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Jason A. Parson  
*Washington University School of Law*

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## COMMENT

### DRAWING THE LINE ON ACADEMIC FREEDOM: REJECTING AN ACADEMIC PEER-REVIEW PRIVILEGE FOR TENURE COMMITTEE DELIBERATIONS

*Rollins v. Farris*, 108 F.R.D. 714 (E.D. Ark. 1985)

In *Rollins v. Farris*,<sup>1</sup> the District Court for the Eastern District of Arkansas refused to recognize an academic peer-review privilege for tenure-review bodies in employment discrimination cases.

The University of Central Arkansas denied tenure to Dr. Nanette Rollins, who had served as an assistant professor at that university for six years.<sup>2</sup> Rollins filed charges with the Equal Employment Opportunity Commission (E.E.O.C.) claiming sex, race and age discrimination.<sup>3</sup> On deposition, a tenure committee member refused to answer questions concerning statements made in the course of committee deliberations, insisting that the statements were privileged in the name of "academic freedom."<sup>4</sup> Rollins then moved to compel discovery of the statements and the district court held: Tenure-review materials are discoverable in employment discrimination suits only if intent is an element of the claim or necessary to rebut proof offered by the defendant.<sup>5</sup>

Courts have long recognized the concept of academic freedom as a limit on state control of educators and educational institutions.<sup>6</sup> The

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1. 108 F.R.D. 714 (E.D. Ark. 1985).

2. *Id.* at 715. Rollins became eligible for tenure in January, 1984, and the University denied her request for tenure on July 3, 1984. *Id.*

3. *Id.* Rollins asserted claims based on 42 U.S.C. §§ 1983 & 2000e (1985) and 29 U.S.C. § 626(b)(1985). She sought an injunction directing the tenure committee to grant her tenure request, an injunction against further violations, costs and attorney's fees. *Id.* Dr. James Rollins, the plaintiff's spouse, joined in the action, claiming that he had suffered severe reductions in his teaching schedule in retaliation for statements he had made. *Id.* He asserted that the university's actions constituted retaliatory discrimination under 42 U.S.C. § 2000e (1985) and the first amendment. *Id.*

4. 108 F.R.D. at 715. During the desposition the committee member was asked to identify the areas of Rollins's tenure application that committee members had commented negatively upon. *Id.* The committee member asserted that tenure-committee minutes had precipitated the discussion.

5. *Id.* at 719.

6. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (affirming university's freedom to make its own decisions); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring) (identifying four types of institutional academic freedom: "to determine . . . on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

preservation of academic freedom furthers society's interest in the uncensored development and availability of ideas.<sup>7</sup> The Supreme Court has identified academic freedom as an individual right arising from the periphery of the first amendment,<sup>8</sup> but the scope of academic freedom as applied to institutions remains undefined.

The academic peer-review privilege combines the concepts of academic freedom and common-law privilege as codified in rule 501 of the Federal Rules of Evidence.<sup>9</sup> Although common-law courts tended to restrict the scope of existing privileges and disfavor the creation of new ones,<sup>10</sup> rule 501 permits case-by-case consideration of "novel" privileges.<sup>11</sup> Even under rule 501, however, courts only reluctantly recognize new privileges because such privileges may frustrate the search for "every man's evidence."<sup>12</sup>

Opponents of the academic peer-review privilege argue that such a privilege is antithetical to the notion of academic freedom because it permits tenure committees, without fear of exposure, to deny tenure to per-

7. See Comment, *An Academic Freedom Privilege in the Peer Context*: In *Re Dinnan and Gray v. Board of Higher Education*, 36 *RUTGERS L. REV.* 286, 288-93 (1983). See also *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS*, 33, 34 (L. Joughin ed. 1967) (*Statement of Principles on Academic Freedom and Tenure of American Association of University Professors*) (recognizing academic freedom as encompassing freedom in research, publication and classroom discussion).

8. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("special concern of the First Amendment"); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (describing individual academic freedom as a "peripheral" and "penumbral" right). *But see Barenblatt v. United States*, 360 U.S. 109 (1959) (does not apply to non-academic activities).

