

UE on Appeal

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



Winter 2022

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U.S. Court of Appeals for the Sixth Circuit

Court Affirms Revocation of Professor's Tenure, Holds That Procedural Safeguards Were Adequate

The Sixth Circuit, considering the plaintiff's complaint on its face, affirmed a lower court's dismissal of his complaint in its entirety for failing to state a claim for violations of the Fourteenth and First Amendments. When terminating his position as departmental chair and tenured professor, the university afforded adequate due process.

ALLEGATIONS OF BIASED TITLE IX INVESTIGATIVE PROCESS

The plaintiff, Dr. Henry Kaplan, joined the University of Louisville's Department of Ophthalmology and Visual Sciences (DOVS) in 2000 as a tenured professor and departmental chair. He was deemed successful for most of his time at the university.

His most recent five-year review described his performance as "superb" and, consequently, the reviewing committee unanimously recommended him for another term. The university followed the recommendation and reappointed him through 2021.

His relationship with the university began deteriorating after the announcement of cost-control measures. As part of the reforms, the university planned a 15% salary cut to DOVS's faculty doctors. To avoid these salary cuts, Kaplan explored selling DOVS's clinical practice to a private equity group.

Because DOVS was treating more patients and more doctors requested time there, he also told the university that his department needed more space and began negotiating a new lease in March 2018. Circumstances prompted Kaplan to sign the new lease before the university administration authorized him to do so.

The university commenced a “special chair review” in October 2018 to investigate his conduct as chair. The review stemmed from concerns about his unauthorized lease agreement, reneging on an agreement that DOVS would lease space from the medical school despite its having made significant investments in reliance on his representations, attempting to seek outside funding, and creating an LLC to “spin-off” DOVS’s clinical practice, among other things. For the length of the review, Kaplan was placed on paid administrative leave from his role as chair.

Less than a month later, the university canceled Kaplan’s scheduled interview for the review. It advised him that the investigation was being escalated to the university’s Compliance and Audit Services (CAS) office, he was being placed on administrative leave with pay from his tenured position, and the university might terminate his tenure.

Kaplan participated in an interview with investigators. Following their investigation, CAS recommended disciplinary action up to and including termination of his tenure. The CAS report revealed other financial mismanagement by Kaplan, including DOVS failing to make required payments to the university since 2015 (over \$1.1 million a year), attempting to give his faculty doctors raises despite budget reductions, and reneging on an agreement with the medical school after over \$335,000 in equipment was ordered for the space to specialize it for ophthalmology.

Kaplan filed a written response to the CAS report and received a two-day hearing, at which he called witnesses and introduced his own evidence. He successfully defeated two of the six grounds on which the university sought his termination. But the Board of Trustees terminated his tenure based on the remaining grounds, including the unauthorized lease and his perceived attempt to sell DOVS’s clinical practice to private investors.

Kaplan filed suit, challenging his dismissal on Fourteenth and First Amendment grounds. The district court granted the university’s motion to dismiss all causes of action, and he appealed to the Sixth Circuit.

The Sixth Circuit’s opinion commences by summarily affirming the district court’s holding that all the plaintiff’s claims against the university were barred by sovereign immunity. Consequently, the only claims addressed in detail are Kaplan’s due process claims against the individual defendants.

NO PROTECTED PROPERTY INTEREST IN POSITION AS DEPARTMENTAL CHAIR

Kaplan argued that he was suspended from his position as chair and tenured professor without due process, in violation of the Fourteenth Amendment. The U.S. Supreme Court has recognized that tenured professors at public institutions have a protected property interest in their continued appointment. However, as noted by the Sixth Circuit, the U.S. Supreme Court is generally hostile to bright-line rules in the procedural due process context.

The Sixth Circuit then applied the *Mathews v. Eldridge* three-part balancing test in analyzing whether the plaintiff sufficiently stated a claim. With respect to Kaplan’s position as chair, the court affirmed that he had no protected property interest and so no process was due.

The court similarly analyzed Kaplan’s due process claim in relation to his tenured faculty position. It applied the balancing test and made several assumptions in Kaplan’s favor. Ultimately, however, the court held that the university’s suspension of Kaplan with pay and procedural processes didn’t violate his procedural due process rights.

Kaplan never asserted that his placement on paid leave cost him income. Weighing this interest against the university’s interest in Kaplan’s removal, the court affirmed that the university’s interest in placing him on leave (and ultimately terminating him) was “clear” based on the face of the complaint.

In weighing whether more procedural safeguards would have benefitted the plaintiff, the court noted that despite the “Cadillac plan” of due process afforded to him, the faculty who heard Kaplan’s appeal concluded that he had undermined university budget reduction efforts and had tried to separate DOVS’s clinical practice from the university — either of which would have independently justified his termination.

PAID SUSPENSION DIDN’T DEPRIVE PLAINTIFF OF HIS LIBERTY

Kaplan also claimed a due process violation in relation to his liberty interests, asserting that he had been deprived of liberty interests in his reputation and his career without due process.

