

STUDENT-FACULTY ACADEMIC CONFLICTS: EMERGING LEGAL THEORIES AND JUDICIAL REVIEW

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INTRODUCTION

Student conflicts with their professors or faculty advisors are attracting attention, whether or not these conflicts result in litigation. For example, in July of 2013, the *Chronicle of Higher Education* reported that an African-American graduate student enrolled in a master's degree program in music at Northwestern University refused to sing the lyrics to a song required for his course in chorale singing. The course professor gave him a failing grade; the student asserted that the lyricist, Walt Whitman, was racist.¹ Some graduate students take a very long time to finish their dissertations, if they finish them at all, and may face dismissal from the graduate program after what the faculty

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¹ Stacey Patton, *Northwestern U. Student Jeopardizes Degree by Refusing to Perform Whitman*, THE CHRONICLE OF HIGHER EDUCATION, July 25, 2013, <http://chronicle.com/article/Northwestern-U-Graduate/140531/>.

considers to be inadequate academic performance.² Increasingly, such disputes between students and their faculty advisors or course professors are leading to litigation.

In October of 2012, the United States Court of Appeals for the Ninth Circuit ruled that a former doctoral student whose advisor resigned from her dissertation committee could sue the University of Oregon for retaliation under Title IX of the Education Amendments of 1972.³ Although the advisor stated that he resigned because the student would not heed his advice on the research she was conducting,⁴ the student claimed that he resigned because of her complaints about his alleged mistreatment of women students.⁵ A trial court had awarded summary judgment to the university, but the appellate court viewed the dispute as one of dueling facts, and determined, in a 2-1 opinion, that a trial must be held.⁶

Emeldi may be an outlier—courts historically have tended to defer to the academic judgments of faculty unless there is some evidence that academic judgment was not actually exercised.⁷ Or does *Emeldi* portend a waning of judicial deference to academic judgments? What type of decision is considered to be an “academic judgment”? This question is particularly interesting when the “academic” activity takes place not in a traditional classroom, but in a clinical setting such as a hospital, school, or social services agency, or involves a student’s independent research, such as a thesis or dissertation.

Emeldi also raises questions about the obligations of an academic program or department to students, particularly

² See, e.g., Anne Herbert, *The Case of the Vampire Student*, THE CHRONICLE OF HIGHER EDUCATION, May 8, 2013, <http://chronicle.com/article/The-Case-of-the-Vampire/139099/>.

³ *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1225 (9th Cir. 2012).

⁴ *Id.* at 1228.

⁵ *Id.* at 1225.

⁶ *Id.* at 1230. At the subsequent trial, the judge entered a verdict for the university before the trial was over. See *infra* notes 45-46 and accompanying text.

⁷ See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1975); see generally Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010); Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1 (2006). But see *Ward v. Polite*, 667 F.3d 727, 736 (6th Cir. 2012). For further discussion, see *infra* Part IV..

graduate students, who are admitted to a degree program and who require one or more advisors (often a committee of advisors) in order to complete their degree. Does the program's decision to admit the student obligate the program to ensure that the student has the required advising so that the student can graduate? If a student and advisor clash, must the program identify another individual to replace the advisor, or is that the student's responsibility? Are there mechanisms to address conflicts between students and faculty that will 1) maintain academic standards, 2) enable an academically qualified student to complete a degree, and 3) avoid litigation, if possible?

This Article will examine the legal theories used by students who chose to litigate their "academic conflicts" with faculty. Academic conflicts, for purposes of this Article, are defined as disagreements between students and faculty as to 1) the quality of the student's academic performance; 2) the quality of the student's professional or clinical performance (including behavior); or 3) the adequacy of a faculty member's justification for determining that the student has not met the appropriate performance standard.

The Article will first review the concept of "fiduciary duty" as it has (or in some cases, has not) been applied to the relationship between faculty advisor and student. It then examines *Emeldi* and other cases in which students have claimed retaliation by their advisor or mentor. The discussion then shifts to clashes between students and faculty advisors in clinical settings—cases that one commentator calls "certification cases,"⁸ in which students attempt to state free speech or due process claims. The Article concludes with suggestions as to how faculty—individually and collectively—may wish to shape their relationships with students either to avoid such claims or to prevail should litigation ensue.

I. FIDUCIARY DUTY—DOES IT APPLY TO FACULTY?

Application of the fiduciary duty theory is relatively new to higher education. *Black's Law Dictionary* defines a "fiduciary relationship" as a relationship "founded on trust or confidence

⁸ Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 388 (2013).

reposed by one person in the integrity and fidelity of another;”⁹ the concept typically applies to attorneys acting on behalf of clients, trustees acting on behalf of beneficiaries, or directors acting on behalf of shareholders. A fiduciary is expected to conform to a higher standard of conduct than the “good faith and fair dealing” requirements of parties to a contract.¹⁰ Although the concept is common across jurisdictions, it is a question of fact, and its application is a matter of state law.¹¹ Students have attempted to convince courts that a fiduciary relationship exists between a graduate student and his or her advisor, or even between the institution as a whole and the student.¹²

There is little jurisprudence on whether or not the student or faculty advisor relationship is a fiduciary one, and in most cases the courts have declined to find such a relationship.¹³ But in

⁹ BLACK’S LAW DICTIONARY 625 (6th ed. 1990).

¹⁰ U.C.C. §1-205 (2005).

¹¹ *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. Ct. App. 2009).

¹² In earlier cases, courts have concluded that an employee owes a fiduciary duty to his or her employer to protect its property. In a case in which two faculty members at the University of Tennessee were accused of approving graduate degrees for a student who had not done the work, in exchange for the receipt of grant funds from the students’ employers, the court said:

Ultimately, a university is a business: in return for tuition money and scholarly effort, it agrees to provide an education and a degree. The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University of Tennessee therefore has a property right in its unissued degrees, and [the two faculty members] had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student.

United States v. Frost, 125 F.3d 346, 367 (6th Cir. 1997).