Commentators have disagreed about whether academic freedom is recognized as a constitutional right. Compare *Developments in the Law—Academic Freedom*, 81 *HARV. L. REV.* 1045, 1065 (1968) (questioning existence of academic freedom as a constitutional right) with Note, *Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia*, 60 *N.C.L. REV.* 438, 446 (1982) (suggesting that academic freedom has attained the status of a constitutional right).

9. *FED. R. EVID.* 501 provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts . . .".

10. See *Developments in the Law: Privileged Communications*, 98 *HARV. L. REV.* 1450, 1472 (1985) [hereinafter cited as *Privileged Communications*]. See also 8 *WIGMORE, ON EVIDENCE* § 2285 (McNaughton rev. 1961). Dean Wigmore identified four characteristics necessary to establish a communication as privileged: (1) a confidence that communications will remain undisclosed, (2) a relationship in which confidentiality is essential, (3) a relationship the community seeks to foster, and (4) the injury to the relationship by disclosure is greater than the benefit derived by correct disposal of the litigation. *Id.*

11. See, e.g., *Trammel v. United States*, 445 U.S. 40, 47-48 (1980).

12. *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that privileges should not be created lightly as they are "in derogation of the search for truth.").

sons espousing unpopular or unconventional views.<sup>13</sup> Proponents of an academic peer-review privilege fear that disclosure of internal communications would chill the free exchange of opinions during tenure committee deliberations and thereby inhibit effective and independent institutional decisionmaking.<sup>14</sup> Federal courts have disagreed on the question of whether academic freedom creates a privilege that bars discovery of tenure-committee deliberations in employment discrimination cases.<sup>15</sup>

In *Keyes v. Lenois Rhyne College*,<sup>16</sup> the Fourth Circuit recognized a qualified peer-review privilege that applies only if the contents of the tenure-committee records are not at issue.<sup>17</sup> Under this approach, also adopted by the Ninth Circuit,<sup>18</sup> a court must first determine whether an institution has denied tenure on the basis of information contained in tenure-committee files. If these files contain the information upon which tenure denial is based, the institution cannot shield the files from discovery by claiming privilege.<sup>19</sup> If however, the institution does not rely upon peer-review materials to justify its denial of tenure, the records are privileged.<sup>20</sup>

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13. See, e.g., Comment, *supra* note 7, at 344. See also *Gray v. Board of Higher Education*, 692 F.2d 901, 909 (2d Cir. 1982) (academic peer-review privilege may create a veil for censors).

14. See *Privileged Communications*, *supra* note 10, at 1612. See also *Murphy, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1542 (1981). But see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72 (E. Cleary 3d ed. 1984) (questioning whether there would be any ebb in information if privileges were absent).

15. See *infra* notes 16-40 and accompanying text.

16. 552 F.2d 579 (4th Cir. 1977).

17. *Id.* at 581. The plaintiff brought a Title VII action claiming sex and age discrimination. *Id.* at 579.

18. See *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337 (9th Cir. 1981) (dictum), *cert. denied*, 459 U.S. 823 (1982).

19. 552 F.2d at 581. The Fourth Circuit stated that "if the College had sought to justify any male-female disparity on the basis of [faculty] evaluations, the plaintiff should have been granted the opportunity to use them. . . ." *Id.*

20. *Id.* The College did not claim, however, that faculty evaluations justified disparate treatment of males and females with respect to permission to teach beyond retirement age. Rather, the statistics did not evidence any such disparity. *Id.* at 580 n.3.

In *Lynn*, 656 F.2d at 1347, the Ninth Circuit asserted that the University's denial of tenure based on the plaintiff's ability necessarily implicated the peer evaluations contained in the tenure files. In addition, because the University systematically released summaries of such information to personnel requesting the information, the court found that the University possessed far less interest in confidentiality than in the ordinary case. Although the court expressly adopted the Fourth Circuit's reasoning in *Keyes*, it did not need to reach that issue because the initial balancing process weighed in the plaintiff's favor. *Id.* at 1347-48.

