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DUE PROCESS FOR ADJUNCT FACULTY IS OVERDUE

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1. Introduction

Unfortunately, in the United States the overwhelming majority of adjunct professors do not have any fair dismissal or renewal rights. There are exceptions, such as when an individual employment contract, handbook, or collective bargaining agreement provides just cause dismissal, notice of nonrenewal, academic freedom assurances, and other rights. Contracts or handbooks may also be used to establish a protected property interest in employment under certain, limited circumstances.

2. Adjunct Faculty are Presumptively At-will Employees

“The latest statistics put adjuncts at nearly two thirds of the academic workforce. They generally receive $3,000 per course or less, work without medical or pension benefits, and have little job security.” According to a 2012 report from the Coalition on the Academic Workforce, 22.6% of adjuncts reported having access to health benefits through their employer, 40% had access to retirement benefits through their employer, and the median pay per course was $2700. The report also indicated that “80% of part-time faculty respondents reported having taught as a contingent faculty member for at least three years; over 55% taught in that role for six or more years, and over 30% for ten or more years.”

Despite the prevalence and importance of adjunct faculty in academia,

1 The assistance of Matthew St. Martin, in researching and preparing this report, is gratefully acknowledged. Mr. St. Martin is a third year student at Albany Law School.


3 Coalition on the Academic Workforce, A Portrait of Part-Time Faculty Members: A Summary of Findings on Part-Time Faculty Respondents to the Coalition on the Academic Workforce Survey of Contingent Faculty Members and Instructors, p. 10, 13 (June 2012), http://www.academicworkforce.org/CAW_portrait_2012.pdf.

4 Id. at 9.
only 4% of non-unionized adjuncts reported having “some kind of job security.” These statistics illustrate that the overwhelming majority of adjunct faculty are unfairly compensated, lack access to benefits through their employer, and lack basic job security.

The lack of compensation, benefits, and job security is likely due to the fact that most adjunct faculty are considered at-will employees.\(^5\) This is also true in New York, where “absent a written agreement” adjunct professors are considered at-will employees.\(^7\) For example, The Policies of the Board of Trustees of SUNY state “[t]he services of academic and professional employees having temporary appointments may be terminated at will . . . [t]here shall be no right to appeal from such a termination.”\(^8\) Courts have stated that an at-will employee “may be terminated at any time, for any reason, or for no reason at all.”\(^9\) For adjunct professors this often means that they are terminable at the prerogative of their school’s administration.\(^10\)

For example, in the New York Supreme Court case of Rieser v. Plaza College, the plaintiff was an adjunct faculty professor who brought eight causes of action against Plaza College stemming from his termination.\(^11\) The complaint alleged that he was terminated as retaliation for complaints

\(^5\) Brill & Melican, supra note 2, at 21.

\(^6\) See R. Michael Cassidy, Reforming the Law School Curriculum from the Top Down, 64 J. Legal Educ. 428, 432 (2015) (“adjunct positions are terminable at will and subject to decanal prerogative”).


\(^9\) Trakis v. Manhattanville College, 51 A.D.3d 778, 780 (2 Dep’t 2008). The notion that any employee, even an at-will employee can be terminated “for any reason” is of course constrained by statutes that prevent termination for, among other reasons, discrimination and attempts to collectively organize and bargain.

\(^10\) Cassidy, supra note 6, at 432.

sent to the defendant in which the plaintiff claimed that other professors were not teaching to the syllabi and not properly credentialed to be teaching at all. The court stated that there is a presumption of at-will employment in New York State, and “absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer’s right at any time to terminate an employment at will remains unimpaired.” The adjunct professor was determined to be an at-will employee, and as such all eight of his claims were dismissed in their entirety. Similar decisions have been reached in other state and federal courts.

In Collins v. Colorado Mountain, the Colorado Court of Appeals held that an adjunct professor's contract could not support a breach of contract action since the position was “at will and [could] be terminated at the discretion of the College at any time, with or without cause and with or without notice.” A federal court in Louisiana reached a similar decision in the case of Filson v. Tulane University. The court stated “this agreement constituted a general at-will employment relationship wherein such employment could be terminated at any time by either party for any reason.”