¹³ *See, e.g., Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693 (Tex. App. 1998) (finding that no “confidential” relationship existed between a doctoral student dismissed from the program and her professors, which was necessary to a finding that a fiduciary relationship existed); *see also Manning v. Temple Univ.*, No. Civ.A. 03-4012, 2004 U.S. Dist. LEXIS 26129 at *10 (E.D. Pa. Dec. 30, 2004), *aff’d*, 157 F. App’x 509 (3d Cir. 2005) (no fiduciary duty existed because faculty did not benefit from student’s dismissal from medical school); *Demas v. Levitsky*, 738 N.Y.S.2d 402, 408 (N.Y. App. Div. 2002) (no fiduciary relationship between doctoral student and member of dissertation committee because no evidence of reliance on a fiduciary relationship); *Hendricks v. Clemson Univ.*, 578 S.E.2d 711, 716 (S.C. Ct. App. 2003) (fiduciary duty does not exist between advisor and student, but only within a business relationship).

Johnson v. Schmitz, where a doctoral student brought a lawsuit against Yale University and two members of his dissertation committee, a federal trial court refused to grant Yale's motion to dismiss his claim of breach of fiduciary duty—as well as other claims.¹⁴ Johnson, the student, alleged that the two faculty members appropriated his research ideas and claimed them as their own.¹⁵ The faculty members disagreed, saying the student had not performed up to their expectations. With respect to the student's claim that Yale owed him a fiduciary duty, the court said, "Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student."¹⁶

The court also ruled that the student might be able to demonstrate that, in addition to a fiduciary duty on the part of the university, there was a fiduciary relationship between him and the members of his dissertation committee because the dissertation committee's only purpose was to "assist Johnson in the development and completion of his dissertation."¹⁷ But in a case involving similar allegations of misappropriation of a student's work, a state appellate court rejected the student's attempt to state a claim of breach of fiduciary duty. In *Swenson v. Bender*, Swenson, a doctoral student enrolled at Capella University, which is an all-online university, sued her former advisor, Bender, for breach of fiduciary duty, alleging that the advisor had misappropriated her research and then falsely

But if the student alleges "theft" or misappropriation of the student's work, the outcome may be different. For a discussion of misappropriation of student work by faculty, and how it may be avoided, see generally Melissa Astala, Comment: *Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Infringement Cases*, 3 HOUS. BUS. & TAX L.J. 31 (2003); Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L. J. 159 (2005); Sean B. Seymore, *How Does My Work Become Our Work? Dilution of Authorship in Scientific Papers, and the Need for the Academy to Obey Copyright Law*, 12 RICH. J.L. & TECH. 11 (2006); Carmenelisa Perez-Kudzma, *Fiduciary Duties in Student's Work Product*, 48 IDEA 491 (2008).

¹⁴ 119 F. Supp. 2d 90, 91-92, 97 (D. Conn. 2000).

¹⁵ *Id.* at 92.

¹⁶ *Id.* at 97-98.

¹⁷ *Id.* at 98.

accused her of plagiarism.¹⁸ Bender and Swenson had worked closely together on Bender's research and had discussed collaborating on publications. Subsequently, the two disagreed on attribution of credit for certain theories; Swenson accused Bender of having "sabotaged" Swenson's efforts to complete her doctoral degree, and Bender accused Swenson of plagiarism.¹⁹ A faculty committee took no position on the alleged plagiarism, but concluded that Bender had behaved unprofessionally by developing a close personal relationship with a student. Swenson then sued for conversion and breach of fiduciary duty.²⁰

Although the trial court ruled for Swenson on the fiduciary duty claim, the appellate court reversed. The appellate court noted that all dissertation committee members have an "independent obligation" to the university, and that the committee does not act solely for the benefit of the student.

It is undisputed that Capella faculty are obligated to report plagiarism. Separately, as an independent reviewer of Swenson's dissertation, Bender testified without contradiction that she also had a duty to evaluate the quality of Swenson's academic performance as reflected in her dissertation. The scope and character of Bender and Swenson's relationship cannot be defined without incorporating Bender's independent and competing obligations to the university. So considered, the advisor-student relationship between Bender and Swenson is neither unique nor one in which Swenson, as student, could have reasonably assumed confidentiality in her discussions of her dissertation concepts with Bender. As faculty member, Bender had a duty to advance the school's academic standards regarding plagiarism and excessive collaboration, and to report suspected violations of those standards. This defeats Swenson's claim that Bender was her fiduciary.²¹

¹⁸ 764 N.W.2d 596, 598 (Minn. Ct. App. 2009).

¹⁹ *Id.* at 599.

²⁰ *Id.*

²¹ *Id.* at 602.

In some respects, the court noted that Bender's obligations to Capella University were contrary to Swenson's interests; thus no fiduciary duty could exist.²²

In two cases, courts found what they considered a betrayal of a student's trust by a faculty member, and ruled that the student could state a cause of action for breach of fiduciary duty. In *Chou v. University of Chicago*, a patent dispute between a post-doctoral fellow and her former graduate advisor, the appellate court ruled that the advisor's promises to his former student to protect her ideas and give her credit for her work gave rise to a fiduciary duty on the part of the advisor, Professor Roizman.²³ The appellate court reversed the trial court's dismissal of the plaintiff's claims. The court explained:

Chou alleged that Roizman held a position of superiority over her as her department chairman, and that he had specifically represented to her that he would protect and give her proper credit for her research and inventions. Given the disparity of their experience and roles, and Roizman's responsibility to make patenting decisions regarding Chou's inventions, Chou has adequately pleaded the existence of circumstances that place on Roizman a fiduciary duty with respect to her inventions. Furthermore, Chou pleaded that Roizman breached that duty by naming himself as an inventor of her discoveries.²⁴

And in *Schneider v. Plymouth State College*, a case involving alleged sexual harassment of a student by a faculty member, the court ruled that the student-faculty relationship is built on trust, and because faculty have the power to award grades and provide reference letters, rejection of a faculty member's sexual advances may be risky for the student.²⁵ The court said:

When the plaintiff enrolled at [the college], she became dependent on the defendants for her education, thereby requiring them "to act in good faith and with due regard" for her interests. The relationship between students and those

²² *Id.*

²³ 254 F.3d 1347, 1353, 1362-63 (Fed. Cir. 2001).

