its termination decision wasn't arbitrary, capricious, or unreasonable.

Faculty Handbook Authorized University Board to Make Final Decision on Terminating Tenured Professor

On appeal, Ng argued the Board failed to meet its burden of proof and the trial court erred by not reweighing evidence presented at Ng's termination hearing. However, relying on a line of cases according deference to a public university's expertise in applying agreed-upon procedures, the appellate court affirmed the trial court's summary judgment decision. The court stated "[w]hen we integrate principles of academic freedom with our deference to an academic institution's agreed upon grievance process, we conclude an agency standard of review must apply to consider a challenge to a private university's decision to terminate the employment of a tenured professor."

The court also rejected Ng's arguments that the Board failed to establish willful conduct by clear and convincing evidence as required by FDU's faculty handbook and to afford sufficient weight to Ng's responses to student complaints. The court held there was sufficient credible evidence in the record to support the Board's decision and its actions weren't arbitrary, capricious, or unreasonable. The court also reaffirmed that its role wasn't to retry the merits of the tenure hearing on appeal or to substitute its judgment for that of the Board in evaluating and weighing evidence.

New Jersey courts will apply a deferential administrative agency review standard in evaluating public and private university decisions to terminate tenured faculty pursuant to established procedures. Judicial review will be limited to determining whether sufficient credible evidence exists in the

record to support the university's decision and whether its actions were arbitrary, capricious, or unreasonable. Courts won't retry the merits of these decisions and won't substitute their judgment for the university's.

Ng v. Fairleigh Dickinson Univ., 478 N.J. Super. 41 (N.J. App. Feb. 16, 2024).

U.S. Court of Appeals for the Second Circuit

General Allegations of Gender Bias, Differential Treatment, and Procedural Irregularities Are Insufficient to State a Title IX Claim

Despite a respondent's litany of allegations of anti-male bias, a deficient investigation, and differential treatment of the female complainant, the Second Circuit affirmed the dismissal of his complaint for failure to state a claim under Title IX and reiterated that plaintiffs need more than conclusory allegations to support a plausible inference of gender bias.

Student Becomes the Subject of Two Title IX Complaints

In April 2018, St. John's University (SJU) student "Jane Doe" filed a Title IX complaint accusing fellow student "Richard Roe" of engaging in sexual misconduct in a dorm room during a study abroad trip in Paris. Following an investigation and hearing in October 2018, SJU concluded Roe engaged in nonconsensual sexual contact with Doe in violation of the student code of conduct and issued a one-semester suspension.

On Jan. 4, 2019, an anonymous Twitter user created the #SurvivingSJU. Roe was the subject of one among thousands of tweets published with the hashtag. The tweet, posted anonymously, included a picture of Roe and contained the message that he "was allowed to stay abroad after raping me ... [o]nly got half a semester suspension." Roe alleged Doe almost instantly "liked" the allegedly defamatory tweet and was the only person who could have authored it.

On Jan. 5, 2019, another student, "Jane Smith," filed a Title IX complaint accusing Roe of sexually assaulting her in December 2018 while Roe was serving his suspension. Smith alleged she and Roe were at a local New York City bar, and after she got drunk, she ended up spending the night at Roe's house. After an investigation and hearing, the university found Roe again violated its nonconsensual sexual contact policy and expelled Roe.

Roe filed suit in federal court, alleging SJU's actions violated Title IX. The trial court granted the university's motion to dismiss, concluding Roe failed to allege sufficient facts to support a plausible inference of sex-based discrimination by the university necessary to state a claim under Title IX. Roe appealed.

Court Finds No Plausible Inference of Gender Bias Based on Allegations

Roe's Title IX complaint was based on two theories:

1. An erroneous outcome was caused by alleged anti-male bias that influenced SJU's adjudication of the accusations against him.
2. Selective enforcement occurred in SJU's actions in investigating and disciplining him and not Doe, who Roe believed had harassed and defamed him in a tweet.

The court held that even accepting as true Roe's allegations that SJU erroneously concluded he engaged in nonconsensual sexual contact with Doe, that didn't mean SJU reached the outcome due to gender bias. While Roe alleged the university "conducted its disciplinary proceedings in a less-than-flawless manner," the court found such allegations didn't support a plausible inference of sex discrimination. Roe's complaint didn't allege "significant investigatory and procedural irregularities"

or point at specific ways the university’s investigation of the accusations against him were deficient and biased. Instead, Roe “merely complain[ed] that SJU justified its decision against him with an unsatisfying explanation,” which isn’t enough to show a likely bias against men. The court also found that in the absence of “clear procedural irregularities,” Roe’s allegations that the “tweet storm” created pressure on SJU to find him responsible for sexually assaulting Smith weren’t enough to suggest gender bias was a motivating factor in the decision.

Roe’s selective enforcement theory was that SJU decided Doe’s and Smith’s sexual assault claims against him while failing to investigate his theory that Doe published the anonymous tweet accusing him of sexual assault. The court held, however, that Doe and Smith weren’t “similarly situated” to Roe because they weren’t facing comparable disciplinary charges, and SJU was unable to sanction the person who tweeted because it couldn’t confirm their identity.

By contrast, Doe and Smith complained about “alleged sexual attacks by a specific individual whose identity was not in

doubt.” Accordingly, the Second Circuit affirmed the trial court’s dismissal of Roe’s complaint.

