

Suit targets changes to UA tenure policy

Professors: Rules unfairly retroactive by [Emily Walkenhorst](#) | June 1, 2019 at 2:09 a.m.

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A University of Arkansas System revision to the faculty tenure policy violates faculty due-process rights by retroactively modifying faculty contracts with their employers, a federal lawsuit filed Friday afternoon states.

Three faculty members at three UA System institutions filed a lawsuit over the revised policy. The lawsuit describes the policy as going into effect July 1 and expands the examples for why a faculty member may be fired. The lawsuit seeks class-action status.

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A 1993 Arkansas Supreme Court decision in *Arkansas Dept. of Human Servs. v. Walter* held "that statutes can be construed to operate retroactively so long as they do not disturb contractual or vested rights or contractual rights," the lawsuits states.

"Under Arkansas law, both parties to a contract must consent to any changes to that contract," the lawsuit states, citing a 2011 decision in *Bancorpsouth Bank v. Shields*. That ruling states that "[f]undamental principles of contract law require that the parties to a contract agree to any modification of that contract."

The revision allows trustees and administrators to use annual reviews of faculty members to be the basis for termination, which was not previously allowed, the lawsuit states. It further provides more "grounds" that an administrator could cite in firing someone, the lawsuit states.

Tenure is defined by the UA System as the right of continuous appointment. Professors gain tenure based on their job performance over several years but still undergo annual reviews.

Three faculty members at three UA institutions filed the lawsuit: Philip Palade, a pharmacology and toxicology professor at the University of Arkansas for Medical Sciences; Gregory Borse, an associate professor of English and philosophy at the University of Arkansas at Monticello; and J. Thomas Sullivan, a distinguished professor of law at the W.H. Bowen School of Law at the University of Arkansas at Little Rock.

System officials were not aware of the lawsuit until after the *Arkansas Democrat-Gazette* sought comment. They declined to comment Friday without more thoroughly examining it.

Michael Moore, the UA System's vice president for academic affairs, said in March 2018 that "despite some public comments to the contrary, nothing in the proposed changes undermine academic freedom or the value that the University of Arkansas System places on tenure."

At the time, UA System President Donald Bobbitt recommended approval of the revision, describing the update as part of a larger project to ensure policies "are appropriate for the rapidly-changing landscape" of higher education.

The UA System board of trustees approved the policy revision unanimously more than a year ago, after faculty members argued that the expanded language was too broad and could threaten intellectual freedom by allowing faculty members to be fired for intellectual disagreement. Tenure is designed to protect that freedom, they contended. Additionally, they said, the policy violates faculty members' First Amendment right to that freedom.

The old tenure policy, last updated in 2001, listed four examples of grounds for dismissal: "incompetence, neglect of duty, intellectual dishonesty, and moral turpitude."

The revised policy lists 12 examples of grounds for dismissal, including a "pattern of conduct that is detrimental to the productive and efficient operation of the instructional or work environment."

"The Board's actions effectively destroy the concept of tenure by enabling the University of Arkansas System to terminate faculty on almost any ground through the application of the overly-broad and ubiquitous 'grounds' for dismissal listed in the Revised Policy," the lawsuit states.

The new policy has a "chilling effect" that has left faculty "being extremely cautious of what is said in class and what topics may be discussed openly in class without fear of termination," the lawsuit states.

Further, the revised policy violates the U.S. Constitution because it "substantially impairs" the contract between faculty members and the system "without a legitimate purpose," the lawsuit states.

Senate Bill 232, sponsored by Sen. Kim Hammer, R-Benton, during this winter's session of the Legislature sought to prevent new rules from retroactively applying to existing contracts between faculty members and their schools. It failed to pass through the education committee.

Robert Steinbuch, an attorney at the William H. Bowen School of Law at the University of Arkansas at Little Rock, worked the legislation with Hammer. The bill "would have obviated this lawsuit," he said when reached by phone Friday afternoon.

"Contract rights should be enforced," he said. "That was the goal of the legislation, that was the goal as I understand it of the litigation. No party should be able to abrogate the contract rights of the other side of the contract."

Information for this article was contributed by Jaime Adame of the Arkansas Democrat-Gazette.

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CORRECTION: Robert Steinbuch is a professor at the William H. Bowen School of Law at the University of Arkansas at Little Rock. He said, "No party should be able to abrogate the contract rights of the other side of the contract." An earlier version of this story misidentified the law school at which Steinbuch is a professor and misquoted him.

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