Because adjunct professors are presumptively at-will employees, they often do not possess fair dismissal rights, but this is not always the case. First, adjunct professors, even as at-will employees, cannot be terminated for reasons that violate statutory law or certain limitations derived

12 Id.
13 Id. at 3.
14 Id. at 4, 8.
17 Id.
from common law. Second, some adjunct faculty may not be considered at-will employees if their employment contracts have a definitive term, or contain language assuring them of continued employment absent “just cause” or other such provisions. Third, employee handbooks may contain language that protects an adjunct professor from termination. Lastly, and perhaps most importantly, many adjunct professors have unionized and are protected under collective bargaining agreements, and many other adjuncts are beginning to unionize in an effort to improve their working conditions.

3. Basic Statutory and Common Law Limitations on At-Will Terminations

Even at-will employees, including adjuncts, cannot be fired for reasons that violate statutory or common law. Generally under common law, an employee may not be fired: (1) in violation of the state’s public policy; (2) if there is an implied contract; or (3) in violation of a covenant of good faith and fair dealing.¹⁸ Common law is state specific, so not every state prevents at-will terminations under these theories.

An at-will employee’s termination is also limited by applicable state and federal statutes. The most common statutes protect employees who are discharged for discriminatory reasons, or in retaliation for exercising their First Amendment rights, or for attempting to unionize.

It is important to note that these statutory and common law limitations are merely exceptions to the general principle that an at-will employee can be terminated at any time, for any reason or no reason.

4. Individual Employment Contracts and Faculty Handbooks as a Source of Fair Dismissal Rights for Adjuncts

The language of an individual employment contract or faculty handbook may protect an

employee from wrongful discharge if it contains just cause provisions or other language that gives the professor a “legitimate expectation of continued employment at the college.”  

Some adjunct employment contracts or handbooks contain “just cause” provisions.” For example, Union College in New Jersey has an adjunct faculty handbook that states “[n]o adjunct faculty member shall be terminated without just cause.” An employer’s violation of just cause provisions is a breach of the employment contract. However, just cause provisions are atypical for adjuncts, since only 4% of adjuncts reported “having some kind of job security.”

Under certain limited circumstances, an employment contract may provide the employee with a constitutionally protected property interest. For example, in *Meade v. Moraine Valley Community College*, the Seventh Circuit held that an adjunct faculty member had a protected property interest in her employment under the U.S. Constitution. The plaintiff’s employment contract was “one-page” and stated a specific beginning and end date, pay, and course numbers. “At no point [did] the agreement state that Meade’s employment could be terminated only for cause, nor does it say that her employment was at-will and terminable at any time.” The court held that such language provided the plaintiff with a protected property interest in her employment because the agreement was for a fixed duration, which provided with plaintiff with a “legitimate expectation of continued employment at the college.”

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22 *Meade*, 770 F.3d at 686-87.

23 *Id.* at 686.

24 *Id.*
of continued employment at the college.”

Most adjunct professor employment agreements contain at-will employment language, which means a court will not recognize a breach of contract action or a section 1983 action. For example, in *Trakis v. Manhattanville College*, the court determined that the plaintiff, an adjunct professor, was an at-will employee because his contract specifically stated “that he was an at will employee who could be terminated at any time, for any reason.” Because he was an at-will employee, his actions for wrongful discharge and violation of a protected property interest were dismissed. Similarly, in *Rieser*, the plaintiff’s contracts actually contained a beginning and end date. However, they also stated that the “position may be terminated at will, as indicated in the faculty handbook.” The faculty handbook stated “[e]mployment with the company may be terminated at any time with or without cause or notice by the employee or the company. This notice replies to all employees regardless of date of hire.” The court held that such language clearly showed that the adjunct professor was an at-will employee and dismissed his claims.