²⁴ *Id.* at 1362-63.

²⁵ 744 A.2d 101, 103, 105-06 (N.H. 1999).

that teach them is built on a professional relationship of trust and deference, rarely seen outside the academic community. As a result, we conclude that this relationship gives rise to a fiduciary duty on behalf of the defendants to create an environment in which the plaintiff could pursue her education free from sexual harassment by faculty members.²⁶

The inconsistent rulings with respect to the existence of a fiduciary duty suggest that, except in the most extreme factual situations, students will have little success using this theory. *Emeldi*, discussed in the next Part, and a later trial court ruling in *Ashokkumar v. Elbaum*,²⁷ suggest that retaliation claims may be more successful.

II. FACULTY-STUDENT CONFLICTS AND RETALIATION CLAIMS

Many federal and state statutes include retaliation as a separate cause of action when an individual who complains of a violation of the underlying statutory prohibition is harmed in some way as a result of the complaint. For example, the civil rights laws contain either explicit prohibitions against retaliation,²⁸ or have been interpreted to do so.²⁹ With respect to claims brought under Title IX of the Education Amendments of 1972,³⁰ the plaintiff may be unsuccessful in establishing sex discrimination, but may, in fact, be able to demonstrate that she was retaliated against for complaining of the alleged discrimination.³¹

Two lawsuits involving retaliation claims ask, but do not resolve, the important question of whether a graduate program has the responsibility to ensure that a doctoral student has a faculty advisor (and a full dissertation committee), and whether, should the student's dissertation advisor resign, it is the

²⁶ *Id.* at 105-06 (alteration in original) (citations omitted).

²⁷ No. 4:12-CV-306, 2013 U.S. Dist. LEXIS 41026, at *6 (D. Neb. March 15, 2013).

²⁸ *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) (2006); Americans With Disabilities Act of 1990, 42 U.S.C. §12203 (2010).

²⁹ *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005). Although Title IX of the Education Amendments of 1972 does not explicitly address retaliation, the Court ruled that prohibition against retaliation was implied by the statutory language. *Id.*

³⁰ 20 U.S.C. § 1681 (2006).

³¹ *See Jackson*, 544 U.S. at 184.

responsibility of the student or of the program to find a substitute. Particularly in situations, as alleged in two cases below, where the student appears to be academically qualified and has not engaged in misconduct, the courts have suggested, without requiring, that the student may be entitled to a substitute dissertation chair as a form of due process.

In *Emeldi v. University of Oregon*, Emeldi, a female doctoral student, was working on her PhD dissertation in special education.³² Her dissertation committee chair left for a one-year sabbatical, and Emeldi asked Professor Horner to replace him as her chair. He agreed.³³ Emeldi spearheaded a group of female students who complained to the dean about their perceptions of lack of support for female graduate students; Emeldi complained specifically about her perception that Professor Horner did not treat male and female graduate students equally. Subsequently, conflicts arose between Emeldi and Professor Horner about the quality of her research and the sufficiency of her methodological approach.³⁴ When Emeldi complained to another professor about her perceptions of mistreatment by Professor Horner, that professor apparently discussed Emeldi's concerns about her dissertation progress with Professor Horner; (it is disputed as to whether or not that professor told Horner about Emeldi's accusations of sex discrimination against him).³⁵ Emeldi sent Horner an e-mail, telling him that he was a "barrier" to her advancement in the doctoral program.³⁶ Horner then resigned as Emeldi's dissertation chair, which the university attributed to Emeldi's refusal to follow his advice with respect to her dissertation.³⁷

Emeldi then asked fifteen faculty in the program to chair her dissertation committee; all refused for a variety of reasons.³⁸

³² 698 F.3d 715, 721 (9th Cir. 2012).

³³ *Id.*

³⁴ *Id.* at 722.

³⁵ *Id.* at 722-23.

³⁶ *Id.* at 736.

³⁷ *Id.* at 723.

³⁸ Some faculty said that they did not have the requisite expertise to advise her on her project; others said they were too busy. Curiously, Emeldi did not ask her original chair, who had returned from sabbatical leave, to resume his role as chair. *Emeldi v. Univ. of Or.*, 698 F.3d 715, 723 (9th Cir. 2012).

Unable to complete her dissertation, she withdrew from the university and filed claims of sex discrimination and retaliation under Title IX. The trial court awarded summary judgment to the university,³⁹ but the appellate court reversed two to one, ruling that there were significant disputes over material facts that needed to be resolved at trial. Although the majority conceded that Emeldi's claims were "speculative," it was reviewing an award of summary judgment by the court below and was required to interpret challenged facts in the plaintiff's favor.⁴⁰ Stating that the "loss of a [dissertation] chair is an adverse action" that could possibly support a retaliation claim, the majority ruled that the case must be tried.⁴¹

One judge dissented from the majority opinion, stating that Emeldi had not provided sufficient evidence to suggest that gender discrimination motivated Professor Horner's resignation. The judge commented:

We need to be cautious when transporting the doctrines that govern the workplace into the university setting, where the roles of student and teacher, especially in a Ph.D. program, are so bound up in personal interactions and subjective judgments. To turn a falling out between a male professor and a female doctoral candidate into a jury trial over the professor's alleged bias against women should not happen unless there is good evidence to support the charge of discrimination based on gender. Because Emeldi's evidence has not met that threshold, I respectfully dissent.⁴²

The dissenting judge noted that Emeldi had "resisted" Professor Horner's suggestions, quoting Professor Horner as saying that "Ms. Emeldi's dissertation proposal was insufficiently developed to allow presentation to a dissertation committee. The conceptual foundation was not established, and her methodology would not have met the standards for a doctoral dissertation."⁴³

³⁹ *Emeldi v. Univ. of Or.*, No. 08-6364-HO, 2010 U.S. Dist. LEXIS 56543, at *14 (D. Or. June 4, 2010).