The Seventh Circuit, in *EEOC v. University of Notre Dame Du Lac*,<sup>21</sup> adopted a slightly different version of this qualified peer-review privilege. Balancing the plaintiff's need for information against the review committee's need to preserve confidentially, the court allowed the EEOC limited discovery of peer evaluations that formed the basis of the university's decision.<sup>22</sup> The court refused to permit discovery of the identities of the committee members<sup>23</sup> and indicated that further discovery would be authorized only if the plaintiff showed "particularized need" rising above mere relevance.<sup>24</sup>

In *Gray v. Board of Higher Education*,<sup>25</sup> the defendant institution offered no explanation for its denial of tenure.<sup>26</sup> The Second Circuit nevertheless balanced the interests of the respective parties to determine whether the records were discoverable<sup>27</sup>. Because the plaintiff had to prove intent to establish a prima facie case, the court in *Gray* found the plaintiff's need for the disclosure of the tenure materials "transparently evident"<sup>28</sup> and easily struck the balance in favor of discovery.<sup>29</sup> Although the Second Circuit purported to apply a balancing test rather than a rule of privilege,<sup>30</sup> its analysis closely resembled that of circuits recognizing a qualified privilege.<sup>31</sup>

A Fifth Circuit decision, *In re Dinnan*,<sup>32</sup> expressly rejected the academic peer-review privilege. The court stated that the discovery of tenure-committee deliberations poses an evidentiary, not an academic-

21. 715 F.2d 331 (7th Cir. 1983).

22. *Id.* at 337-38.

23. *Id.* The court recognized the institution's need to keep the identities of the peer evaluators confidential in order to insure "candid and frank evaluations." *Id.* at 336.

24. *Id.* at 338. The court defined "particularized need" as a "compelling necessity for the specific information requested." *Id.* The court borrowed the particularized need test from cases where a party seeks disclosure of grand jury material. *Id.*

25. 692 F.2d 901 (2d Cir. 1982).

26. *Id.* at 903.

27. *Id.* at 905. The court approved the balancing approach adopted by the district court, but struck a different balance.

28. *Id.* at 905-06. Gray brought his action under 42 U.S.C. §§ 1981, 1983, 1985 (1985). In addition, Gray asserted a fourteenth amendment claim that his civil rights were violated. The court observed that intent is an element of both claims, 692 F.2d at 905, and noted that the plaintiff must initially establish a prima facie case of discrimination, *id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

29. 692 F.2d at 905. Gray sought to discover the votes of two committee members he claimed had discriminated against him. *Id.*

30. *Id.* at 904.

31. See *supra* notes 16-24 and accompanying text.

32. 661 F.2d 426 (5th Cir.), *cert. denied sub nom.* *Dinnan v. Blaubeurgs*, 457 U.S. 1106 (1982).

freedom question.<sup>33</sup> The court reasoned that the extension of privileged status to tenure deliberations would threaten, rather than foster, academic freedom.<sup>34</sup> The court concluded that permitting the discovery of tenure-committee deliberations would benefit institutions by encouraging responsible decisionmaking.<sup>35</sup>

The Third Circuit, in *EEOC v. Franklin & Marshall College*,<sup>36</sup> also rejected a claim of academic peer-review privilege. The court noted that such a privilege would frustrate a major purpose of Title VII, the eradication of employment discrimination in academic institutions.<sup>37</sup> The court recognized the safeguards provided in rule 26 of the Federal Rule of Civil Procedure<sup>38</sup> as adequate protection against unnecessary interference with institutional decisionmaking.<sup>39</sup> Finally, the Third Circuit noted the Supreme Court's approval of extensive discovery in Title VII discrimination cases.<sup>40</sup>

In *Rollins v. Farris*,<sup>41</sup> the District Court for the Eastern District of

33. *Id.* at 427. In determining whether discovery can be had under rules of evidence, courts balance the relevancy of the disclosure to the case against the potential harm resulting from the disclosure. See 8 WIGMORE, *supra* note 10, at § 2285. See also Comment, *supra* note 7, at 323 n. 206 (noting that this balance is less demanding than one involving the social importance of a privilege).

34. 661 F.2d at 430. The court noted that a university could use tenure denial to suppress ideas, the very danger that the Supreme Court sought to avoid in upholding academic freedom. *Id.* Noting that Justice Frankfurter's four essential freedoms, *see supra* note 6, applied only to decisions made on academic grounds, the court reasoned that denial of tenure on non-academic grounds goes beyond the protection of academic freedom. *Id.* at 431.

35. *Id.* at 432. The court stated that the only harm to the process is that those individuals unwilling to explain their actions will choose not to serve, which is no harm at all. *Id.*

36. 775 F.2d 110 (3d Cir. 1985).

