

**Courts' Failure To Make Faculty &
Staff Handbooks Enforceable
or
*How To Muzzle an Employee***

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What I Will Discuss

1. Valid grounds for employment-dispute lawsuits
2. Breach-of-contract employment disputes
3. La. court cases on breach-of- contract employment disputes
4. Conclusions



Part One

Valid Grounds for an Employment-Dispute Lawsuit

P University violates Federal law when it:

- ▶ **Discriminates:** race, color, nat'l origin, gender, age, disabil., pregnancy
 - Some require “injury” of dismissal
- ▶ Violates 1st Amendment speech rights
- ▶ Dismisses tenured public university professor without due process
- ▶ Retaliates against whistleblower
- ▶ Violates FMLA, FLSA, and other laws



Part One

Valid Grounds for an Employment-Dispute Lawsuit

P University violates Louisiana law when it:

- ▶ Fails to grant leave for military, jury or volunteer-firefighter duty
- ▶ Retaliates against whistleblowers, workers comp
- ▶ Torts of defamation, assault, unjust discharge
- ▶ Breaches contract
 - Tenured professor dismissed without due process(private /public)
 - Oher breaches of contract



Few Louisiana Statutes Address La. Public Universities

P University employees serve under university boards and their non-statutory policies

P Other statutes do not apply:

- ▶ R.S. 49:950 §§ Administrative Procedures Act is for other state agencies
- ▶ R.S. 17:1 §§ Tenure laws are for primary and secondary education teachers
- ▶ R.S. 33:2452 §§ Only for civil service employees



Part One

Summary of Valid Grounds for an Employment-Dispute Lawsuit

- P Disputes involving speech, discrimination, dismissal, or contract law
- P Contract law is important for the university employee since few statutory protections



Part Two: Background Info on Employment Contracts

The Default Employment Contract: Employment at Will (E-A-W)

- P Employees employed indefinite period may be dismissed for good, bad, or no reason
- P Some states allow implied contracts in E-A-W but not Louisiana



Part Two: Background Info on Employment Contracts

The Default Employment Contract: Employment at Will (E-A-W)

P 46 States make at least one of these exceptions to E-A-W but not Louisiana:

- ▶ Public policy
- ▶ Covenant of good faith
- ▶ Implied contract

P Louisiana does subscribe to one exception to the E-A-W doctrine: Tenure



Contracts 101

- P A contract is a promise directly or indirectly enforceable at law
- P A promise is an expression that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to the promisee that he may justly expect performance and may reasonably rely thereon.

Corbin on Contracts (1988) West Publ., St. Paul, MN



Part Three: Court Cases Involving Breach of Contract

- P First: Cases involving indefinite-term employees** — Unclassified employees and tenured professors
- P Second: Cases involving fixed-term employees** — Tenure-track, instructors, associates and others



Morgan Mix v University of New Orleans
609 So.2d 958 (La. App. 4 Cir. 1992)

Must Universities Hear Unclassified Employees' Grievances?

P Mr. Morgan Mix

- ▶ Asst. director of the physical plant
- ▶ Indefinite-term — at-will employee
- ▶ Dismissed after twelve years at UNO

P Mix's complaint

- ▶ Terminated in contravention of the terms of the UNO Staff Handbook



Court's Decision and Reasoning

- P No La. court has ruled that employee handbooks confer contractual rights upon at-will employees
- P *Therefore*, no contractual rights from handbook conferred on Mr. Mix
&
UNO not required to follow its grievance procedures



Henry Fairbanks v Tulane University
731 So.2d 983 (La. App. 4 Cir. 1999)

Exception to Law That Handbook Is Not an Employment Contract

P Background

- ▶ 1979: Tulane starts tuition waiver program
Described in Tulane Faculty Handbook
Professors' children eligible
For professors at Tulane or who had
died while working at Tulane
- ▶ 1986: Professor Fairbanks dies while at Tulane
- ▶ 1992: Tulane ends tuition-waiver program
- ▶ 1994: Tulane refuses waiver to Fairbanks' son



Part Three: *Henry Fairbanks v Tulane University*
731 So.2d 983 (La. App. 4 Cir. 1999)

Exception to Law That Handbook Is Not an Employment Contract

P Fairbanks' Arguments:

- ▶ Contractual obligation due to promise made in Faculty Handbook
- ▶ Tulane's unilateral renegotiation of contract possible only with living professors

P Tulane's Arguments:

- ▶ See *Mix v UNO*: Faculty handbook \neq Contract
- ▶ Tuition waiver: an unenforceable gratuity
- ▶ Program ended before son sought waiver



Part Three: *Henry Fairbanks v Tulane University*
731 So.2d 983 (La. App. 4 Cir. 1999)

Court Holding

- P Faculty handbook conferred contractual right to tuition waiver
- P Right conferred b/c tuition waiver was equivalent to earned compensation, e.g., vacation pay, tenure, or comp time
- P Unilateral renegotiation possible only with living professor



Part Three: *Henry Fairbanks v Tulane University*
731 So.2d 983 (La. App. 4 Cir. 1999)

Implied Contracts Live!