⁴⁰ *Emeldi*, 698 F.3d at 725.

⁴¹ *Id.* at 726.

⁴² *Id.* at 732.

⁴³ *Id.* at 737.

According to the dissent, rather than working to resolve the problems Professor Horner saw with her research, Ms. Emeldi “went to the University administration” to complain about him.⁴⁴

At the subsequent trial, the judge dismissed Ms. Emeldi’s claims on the third day, ruling that she had provided insufficient evidence of discrimination or retaliation to send to the jury.⁴⁵ According to an observer at the trial, the judge stated that the case involved “personalities and academic differences,” not discrimination.⁴⁶

A second case in which a doctoral student claimed retaliation as a result of conflict with her advisors, and her inability to find a substitute dissertation chair, is *Ashokkumar v. Elbaum*.⁴⁷ The student, who was working on a PhD in computer science at the University of Nebraska, accused her former advisor, Professor Henninger, of plagiarism when he submitted a paper she allegedly co-authored without naming her as a co-author. The student had Henninger removed from her dissertation committee and replaced him with two other professors.⁴⁸ Henninger, in turn, accused the student and her new advisors of plagiarism when they submitted a similar paper that they had written together.⁴⁹ The student also became involved in a dispute between the former advisor and two new advisors—all of whom wished to serve on her dissertation committee.⁵⁰ An investigation of the student’s plagiarism charge against the former advisor found that her claims were true (and that his were not), but the faculty involved in the dispute were angry with her for pursuing the investigation rather than settling

⁴⁴ *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1236 (9th Cir. 2012).

⁴⁵ Stacey Patton, “Former Graduate Student’s Gender-Discrimination Case is Dismissed,” *THE CHRONICLE OF HIGHER EDUCATION*, Dec. 6, 2013, <http://chronicle.com/article/Former-Graduate-Students/143463/>.

⁴⁶ *Id.*

⁴⁷ *See generally* *Ashokkumar v. Elbaum*, No. 4:12-CV-3067, 2013 U.S. Dist. LEXIS 41026 (D. Neb. March 15, 2013). For background information and commentary on this case, see Stacey Patton, *My Advisor Stole My Research*, *THE CHRONICLE OF HIGHER EDUCATION*, Nov. 11, 2012, <http://chronicle.com/article/My-Advisor-Stole-My-Research/135694/>. For a general discussion of faculty misappropriation of student work, and other ethical misconduct, see JOHN M. BRAXTON, EVE PROPER, & ALAN E. BAYER, *PROFESSORS BEHAVING BADLY* (2011).

⁴⁸ *Ashokkumar*, 2013 U.S. Dist. LEXIS 41026, at *5.

⁴⁹ *Id.* at *6.

⁵⁰ *Id.* at *9.

it informally.⁵¹ The court quoted the investigatory committee's findings:

[S]ome or most of the involved faculty allowed the discussion of intellectual property to become conflated with a dispute over the composition of [the plaintiff]'s supervisory committee. The interviews revealed a hierarchy in which the needs and rights of a graduate student were somehow less important than those of faculty members and in which the serious responsibility for graduate education was allowed to become subordinate to the resolution of a dispute between groups of faculty members.⁵²

As a result of the dispute, all of the involved faculty members refused to serve on the student's dissertation committee, and she could not find any other faculty members to supervise her research.⁵³ She sued the professors, the department chair, and various administrators, claiming constitutional violations under Section 1983⁵⁴ in the retaliation for exercising her free speech rights (the plagiarism charge), and a violation of due process (for being unable to continue her doctoral work after her charges were substantiated), as well as breach of contract. The university and professors moved for summary judgment.⁵⁵

The court agreed with the plaintiff that, although she had received due process in the plagiarism complaint process, her treatment after she was vindicated could be a denial of due process. The court commented:

[T]he plaintiff has sufficiently alleged that she was retaliated against for exercising her due process rights, which itself states a constitutional violation. It is well settled that an act in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.⁵⁶

⁵¹ *Id.* at *8-9.

⁵² *Id.* at *8.

⁵³ *Id.* at *10.

⁵⁴ 42 U.S.C. § 1983 (2006).

⁵⁵ *Ashokkumar*, 2013 U.S. Dist. LEXIS 41026, at *10-11.

⁵⁶ *Elbaum*, 2013 U.S. Dist. LEXIS 41026, at *20-21.

The university asserted that the student was claiming a “constitutional right to an advisor on the dissertation topic of her choice,”⁵⁷ an argument that the court refused to address squarely, by noting that “if the plaintiff can prove that her constitutional rights are being violated by University professors, then surely someone at the University has the authority to tell them to stop.”⁵⁸ The court dismissed most of the plaintiff’s claims against individual faculty members and administrators, including the breach of contract claims, but denied the motion to dismiss the constitutional claims against the department chair in his official capacity, against whom the plaintiff sought injunctive relief (to constitute a dissertation committee so that she could complete the PhD).⁵⁹ In making its ruling, the court commented:

The Court cannot help but note that the plaintiff seems to be concerned, first and foremost, with the opportunity to complete her degree. And Goddard is a department chair at a university that is in the business of providing students with such opportunities. It is difficult to conceive that some sort of mutually beneficial agreement may not be attainable.⁶⁰

A third retaliation claim was brought by a former doctoral student at Vanderbilt University (who eventually received her doctoral degree) against her dissertation chair, a professor of archeology, and the university.⁶¹ In *Kovacevich v. Vanderbilt University*, the plaintiff joined a group of other women graduate

⁵⁷ *Id.* at *24 n.5.

⁵⁸ *Id.* at *28 n.6. The court rejected the student’s attempt to hold the professors individually liable for constitutional violations; it concluded that they were protected by qualified immunity because

[i]t was not unreasonable for Espy, Goddard, or Paul to conclude that once those proceedings were complete (at least as to the plaintiff), the plaintiff would be subject to the same rules as any other student in the Ph.D. program, including the requirement that students were responsible for finding their own academic advisors.