Therefore, while some colleges have handbooks or individual employment contracts providing adjunct faculty with just cause protections or language otherwise giving the employee a “legitimate expectation of continued employment at the college,” most adjunct faculty lack fair

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25 *Id.* at 687.

26 *Trakis*, 51 A.D.3d at 780.

27 *Id.* at 781.


29 *Id.*

30 *Id.*

31 *Id.* at 9.
dismissal rights, which leaves them vulnerable to termination.

5. The Unionization of Adjunct Faculty and CBAs as a Source of Employment Rights

Due to the lack of compensation, benefits, and job security, adjuncts nationwide have unionized or begun to unionize. Furthermore, adjuncts at some universities have already formed their own associations, or joined an existing bargaining units. Unionized adjuncts enjoy the right to collectively bargain terms and conditions of employment, including provisions dealing with fair discipline. Collective bargaining agreements are likely to address: “minimum pay rates and pay raises; guarantees of professional development opportunities and funds; course cancellation pay; health benefits; due process protections in disciplinary and termination proceedings; equitable vacation and sick leave policies; participation in University governance; [and] just cause . . . discipline and discharge.” Unionized adjuncts also reported 25% higher pay than their non-unionized colleagues, a greater likelihood to be paid for course cancellations and office hours, and a much greater likelihood to have job security than their non-unionized colleagues. Some examples of institutions where adjunct professors have unionized are: Syracuse University, the California State University System, the City University of New York, the New School, Oakland University, Rider University, Vancouver Community College, American University, Georgetown, George Washington, Tamar Lewin, *More College Adjuncts See Strength in Union Numbers*, NY TIMES (Dec. 3, 2013), http://www.nytimes.com/2013/12/04/us/more-college-adjuncts-see-strength-in-union-numbers.html?r=0.

32 See, e.g., Union Cnty. College, Adjunct Faculty Handbook, supra note 21, at 64 (Adjuncts at UCC are represented by the Union County College Adjunct Faculty Federation); see, e.g., CBA between Syracuse Univ. and Adjuncts United, at 2 (Aug. 18, 2011 - May 31, 2014), http://humanresources.syr.edu/wp-content/uploads/2014/06/AUContract-2011-2014.pdf (“Syracuse University recognizes Adjuncts United/ NYSUT as the sole and exclusive bargaining agent for all part-time non-tenure track faculty members . . .”).

34 Id. at 21.

35 Id. at 21.
Montgomery College, and Tufts University, among others.\textsuperscript{36}

Therefore, there is a movement to unionize adjuncts and those that have already unionized have received increased, pay, benefits, job security and other protections. While these movements have gained momentum, the majority of adjuncts are still considered at-will employees and lack such compensation, benefits, and other job protections.

\textbf{6. Contract Renewal Rights in General}

Adjunct contracts typically run for one year, or one semester. Generally, adjuncts do not have any legal recourse if their employer decides not to renew their contract. “Unless non-tenured, temporary faculty members can show that their nonrenewal resulted from a deprivation of a constitutional right, or unless they can demonstrate their property right by statute, contract, or general institutional understanding, they are not entitled to procedural or substantive due process.”\textsuperscript{37} One law review article on the topic described the situation as follows:

Institutions use the adjunct as needed, often providing little or no security as to whether the adjunct will be asked to teach for an upcoming session. Once the administration receives students' demands for classes, reflected through registration and class enrollments, the institutions hire adjuncts at the last minute or after the session has begun. On the other hand, some adjuncts who were expecting to teach are told the class did not make, so they are not needed. In other instances, classes taught by full-time faculty may not “make,” causing the adjunct to be “bumped” from teaching his or her class so that the full-time faculty member teaches the adjunct's class and maintains a full-time load. Thus, the adjunct is left unemployed.


\textsuperscript{37} John C. Duncan, Jr., \textit{The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies}, 74 Ind. L.J. 513, 547 (1999).
with no assurance of work in the future.\textsuperscript{38}

Adjunct faculty members may be able to establish that they have a constitutionally protected property interest in their employment. Similar to the analysis above, the adjunct must illustrate “legitimate expectation of continued employment at the college.” This will of course be difficult for many adjuncts since universities typically use at-will language in adjunct contracts.