The Bottom Line

The three-judge panel of the Second Circuit issued a lengthy, but not unanimous decision, consisting of a 41-page majority opinion, a four-page concurrence in the result, and a 42-page dissent, which argued Roe’s Title IX allegations gave rise to a plausible bias claim that should have made it past the pleadings stage. While courts may agree on general Title IX principles, applying those principles to individualized allegations isn’t always straightforward. At the motion to dismiss stage, courts will carefully analyze a respondent’s allegations against the educational institution’s policies to determine whether challenges to investigatory or disciplinary decision-making and/or procedural irregularities are sufficient to state a plausible Title IX claim.

Roe v. St. John’s Univ., 91 F.4th 643 (2d Cir. Jan. 31, 2024).

Related UE Resource

- [Higher Ed Checklist: Title IX-Compliant Policies Against Sexual Harassment](#)
- [Higher Ed Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures](#)

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Speech About Matters of Public Interest May Protect Speakers from Lengthy Defamation Litigation

The District of Columbia Court of Appeals determined a university publication's reporting on workplace complaints about a manager made by women of color constituted protected speech under the District of Columbia Anti-SLAPP Act, thereby defeating the manager's defamation claim and other claims.

Manager Sues for Defamation After University Publication Writes About Alleged Inappropriate Conduct

In 2019, Zuri Berry was hired as Senior Managing Editor at WAMU, the public radio station American University owned and operated. On July 20, 2020, *Current*, a publication issued by the university's School of Communication, published "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color." The article identified Berry as "the subject of multiple complaints" by female journalists who allegedly left WAMU's newsroom because they felt "undermined, micromanaged and mistreated" by Berry and because he "cultivated a culture of harassment and disrespect towards his female reporters, particularly his female reporters of color."

Berry filed two lawsuits in the Superior Court of the District of Columbia.

The first suit — *Berry I*, filed during WAMU's investigation into Berry's conduct against *Current*, American University, the intern who wrote the article, and certain WAMU employees — asserted claims for:

- Defamation
- False light invasion of privacy
- Tortious interference with employment relations
- Civil conspiracy in conjunction with the alleged inaccurate and defamatory statements made in the *Current* article

Berry II, filed after Berry's termination from WAMU, asserted claims against the university for:

- Defamation
- False light invasion of privacy
- Violations of the District of Columbia Human Rights Act

Defendants in both actions responded by filing special motions to dismiss pursuant to the D.C. Anti-Strategic Lawsuits Against Public Participation Act (Anti-SLAPP Act). The motions were granted by the trial courts. Berry appealed the dismissal of both lawsuits on Anti-SLAPP Act grounds as well as an award of defendants' attorney's fees.

Anti-SLAPP Act Rulings Affirmed on Appeal

In its *per curiam* decision, the appellate court noted the Anti-SLAPP Act provides a mechanism for swiftly dismissing suits attacking speech identified as protected under the statute. To get the statute's benefit, a defendant must first make a *prima facie* showing that the claim at issue arises from a statement in a public forum in connection with an issue of public interest. The burden then shifts to the plaintiff to demonstrate the claim is likely to succeed on the merits.

On appeal, Berry argued his claims were based on statements made about his "private employment dispute at WAMU" and weren't connected with issues of "public interest." While the court agreed the statements regarding his subordinates' complaints about workplace mistreatment related in part to Berry's private interests, the court also concluded the statements were "intermingled with" and "sufficiently connected" to issues of public interest.

The court noted that in opposing the Anti-SLAPP Act motion, Berry placed his employment dispute in the context of "years of bad publicity" that WAMU — a popular national public radio affiliate — suffered. The court found the *Current* article documented a continuation of a "long history of racism and sexism at WAMU," which Berry acknowledged had been the subject of other news and social media reports.

Based on the coverage in *Current*, the court held that defendants met their burden to establish Berry's claims were connected to issues of public interest raised in a public forum. Specifically, the *Current* article conveyed "perceptions by

multiple women of color, both that they were collectively being forced out” of a newsroom at a prominent donor-funded news organization and “management had failed to take steps to address the situation.”

The court then determined Berry was unable to meet his burden to establish his claims were “likely to succeed on the merits.” The trial court had concluded the allegedly defamatory statements Berry challenged constituted “nonactionable statements of opinion.” Because Berry hadn’t challenged that conclusion on appeal, the court didn’t need to consider whether the trial court erred and could assume that decision was correct. The court affirmed the dismissal of Berry’s claims.

The court also upheld the fees awarded pursuant to the Anti-SLAPP Act, which gives a trial court granting a special motion to dismiss discretion to also award the costs of

litigation, including reasonable attorneys’ fees, to the defendant. Finding Berry failed to make a “very strong showing of abuse of discretion,” the court let stand the over \$350,000 in total fees the trial court awarded in *Berry I* and *Berry II*.

The Bottom Line



This District of Columbia Court of Appeals decision demonstrates the benefit of an Anti-SLAPP Act motion. In jurisdictions with similar Anti-SLAPP statutes, bringing such dispositive motions where matters of public interest are involved can quickly dispose of lawsuits challenging public statements connected to matters of public interest. The potential award of attorneys’ fees also can deter the filing of suits that lack merit.

Berry v. American Univ., Case Nos. 22-CV-0025, 0235, 0236, 0363, and 0364 (D.C. App. Feb. 13, 2024 (unpublished)).

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