Id. at *29.

⁵⁹ *Id.* at *31-35.

⁶⁰ *Id.* at *47-48 n.9.

⁶¹ *Kovacevich v. Vanderbilt Univ.*, No. 3:09-0068, 2010 U.S. Dist. LEXIS 36054, at 30 (M.D. Tenn. Apr. 12, 2010). The plaintiff also alleged violations of Title VII of the Civil Rights Act of 1964 in that she held a graduate assistantship and was supervised by Professor Demerest, who then refused to renew the assistantship after her complaint. *Id.*

students who filed a sexual harassment complaint with the University against Professor Demerest, who was the plaintiff's dissertation advisor.⁶² She claimed that, prior to the harassment complaint, Demerest had said that she was his best student.⁶³ After she filed the complaint, the plaintiff alleged that Demerest engaged in a course of retaliation that was intended to disparage her as a scholar.⁶⁴ She then filed a complaint with the Equal Employment Opportunity Commission and a lawsuit, alleging sex discrimination, sexual harassment, and retaliation.⁶⁵

The University settled the lawsuit with the plaintiff and constructed a mechanism that would retain Professor Demerest as co-chair of her dissertation committee, but would add other faculty members to monitor the communications between the plaintiff and Demerest.⁶⁶ The settlement agreement also stated that Demerest

⁶² *Id.* at *8.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at *8-9.

⁶⁶ *Id.* at *10-11. The court described the elaborate process designed to protect the student and to ensure that she could benefit from Professor Demerest's expertise. Against this backdrop of Plaintiff's university complaint and EEOC charge, adjustments were made in the procedure for the writing and evaluation of Plaintiff's dissertation. An agreement was reached on March 2, 2006, between the Department of Anthropology, represented by its Chair, Dr. Demarest, and Plaintiff which provided that the Dissertation Committee would be comprised of two Co-Chairs, Dr. Tom D. Dillehay and Dr. Demarest; two department members, Dr. John Janusek, Director of Graduate Studies, and Dr. William Fowler; and two outside readers. The agreement set out a procedure by which Plaintiff would submit her dissertation drafts to Dr. Demarest by overnight express mail and Dr. Demarest would read the drafts and email his written comments to Dr. Dillehay within two weeks. The agreement provided in part:

Dr. Demarest is expected to provide only constructive criticism on the dissertation chapters. For obvious academic and intellectual reasons, he may disagree with Ms. Kovacevich's approach to and interpretation of the data, and, in turn, she may disagree with his suggestions and choose not to follow them. Dr. Dillehay will read the comments for content and tone and, if satisfied that they are professionally suitable, distribute them to Ms. Kovacevich and the other committee members. If Dr. Demarest's comments are negative beyond normal and justified scholarly criticism, Dr. Dillehay will return them to him for revision. Dr. Demarest's questions and comments on the candidate's answers to them during the oral defense of the dissertation also will be subjected to the same scrutiny for content and tone. Further, Dr. Demarest will not be able to solely veto the dissertation and the dissertation defense.

Id. at *9-10.

would not be present at the dissertation defense but that he could submit written questions and receive written answers from the plaintiff.⁶⁷ A dispute arose between the plaintiff and Demerest as to the correctness of her interpretations of some of the data she cited in the dissertation.⁶⁸ Although the dispute did not prevent the plaintiff from successfully defending her dissertation, Demerest publicly criticized the plaintiff's research at two scholarly conferences during the time that she was seeking a tenure-track faculty position. The plaintiff filed a second retaliation lawsuit against Vanderbilt, arguing that Demerest had violated the nondisparagement terms of the settlement agreement with respect to the prior lawsuit, and that Vanderbilt had the responsibility to control Demerest's behavior because he was acting within the scope of his employment when he spoke at the conferences.⁶⁹ Both parties filed motions for summary judgment—Vanderbilt arguing that the settlement agreement prevented the plaintiff from suing, and the plaintiff arguing that neither Vanderbilt nor Demerest had complied with the terms of the settlement agreement. The court denied both summary judgment motions, ruling that there were many disputed facts that a jury would need to sort out.

The *Kovacevich* opinion is interesting for several reasons. The university apparently went to great lengths to balance the student's interest in being treated fairly with respect to her dissertation research and defense, while acknowledging that Professor Demerest—a well-respected expert in archeology—was entitled to make appropriate scholarly criticisms.⁷⁰ The opinion also asks, but does not answer, the question: to what extent is a university responsible for a faculty member's public criticisms of another's work, particularly when these criticisms are characterized as opinion and thus probably outside the scope of defamation liability? How does a university ascertain whether a professor's criticism of student work is justified, or is a form of retaliation?

⁶⁷ *Id.* at *10.

⁶⁸ *Id.* at *11-12.

⁶⁹ *Id.* at *30.

⁷⁰ *Id.* at *35-50.

These retaliation cases illustrate the sometimes fractious relationships between faculty, who may be appropriately critical of a student's work, and students, who, as junior scholars, may believe that they have a deeper understanding of the particular topic they wish to pursue. These conflicts seem poorly suited to resolution through litigation, however. Mediation by other program faculty or even outside experts,⁷¹ clearer communication between the faculty member and the student, and active monitoring by the graduate director to ensure that students are making progress and being treated fairly should help to minimize these conflicts before they explode into litigation.