Individual employment contracts, handbooks, and CBAs also can provide a right to renewal. For example, Policies of the Board of Trustees of the SUNY state that “[i]n the event a term appointment is not to be renewed upon expiration . . . the appointee” will be notified in writing not less than 45 calendar days prior to the end of the term (the notice increases for employees with longer terms).\textsuperscript{39} CBAs also can contain similar language requiring notice of nonrenewal. However, while notice may be required, there is rarely language assuring an adjunct that their employment will be renewed. Therefore, an adjunct professor is unlikely to have any legal recourse if their position is not renewed.

7. Academic Freedom

“Academic freedom is a fundamental characteristic of higher education, necessary to preserve an independent forum for free inquiry and expression, and essential to the mission of higher education to serve the common good.”\textsuperscript{40} There has been significant literature arguing that many adjuncts effectively lack academic freedom because they are too afraid to express themselves for fear of retribution due to lack of job security:

\textsuperscript{38} Id. at 526.

\textsuperscript{39} STATE UNIVERSITY OF N.Y.: POLICIES OF THE BOARD OF TRUSTEES, supra note 8, at 34.

Currently, neither peer review nor academic due process operates adequately to secure academic freedom for most contingent faculty members. The lack of adequate protection for academic freedom can have visible results. Contingent faculty may be less likely to take risks in the classroom or in scholarly and service work. The free exchange of ideas may be hampered by the specter of potential dismissal or nonrenewal for unpopular utterances. In this chilling atmosphere, students may be deprived of the robust debate essential to citizenship. They may be deprived of rigorous and honest evaluations of their work. Likewise, faculty may be discouraged from explorations of new knowledge and experimentation with new pedagogies. Perhaps most important, institutions may lose the opportunity to receive constructive criticism of academic policies and practices from a significant portion of the academic community.\footnote{Id. at 5.}

Furthermore, some have argued that the “extraordinary lack of protections and vulnerability to pressures for conformity . . . result in adjuncts having considerably less academic freedom than their colleagues with tenure”\footnote{Jan Clausen and Eva-Maria Swidler, Academic Freedom from Below: Toward an Adjunct-Centered Struggle, 4 AAUP J. Acad. Freedom 1, 1 (2013), available at http://www.aaup.org/sites/default/files/files/JAF/2013%20JAF/ClausenSwidler.pdf.} and for a “large proportion of scholars and teachers [academic freedom] can scarcely be said to exist.”\footnote{Id. at 3.} There seems to be a strong argument that the lack of job protections effectively chills academic freedom for many adjuncts.

As discussed above, not all adjuncts lack job security, and some adjuncts have CBAs or handbooks that expressly protect academic freedom. For example, under the terms of the Adjunct Faculty Handbook of Union County College in New Jersey, adjuncts are entitled to academic freedom. They “are free in the classroom to discuss controversial issues relating to their subject”; “free from institutional censorship or discipline” when “he/she speaks, acts, or writes as an individual or a professional”; and “free to pursue research and publication outside of the classroom

\footnote{Id. at 5.}
where these activities do not interfere with their responsibilities, and at no cost to the college.\footnote{Union Cnty. College, Adjunct Faculty Handbook, supra note 20, at 8.} Therefore, adjuncts who have contracts or other job security assurances may have greater academic freedom than their colleagues.

8. **Conclusion**

The overwhelming majority of adjunct professors do not have any fair dismissal or renewal rights. Academic freedom is also severely impaired because adjunct professors may be hesitant to express themselves due to the lack of job security. There are exceptions, such as when an individual employment contract, handbook, or CBA provides just cause dismissal, notice of nonrenewal, academic freedom assurances, and other rights. Contracts or handbooks may also be used to establish a protected property interest in employment under certain, limited circumstances.