In the Sixth Circuit, a plaintiff’s failure to request a name-clearing hearing is fatal to a claim alleging a deprivation of a liberty interest in reputation without due process, because the denial of a request for a hearing that gives rise to the question of the adequacy of process. Kaplan’s admission that

he never requested a name-clearing hearing from the university was therefore fatal to his claim after the court rejected his arguments for why the failure to do so should be excused.

The court similarly disposed of Kaplan's argument regarding a liberty deprivation in relation to his career. To succeed on a such a claim would require a plaintiff to plead state action that precluded him from engaging in his profession anywhere in the state. Accordingly, Kaplan's claim failed because it involved only a singular position at a singular employer.

Kaplan next alleged that the university's decision to place him on paid administrative leave from his tenured position violated his academic freedom. In the court's view, this claim merely repackaged his procedural due process argument.

Kaplan failed to allege that his placement on leave was an attempt to control or direct the content of the speech engaged in by the university or those affiliated with it. Kaplan did allege that his suspension affected ongoing grant proposals, but that allegation wasn't enough to sustain a claim for deprivation of academic freedom, in violation of the First Amendment.

As the court stated, the university suspended the plaintiff because of his attempts to circumvent its cost-control measures and not because of ideas he advocated or research he conducted.

THE BOTTOM LINE

Although a public institution may have sovereign immunity, plaintiffs still can sue individual employees for due process and other constitutional violations. For private institutions, much of the process afforded to faculty is included as part of a contract or employee handbook. Regardless of whether they're public or private, institutions should follow procedures outlined in their policies and consider consulting with counsel when determining whether revocation of tenure is an appropriate disciplinary measure.

Kaplan v. Univ. of Louisville, et al., 10 F.4th 569 (6th Cir. Aug. 18, 2021), petition for reh'g en banc denied.

RELATED UE RESOURCES

- [The Goal Is Fairness](#)
- [Tenure Evaluation Challenges](#)
- [Problems Arising From Tenure Denials: A Review of Recent Claims](#)

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Missouri Supreme Court

Public University's Policy Prohibiting Firearms on Campus Passes Constitutional Muster

This case involved a challenge by the state of Missouri to the University of Missouri's rule prohibiting university employees from possessing firearms in their vehicles on university campuses. After the case's lengthy trip through the state's courts, the Missouri Supreme Court's denial of a petition to transfer the case from the appellate court concluded the case and left in place the appellate court's affirmance of the trial court's decision that the university's policies pass constitutional muster.

TRIAL COURT RULES IN UNIVERSITY'S FAVOR IN PROTRACTED CONSTITUTIONAL DISPUTE

In 2015, a law professor at the University of Missouri brought suit against the university's Board of Curators claiming that

the university's campus weapons ban violated the Missouri Constitution and a state statute that allowed employees to conceal guns in their vehicles parked on public property, provided the vehicle is locked and the firearm isn't visible.

The university's policy stated that "possession of and discharge of firearms, weapons, and explosives on university property including university farms is prohibited except in regularly approved programs or by university agents or employees in the line of duty."

The state's Attorney General (AG) subsequently intervened in the state court lawsuit. The AG similarly argued that the university's rule violated the state constitution. Specifically,

the AG sought a declaration that the rule was unconstitutional to the extent it prohibited university employees from:

- Possessing firearms while driving their vehicles on university property to and from work
- Keeping firearms secured and out of sight in their locked vehicles parked on university property while conducting activities within the scope of their employment
- Transferring firearms from the passenger compartment to the trunk of their vehicles while parked on university property

After a 2019 bench trial, the court entered judgment in the university's favor, holding that its rule barring guns on campus was constitutional and satisfied strict scrutiny.

The AG appealed. The law professor and the university resolved his remaining claims pursuant to a settlement agreement prior to trial.

UNIVERSITY POLICY IS NARROWLY TAILORED TO MEET PUBLIC SAFETY INTEREST

Earlier this year, the Missouri Court of Appeals issued its opinion affirming the trial court in part. Notably, it upheld the trial court's determination that the university's rule survives strict scrutiny.

To pass constitutional muster under a strict scrutiny analysis, the university, as the government entity restricting the constitutional right, generally must show that its rule is narrowly tailored to achieve a compelling interest. The appellate court, however, began its *de novo* analysis by citing a Missouri Supreme Court case and its progeny holding that laws regulating the right to bear arms aren't presumptively invalid and a statute won't be declared unconstitutional unless it clearly contravenes some constitutional provision.

Further, this line of case law reaffirmed the principle that, in a case involving a law or regulation impacting the constitutional right to bear arms in the Missouri constitution, the party challenging the law bears the burden of proof.

RELATED UE RESOURCES

- [Guns on Campus: Emerging Issues and Challenges](#)
- [Firearms and Weapons Policies](#)

Citing the analysis the trial court applied, the appellate court reaffirmed that the state bears the burden of proof.

Significantly, however, the appellate court held that even if the burden had shifted to the University of Missouri, the university met the burden of demonstrating that the rule is narrowly tailored to achieve a compelling state interest.