III. STUDENT-FACULTY CONFLICTS AND PROFESSIONAL CERTIFICATION

Many of the lawsuits involving conflicts between students and their faculty supervisors arise in pre-professional programs with a clinical component. In these cases, students who have performed well in traditional classroom settings may have difficulty complying with professional, ethical, or practical requirements imposed by the clinical setting in which they work with patients, clients, or younger students. Most, if not all, pre-professional and professional programs are accredited by specialized agencies (such as the Council for the Accreditation of Counseling and Related Educational Programs—CACREP),⁷² which may impose specific behavioral or ethical requirements on practitioners of the profession, including student practitioners. One commentator has argued that, in reviewing student free speech challenges to dismissals from these programs, courts should defer to faculty judgment under most circumstances:

When a student's speech undermines the university's confidence that he or she will be an appropriate member of

⁷¹ For an example of the use of an outside neutral reader to determine whether a dissertation draft was acceptable, see *Ogindo v. DeFleur*, No. 07-CV-1322, 2010 U.S. Dist. LEXIS 6478, at *27-28 (N.D.N.Y. Jan. 27, 2010) (outside reader determined that dissertation did not meet standards for doctoral dissertation; court awarded summary judgment on all counts to university and named defendants).

⁷² For information, see COUNCIL FOR ACCREDITATION OF COUNSELING & RELATED EDUCATIONAL PROGRAMS, <http://www.cacrep.org/template/index.cfm> (last visited Jan. 28, 2013).

the profession for which the university is training him or her, the university can impose a sanction if either (1) the speech violated program rules that were closely tied to established professional conduct standards; (2) the speech was curricular (provided that the university's response stemmed from a legitimate pedagogical concern); or (3) the sanction flowed directly from an external entity's refusal to let the student fulfill a required part of the program (provided that the external entity's decision was not itself unlawful)."⁷³

An instructive example of judicial deference to faculty judgment in a "certification" case is *Tatro v. University of Minnesota*.⁷⁴ Ms. Tatro was enrolled in a mortuary science program at the University of Minnesota, which required students to work directly with donated cadavers. Program rules forbid students from blogging about activities in the anatomy lab or the dissection of cadavers. Ms. Tatro posted several comments on her Facebook page about her intent to "take out her aggression" on the cadaver with which she was working and her desire to "stab someone in the throat" with an embalming tool. After learning of Ms. Tatro's posts, the program faculty banned her from class and filed a charge against her under the university's student conduct code which prohibited "threatening, harassing, or assaultive conduct." A hearing panel found Tatro responsible for the misconduct, placed her on academic probation for the remainder of her academic career, and imposed the following sanctions: a failing grade in the course, required enrollment in a clinical ethics course, composing a letter to department faculty addressing respect within the profession, and submission to a psychiatric examination. Tatro sued, claiming that the discipline violated her right to free speech.

Although student free speech claims are typically evaluated under the standard articulated by the U.S. Supreme Court in

⁷³ Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 401 (2013). For an opposing perspective, see generally R. George Wright, *Standards of Professional Conduct as Limitations on Student Speech*, 11 FIRST AMEND. L. REV. 426 (2013).

⁷⁴ See 816 N.W.2d 509 (Minn. 2012).

Tinker v. Des Moines Independent Community School District,⁷⁵ the Minnesota Supreme Court chose a different strategy. Affirming the ruling of the trial court, but rejecting its rationale,⁷⁶ the supreme court stated that a public university may not regulate “a student’s personal expression at any time, at any place, for any claimed curriculum-based reason,” but noted that the program’s emphasis on ethical behavior was appropriate, and justified the limited regulation of speech in this instance. The court held that the academic program’s rules were “narrowly tailored and directly related to established professional conduct standards[.]”⁷⁷ and thus there was no First Amendment violation.

The *Tatro* court cited two recent cases involving students pursuing master’s degrees in school counseling, *Ward v. Polite*⁷⁸ and *Keeton v. Anderson-Wiley*.⁷⁹ In both cases, the graduate students, enrolled respectively at Eastern Michigan University and Augusta State University, were opposed to homosexuality for religious reasons, and expressed concerns about counseling clients during a required internship if those clients were likely to seek advice on a same-sex relationship. Keeton informed her faculty advisors that she intended to attempt “conversion therapy” on her gay clients; Ward asked her supervisor if she could refer her client to a different counselor. In both cases, the students were placed on remediation plans which required them to read and report on methods of counseling gay clients. Both were informed that refusing to counsel such clients, or attempting to “convert” them to heterosexuality, violated the American Counseling Association Code of Ethics, which was not only a central aspect of the master’s degree curriculum, but which also was required by the association that accredited school counseling programs, CACREP.⁸⁰ Failure to

⁷⁵ See 393 U.S. 503, 513-14 (1969). For a discussion of *Tinker* as applied to college students, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 1198 (5th ed. 2013).

⁷⁶ See 800 N.W.2d 811, 821-822 (Minn. Ct. App. 2011). The appellate court, following the *Tinker* framework, had ruled that *Tatro*’s blogs had created a “substantial disruption” among fellow students and the general public, and thus were unprotected by the First Amendment. *Tinker*, 393 U.S. at 503.

⁷⁷ *Tatro*, 816 N.W.2d at 521.

⁷⁸ 667 F.3d 727 (6th Cir. 2012).

⁷⁹ 664 F.3d 865 (11th Cir. 2011).

⁸⁰ See *supra* note 53.

conform their behavior with the code of ethics was grounds for dismissal from the program.⁸¹

Rather than completing the remediation plans, both students sued, claiming that requiring them to counsel homosexual clients violated their rights to free speech and free exercise of religion. Keeton sought a preliminary injunction to prevent her dismissal from the program, and Ward sought reinstatement. Both the trial and appellate courts rejected Keeton's claim, stating that restrictions on behavior imposed by the code of ethics were reasonable and closely related to the program's legitimate pedagogical concerns, and noting that the program faculty were not asking her to change her beliefs, but to separate her personal beliefs from her work with clients.