Sort of

P The court found Tulane had formed a contract from the faculty handbook with the professor. Therefore, at least for these circumstances, an implied contract existed.

P It appears Court relied on “unjust reliance” for finding an implied contract where elsewhere it couldn’t: professor had worked there b/c of tuition waiver, professor would have quit otherwise





Dr. Steven Rushing v SLU 2003 CA 0871
(La. App. 1st Cir. 2004) (unpublished) *writ denied*

Must Universities Hear Professors' Grievances?

P SLU refused to hear Dr. Rushing's grievances regarding:

- ▶ University unfairly favored the sciences over the arts in awarding in-house grants
- ▶ University's failure to hear his grievances

P Rushing contended that SLU's refusal:

- ▶ Denied his constitutional right of due process
- ▶ Denied his 1st Amendment freedom of speech



Part Three: *Dr. Steven Rushing v SLU* 2003 CA 0871
(*La. App. 1 Cir. 2004*) (*unpublished*) writ denied

Court Holding

P There was no constitutional requirement that SLU hear Rushing's grievances:

- ▶ Speech not protected by 1st Amendment
- ▶ Right to have grievances heard not a property right and therefore no constitutional protection
 - Note: Loss of tenured position is loss of property allowing constitutional protection



Part Three: *Dr. Steven Rushing v SLU* 2003 CA 0871
(*La. App. 1 Cir. 2004*) (*unpublished*) writ denied

Judge Gaidry's Dissent: Facts Suggest Handbook = Contract

P SLU's letter of employment to Rushing:

- ▶ *"The terms of your employment are stated in the [SLU] Faculty Handbook"*

P SLU's letter of employment may have formed contract requiring SLU hear grievances



Part Three: *Dr. Steven Rushing v SLU* 2003 CA 0871 (La. App. 1st Cir. 2004) (unpublished) (writ denied)

La. Supreme Court Refused to Hear Rushing Case

- P No property right in hearing grievances
- P Not even explicit incorporation of handbook into employment letter made for a contract & right to grievance procedure



Part Three Continued:

Court Cases Involving Term Appointments — Tenure-track, Associates, Instructors



Dr. Frank Schalow v Loyola University
646 So.2d 502 (La. App. 4 Cir. 1994)

Can Term-Appointment Contracts Incorporate Faculty Handbook?

P Background

- ▶ Dr. Schalow on term appointment & tenure-track
- ▶ Employment contract included terms from the faculty handbook
- ▶ Handbook described tenure-granting procedures
- ▶ Loyola denied Schalow tenure

P Dr. Schalow's complaint

- ▶ Terminated in violation of the terms of the faculty handbook



Part Three: *Dr. Frank Schalow v Loyola University*
646 So.2d 502 (La. App. 4 Cir. 1994)

Court's Reasoning and Holding

- P Ambiguous contract conditionally promising employment after term ends VS allowing dismissal without cause after term ends
- P Ct interpreted ambiguity favorable to E-A-W
 - If not tenured, civil service or term appt.? You're E-A-W
- P Loyola could terminate Schalow at term end without cause and did not have to follow tenure procedures



Schwarz v Tulane University
690 So.2d 895 (La. App. 4 Cir. 1997)

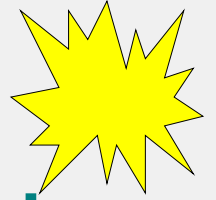
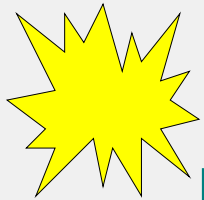
**A Case Like *Schalow v Loyola*:
University Again Not Required to
Follow Its Tenure Policies**

P Schwarz said,

“I would not have given up six years of my professional career at Tulane if I believed that Tulane was free to deny me tenure for no valid reason”



Morgan Mix v University of New Orleans
609 So.2d 958 (La. App. 4 Cir. 1992)



Really, Louisiana Law is Not Aberrational or Anachronistic!

P In a footnote to the *Mix v UNO* opinion, the Court thanked defendant UNO for supplying out-of-state citations to help *"refute the contention that Louisiana is somehow aberrational or anachronistic"*.



Conclusions



University Handbooks and Policies are Enforceable IF

P Employee on a fixed-term appointment and

- Employment contract states that university policies are part of contract AND no promises of employment outside of term of appointment

P An employee---any employee---and

- Policies address earned compensation, e.g., vacation, severance or tenure



Problems with Employment Contracts for Fixed-Term Appointment Employees

- P University need not follow its policies in granting tenure (see *Schalow & Schwarz*)
- P University can legally violate some academic freedom rights and refuse to renew appointment
- P Unclear what policies apply to LSU term employees given disclaimer in LSU A&M PS statements



Problems with Enforcement of Contracts with Indefinite-Term Employees incl. Professors

- P Obstructs fundamental right to meaningful access to courts to assert the protection of laws to correct wrongs
- P Unfair to make promises in handbooks and break them in court
 - Rejects law for implied and explicit contracts
- P Bad-actor universities need legal oversight or unions—not self-enforcement



What To Do?