Like other fundamental rights, the application of strict scrutiny to the right to bear arms depends on context. In the setting of higher education, courts routinely have held that universities have a compelling interest in ensuring public safety and reducing gun-related crime. Citing the unambiguous and essentially unrebutted testimony from trial, the appellate court affirmed the university's rule was narrowly tailored to meet this compelling interest.

In contrast to the university, the AG offered no evidence from law enforcement at trial and relied solely on a statistician whose opinions arguably supported the university's rule. Two university law enforcement officials with 70 years of combined experience testified in support of the rule, explaining how and why the rule is narrowly tailored to achieve compelling interest and how the rule achieves those interests.

The appellate court agreed with the trial court's assessment of the evidence presented at trial and held that it didn't err in rejecting the AG's evidence in favor of that presented by the university demonstrating that the university's rule is narrowly tailored to advance a compelling government interest.

The AG filed a motion for rehearing to the Missouri Supreme Court. The motion was denied.

Subsequently, the AG filed an application directly for transfer to the Missouri Supreme Court. The university objected to the AG's application for transfer. The court recently denied the application for transfer, ending this protracted dispute.

THE BOTTOM LINE



While this case involves state constitutional and statutory issues, the issue of firearms on campus touches all educational institutions. Public institutions must be particularly mindful of state laws and regulations that may impact their formulation of a firearms-related policy and ensure that the policy is carefully drafted, and effectuated, to advance safety on campus.

State of Missouri ex rel. Eric Schmitt, Attorney General v. Mun Choi, et al. Case No. SC98992, Missouri Supreme Court (Aug. 31, 2021).

SUPREME COURT UPDATE: COURT DENIES CERTIORARI IN TITLE IX CASE

UE is pleased to report that the U.S. Supreme Court has denied *certiorari* in the Title IX case, *KD v. Douglas County Sch. Dist.*, following the plaintiffs' appeal of the Eighth Circuit's affirmance of summary judgment in favor of the school district and the Principal, a decision discussed in the [Summer 2021 issue](#) of *UE on Appeal*.

The case was brought by parents of a female middle school student who was sexually abused by her male teacher. The parents alleged claims under Title IX, Section 1983, and state law claims for negligence, battery, and intentional infliction of emotional distress. The U.S. District Court for the District of Nebraska granted summary judgment in favor of the school district and Principal, and entered a default judgment against the teacher, who had been criminally convicted.

The Eighth Circuit Court of Appeals affirmed the district court decision and held that:

- The Principal didn't have actual notice that the teacher had sexually abused the student, and thus the school district and Principal weren't liable under Title IX and Section 1983.
- The intentional tort exception to the Nebraska Tort Claims Act applied to the claim against the Principal and school district.
- The Principal didn't aid or abet any intentional infliction of emotional distress by the teacher.
- The parents weren't entitled to a jury trial on damages on any default judgment against the teacher.
- The award of damages the court issued against the teacher was warranted under the circumstances.

The parents appealed the Eighth Circuit's decision on Oct. 14, 2021, and *cert.* was denied on Nov. 15, 2021.

KD v. Douglas Cnty. Sch. Dist. No. 001, 1 F.4th 591 (2021), cert. denied, No. 21-424 (Nov. 15, 2021).

RELATED UE RESOURCES

- [Educator Sexual Misconduct at K-12 Schools Resource Collection](#)
- [Title IX and VAWA-Campus SaVE Act Resource Collection](#)

SUPREME COURT UPDATE: COURT HEARS ARGUMENTS IN FIRST AMENDMENT CASE

In the [Spring 2020 issue](#) of *UE on Appeal*, we reported on the Fifth Circuit's decision in *Houston Cmty. Coll. Sys. v. Wilson*. On Nov. 2, 2021, the U.S. Supreme Court heard arguments in the case.

The question before the court is whether the First Amendment restricts the authority of an elected board to issue a censure in response to a member's speech. David Wilson, an elected member of Houston Community College System's board of trustees, publicly criticized the board. In response, the board adopted a resolution publicly censuring Wilson.

Wilson filed a complaint alleging that the censure was issued to punish him for exercising his free speech rights. The district court granted the community college's motion to dismiss.

The Fifth Circuit reversed that decision, holding that a reprimand against an elected official for speech addressing public

concerns is actionable under the First Amendment. Before the Supreme Court, the community college argued that the board's censure itself is protected speech.

Wilson's attorney argued that because the censure invokes a board's disciplinary power and imposes a sanction, the censure implicates Wilson's First Amendment rights.

The 90-minute argument before the Supreme Court included an argument in support of the community college by the Assistant to the U.S. Solicitor General, who focused on historical precedents for allowing legislative bodies to censure a member without running afoul of the First Amendment.

We expect a decision in early summer 2022.

Houston Cmty. Coll. Sys. v. Wilson (No. 20-804).



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[Resolutions Philosophy](#)

[Claims Handling](#)

[How to Report a Claim](#)



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