On the other hand, the appellate court in *Ward* reversed the lower court's award of summary judgment to the university, ruling that there were sufficient disputes of material facts to require a jury to determine whether the student should prevail. The court explained that the code of ethics at issue in both cases could be interpreted as not barring the referral made by Ward, there was no written requirement that students not make referrals, and Ward had alleged sufficient facts to suggest that the faculty's decision to dismiss her from the master's program was based on hostility to her speech and her religion. In particular, the court noted that statements made by faculty at her pre-dismissal hearing focused on Ward's religious beliefs and the nature of her religious objections to counseling gay clients. For those reasons, the court ruled that the case must go before a jury.⁸²

⁸¹ For a discussion of *Ward* and *Keeton*, and their significance for graduate counseling programs, see generally Todd A. DeMitchell, David J. Hebert & Loan T. Phan, *The University Curriculum and the Constitution: Personal Beliefs and Professional Ethics in Graduate School Counseling Programs*, 39 J.C. & U.L. 303, 317-26 (2013).

⁸² The case was settled, ending the lawsuit. Doug Lederman, *Settlement in Counseling Conflict*, INSIDE HIGHER ED (Dec. 11, 2012), <http://www.insidehighered.com/news/2012/12/11/university-and-student-settle-lawsuit-over-requirement-counseling-gay-people>. For an earlier case in which a federal appellate court rejected a student's free speech claim, but allowed his free exercise claim to go forward, see *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007) (student dismissed from master's program in social work for telling client that churches operated bereavement programs; free speech claim dismissed because the speech was not a matter of public concern, but because the speech reflected his religious beliefs, his free exercise claim could go forward).

Students who have been barred from, or dismissed from, student teaching experiences have attempted to state free speech and procedural due process claims, but with little success. In *Oyama v. University of Hawaii*,⁸³ the plaintiff was enrolled in a post-baccalaureate certification program in secondary education. Throughout his coursework, the faculty had been concerned about his performance and his attitudes, particularly his stated beliefs concerning online child predators and the age of consent.⁸⁴ The faculty believed that the plaintiff was insufficiently sensitive to safety issues related to adolescent students, and they denied his application for student teaching, a required component of the certification program.⁸⁵ The faculty members' concerns were based upon comments and statements that the plaintiff had made in his classes, and also upon the observations of a faculty member who had supervised the plaintiff in a field experience.⁸⁶ Although the faculty member gave feedback to the plaintiff concerning his alleged failures in teaching students, the plaintiff's behaviors did not change.⁸⁷ The dean appointed a grievance committee, and the student's statements before that committee were also "serious matters of concern," according to the faculty.⁸⁸ Citing *Hazelwood School District v. Kuhlmeier*,⁸⁹ a case involving the regulation of student speech in a public high school, and *Brown v. Li*,⁹⁰ a case applying *Hazelwood* to student speech in a university, the court in *Oyama* determined that the regulation of speech was "an academic decision based on professional judgment"⁹¹ and rejected the student's free speech claim. It also concluded that the plaintiff's due process rights had not been violated.

Similarly, in *Winkle v. Ruggieri*,⁹² a college senior enrolled in a teacher education program at Ohio University was told he must

⁸³ No. 12-00137 HG-BMK, 2013 U.S. Dist. LEXIS 59655 (D. Haw. Apr. 23, 2013).

⁸⁴ *Id.* at *5-8.

⁸⁵ *Id.* at *8.

⁸⁶ *Id.* at *5-8.

⁸⁷ *Id.* at *8.

⁸⁸ *Id.* at *9-10.

⁸⁹ 484 U.S. 260 (1988). The Court ruled that a public secondary school may regulate the content of curricular student speech provided that the limitation is reasonably related to a legitimate pedagogical purpose. *Id.* at 273.

⁹⁰ 308 F.3d 939 (9th Cir. 2002).

⁹¹ *Oyama*, 2013 U.S. Dist. LEXIS 59655, at *34.

⁹² No. 2:12CV-01079, 2013 U.S. Dist. LEXIS 8533 (S.D. Ohio Jan. 22, 2013).

change his major and that he was not suited for teaching. The faculty who made this determination cited his negative comments about “young adult literature,” his unwillingness to work collaboratively with fellow students, and his “lack of tact” to support their decision.⁹³ Winkle sued, claiming free speech and due process violations.⁹⁴ As in *Oyama*, the court cited *Hazelwood*, and also cited *Ward v. Polite* for the notion that an institution of higher education could require its students to master certain educational content.⁹⁵ Quoting *Ward*, the court said:

It may be true that university students can handle more mature themes, but it is also true that they are not forced to be there, something that cannot be said about most students at public high schools. A prospective university student has the capacity to learn what a curriculum requires before applying to the school and before matriculating there. When a university lays out a program’s curriculum or a class’s requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them.⁹⁶

Rejecting the plaintiff’s contention that the education program’s “core values,” with which the plaintiff’s remarks had been compared, were a speech code, the court ruled that they were a legitimate pedagogical method of assessing a potential teacher’s disposition and suitability for the role of a teacher.⁹⁷

Finally, a case involving free speech claims involved a student teacher’s post on a social media outlet. In *Snyder v. Millersville State University*,⁹⁸ the student teacher had encouraged her high school students to communicate with her via her MySpace page, on which she had posted a picture of herself over the caption “drunken pirate.”⁹⁹ The school district had been unhappy with the student teacher’s performance prior to the posting of the picture, and terminated her student teaching

⁹³ *Id.* at *2-3.

⁹⁴ *Id.* at *7.

⁹⁵ *Id.* at *11, *13.

⁹⁶ *Id.* at *15 (citing *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012)).

⁹⁷ *Id.* at *17.

⁹⁸ No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008).

⁹⁹ *Id.* at *15.

assignment before it was completed.¹⁰⁰ She was not able to receive a bachelor's degree in education, nor could she be certified as a teacher in the state, although the university awarded her a bachelor's degree in English instead. She sued the university and some faculty members individually for violating her free speech and due process rights. The court dismissed her due process claims, but held a bench trial on the free speech issue. Characterizing the plaintiff as a "public employee" (although she was not an employee), the court applied the Supreme Court's analysis in *Connick v. Myers*,¹⁰¹ and determined that the speech was not a matter of public concern, but a personal matter. Thus, concluded the court, the speech did not merit First Amendment protection.