- P Request university declare grievance and tenure procedures legally enforceable
- P Request global disclaimer in LSU A&M PS statements be replaced with specific waiver
- P Don't want handbook legally enforceable?
Conduct third-party review via arbitration



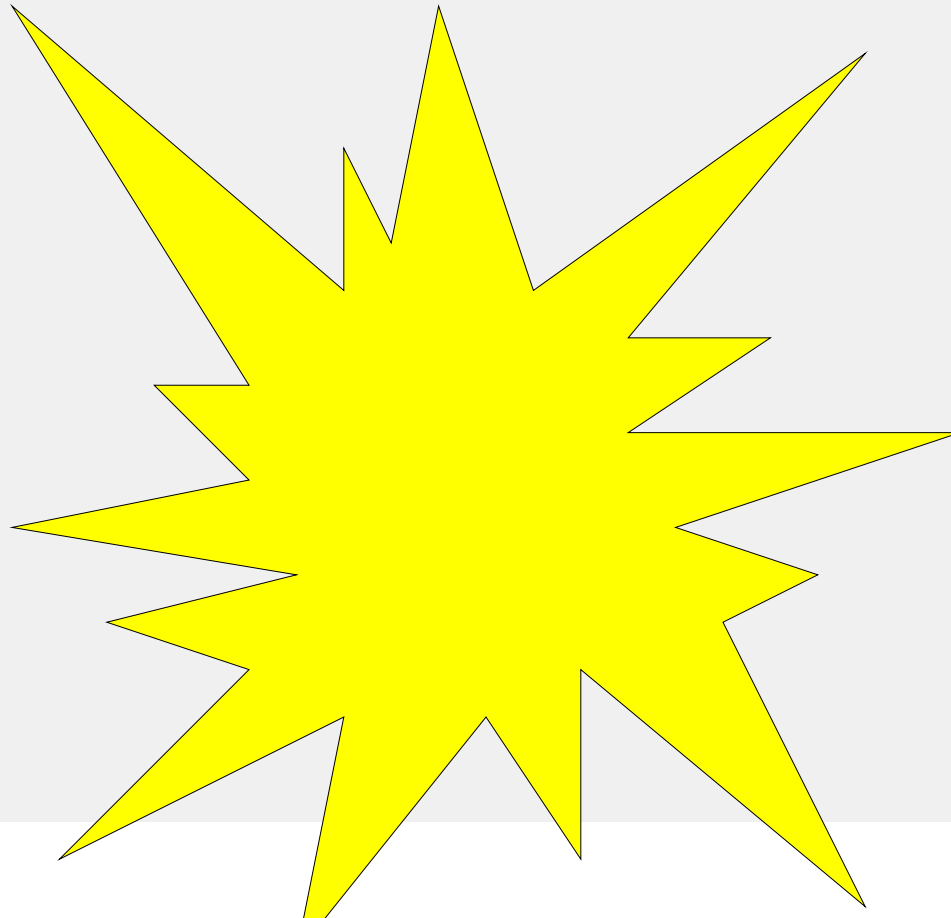
Disclaimer: Don't Decide to File Suit Based Solely on this Presentation

- P Small differences in circumstances = big difference in court — See a lawyer
- P Your case may be the one that will change the anachronistic and aberrational law
- P Call me with questions



Post comments at my blog linked at
<http://members.cox.net/d83>

Requires GMAIL email account



Definitions of an Implied Contract

- P If parties enter into an agreement in which both view themselves bound to act in a certain way, the parties are legally bound
- P A contract that the parties presumably intended as their implied understanding, as inferred from their conduct and other circumstances (*Blacks Law Dictionary*)



University policies and handbooks are NOT enforceable

P for term appointments and:

- Promises of employment outside of term

P for all employees where:

- Policies address internal management of university unless it addresses earned compensation
- It falls under LSU A&M disclaimer, i.e., all LSU A&M policy statements!



Arguments Courts Use to Find Handbooks Not Enforceable

- P Unilateral changes made by administration
- P No bargaining or meeting of the minds of the parties
- P No consideration given by employee in exchange for employer providing benefits from handbook
- P Public policy



Advantages that university policies and handbooks are unenforceable

- P Better-behaving universities work more efficiently in self-enforcing, non-legal environment
- P Great impetus for faculty to work toward effective faculty governance
- P Easier to unionize faculty because starker difference between union and no union



Court's Arguments Against Handbook Was Contract Claim

- P Not fixed-term of employment
- P University never stated handbook was contract
- P Mr. Mix never bargained for the contract
- P Terms of handbook arrived at unilaterally
- P Handbook was not inducement for Mr. Mix to accept or continue employment
- P Mr. Mix never said he would quit if benefits of handbook would not be forthcoming