Additional certification cases using various theories to challenge academic dismissals have also been unsuccessful for student plaintiffs unless the facts demonstrate that some motive other than academic judgment was involved. Due process claims abound,¹⁰² as do breach of contract¹⁰³ and discrimination claims.¹⁰⁴

¹⁰⁰ *Id.* at *17.

¹⁰¹ 461 U.S. 138 (1983) (speech by a public employee that is not a matter of public concern is not protected by the First Amendment).

¹⁰² *See, e.g.,* Zanelli v. Rich, 954 N.Y.S.2d 762 (N.Y. Sup. Ct. 2012) (nursing student dismissed for making multiple medication errors; court found no due process violation); *see also* Scaccia v. Stamp, 700 F. Supp. 2d 219 (N.D.N.Y. 2010) (student who made insufficient progress toward Ph.D. demoted to M.A. program; no due process violation).

¹⁰³ *See, e.g.,* Ogindo v. Defleur, No. 07-CV-1322, 2010 U.S. Dist. LEXIS 6478 (N.D.N.Y. Jan. 27, 2010) (no contract breach when dissertation advisor resigned after several disputes with student). *But see* Dauven v. George Fox Univ., No. 09-305-PK, 2010 U.S. Dist. LEXIS 142066, at *75 (D. Or. Dec. 3, 2010) (court denied summary judgment for defendants because faculty did not follow guidelines for working with interns with performance problems and student provided evidence that faculty intended to destroy her career).

¹⁰⁴ *See, e.g.,* Herzog v. Loyola Coll. in Md., Inc., No. RDB-07-02416, 2009 U.S. Dist. LEXIS 94454 (D. Md. Oct. 9, 2009). In *Herzog*, the student claimed dismissal from clinical psychology doctoral program for misconduct was motivated by his ADHD, but the court disagreed, saying "It is well within Loyola's discretion to dismiss a student who has problems with authority, difficulty understanding the impact of his conduct on others and who has conceded to breaching ethical standards promulgated by the school." *Id.* at *25; *but see* Wallace v. Nev. ex rel. Bd. of Regents, No. 2:09-cv-1588-GMN-PAL, 2011 U.S. Dist. LEXIS 113280 (D. Nev. Sept. 30, 2011) (court allowed doctoral student's claims of race discrimination to go to jury in response to her

Although most student legal claims involving disputes with faculty are unsuccessful, the allegations in some of these cases are troubling, and suggest that faculty who advise graduate students should collectively develop strategies to help students who are capable of completing the program succeed, and to assist students who, for either academic or personal reasons, cannot complete the program exit gracefully. The next section of this Article will offer some suggestions in this regard.

IV. STRATEGIES FOR REDUCING STUDENT-FACULTY CONFLICTS

The relationship between a graduate student and his or her faculty advisor or dissertation chair is often a close personal one in which the advisor inculcates the student in the ethics, knowledge, and social capital that the student will need to become a successful scholar and teacher. For many graduate students, the experience of working with one's dissertation or thesis advisor is a positive and enriching experience. Unfortunately, not all student-advisor relationships are rewarding. According to Braxton, Proper and Bayer:

The graduate school socialization process provides graduate students with occasions to either directly or indirectly experience those negative behaviors that produce proscriptions. Through advising and mentoring, taking courses, serving as graduate research assistants, and engagement in thesis or dissertation work, harm may come to graduate students because of the actions of graduate faculty members.¹⁰⁵

This observation suggests that graduate program faculty have a collective responsibility to ensure that students are advised competently, understand the program's expectations, comply with the program's timeline for completion of milestone events such as comprehensive examinations and thesis defenses, and know how and where to complain if they believe their advisor is not fulfilling his or her responsibilities.

allegations that her failure to find faculty to serve on a dissertation committee and her twice failing her oral examinations were a result of race discrimination).

¹⁰⁵ BRAXTON, *supra* note 47, at 8.

Analysis of the cases reviewed for this Article and the author's practical experience as a dissertation advisor suggest the following strategies for preventing or reducing conflict between faculty advisors and their student advisees:

1. Before a student is admitted to a graduate program, establish which faculty member(s) will advise the student. Create and publicize a process for changing one's advisor that the entire program faculty agree to follow. A student should not have the sole responsibility to identify a faculty advisor.
2. Ensure that expectations for student performance on examinations (written and oral) are clear, and that the scope of material to be covered is communicated to the student.
3. Create and enforce reasonable timelines for completion of course work, comprehensive examinations, dissertation proposals, dissertations or theses, and other milestone achievements. Exceptions to these timelines should be rare.
4. Review the adequacy of each graduate student's progress on a frequent and regular basis. Ensure that faculty advisors are maintaining frequent contact with students; students who are unresponsive should be required to report on their intentions with respect to completing the program.
5. Develop a procedure for mediating student-faculty conflicts over dissertation proposals and dissertation defenses. Consider the use of other program faculty or even faculty external to the institution as mediators or as reviewers of student work if the student claims bias on the part of the faculty member. This is particularly important if the student's faculty advisor is the only expert in the department who can evaluate the student's work.
6. Create a policy with respect to how many times a student may retake an examination or re-defend a dissertation proposal or dissertation. Enforce it consistently.
7. Allow students who are struggling with personal or medical problems to take a leave; ensure that students are capable of handling the stress of graduate school before they are allowed to return from the leave.

8. Most graduate programs have time limits. Enforce them consistently.
9. Create a grievance procedure for students that provides for meaningful review of student complaints rather than permitting the grievance committee to always side with the faculty member.
10. Train students and faculty on the ethics of the discipline and enforce ethical requirements for both students and faculty.

It is not clear whether the programs involved in litigation discussed in this Article had adopted some or all of these suggestions. Given the high stakes involved for students in obtaining their graduate degree, the expense and distraction for faculty and administrators if litigation ensues, and the emergence of retaliation claims by students who believe they have been mistreated by their advisors, adopting these suggestions, and monitoring student progress toward their degree, should reduce the potential for conflict and, one would hope, for litigation as well.