37. *Id.* at 114.

38. FED. R. CIV. P. 26 provides:

(b) . . . (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from source that is more convenient, less burdensome, or less expensive . . . or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case . . . and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c). . . .

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

39. 775 F.2d at 115.

40. *Id.* at 116. The court cited *EEOC v. Shell Oil Co.* 466 U.S. 54 (1984) (Congress implicitly endorsed broad discovery of relevant material in Title VII cases).

41. 108 F.R.D. 714 (E.D. Ark. 1985).

Arkansas surveyed the treatment by other circuits of a claim of academic peer-review privilege and adopted the Third Circuit's *Franklin & Marshall* holding.<sup>42</sup> The court first determined that a qualified privilege was unnecessary because established rules of discovery adequately protect academic freedom.<sup>43</sup> The court found rule 26, which requires material sought for discovery to be "relevant to the subject matter involved" and gives courts the authority to prevent abuses and issue protective orders,<sup>44</sup> sufficient to safeguard institutional interests.<sup>45</sup>

The *Rollins* court found the tenure-committee deliberations relevant and, therefore, discoverable under rule 26.<sup>46</sup> The court proceeded, however, to limit discovery to actions in which "proof of intent to discriminate is necessary to establish an element of the claim or to rebut proof offered by the defendant."<sup>47</sup> The court emphasized that materials cannot be discovered when the tenure committee bases its decision on criteria not contained in tenure-committee files.<sup>48</sup> Finally, the court noted the Supreme Court's policy of permitting extensive discovery when proof of intent is required.<sup>49</sup>

The *Rollins* court correctly held that an academic peer-review privilege is unnecessary in light of the limitations imposed by rule 26. The adoption of a peer-review privilege would inevitably burden the truth-seeking process and hamper the effectiveness of the judicial system.<sup>50</sup> Such a privilege would add to the inherent difficulty of proving employment-discrimination claims and render courts virtually impotent in en-

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42. *Id.* at 720.

43. *Id.*

44. See text of Rule 26, *supra* note 38.

45. 108 F.R.D. at 720.

46. *Id.* at 719. The court stated that the plaintiffs "are entitled to know what matters were considered and are entitled to ascertain the reasons for the action taken in order to prove their case." *Id.*

47. *Id.*

48. *Id.* The court noted that a plaintiff does not have "carte blanche authority to discover secret discussions merely by alleging an employment discrimination." *Id.* Discovery is allowed only if the plaintiff alleges that the tenure committee "harbors a discriminatory animus . . . [that] would be reflected in the notes of the deliberations or votes taken . . . [or] that the tenure denial was based on evaluations of a plaintiff's performance discussed at the tenure committee meetings. . . ." *Id.* If, however, allegations resulting in tenure denial can be shown to be "pretextual in nature," reference to committee reports need not be necessary. *Id.*

49. *Id.* at 718 (citing *Herbert v. Lando*, 441 U.S. 153 (1979)).

50. See *supra* note 12.

forcing anti-discrimination legislation.<sup>51</sup> An academic peer-review privilege would thus thwart Congress' desire to eliminate employment discrimination in academia.<sup>52</sup>

The *Rollins* court also recognized the possibility that an academic peer-review privilege may erode rather than ensure academic freedom.<sup>53</sup> The court correctly observed that academic freedom has little value if discriminatory tenure decisions can be shielded from inquiry. The Fifth Circuit's statement in *Dinnan*, suggesting that the peer-review process can do without those who refuse to account for their decisions,<sup>54</sup> strikes at the heart of the issue.<sup>55</sup> Privileges exist to protect confidentiality in relationships that society values above its search for truth. Privileges should not be perverted to protect decisions which run counter to expressed societal goals or values.<sup>56</sup> The *Rollins* court appropriately recognized that an academic peer-review privilege is antithetical to academic freedom and the eradication of employment discrimination in academic institutions.

Although the *Rollins* court correctly rejected an academic peer-review privilege, it failed to identify precisely the authority for its holding. The court claimed to adopt the Third Circuit's *Franklin & Marshall* holding,<sup>57</sup> but in fact its reasoning mingles aspects of the approaches taken by several circuits. By limiting discovery to situations in which the institution bases its decision on peer-review materials<sup>58</sup>, the court went beyond the Third Circuit's reliance on rule 26.<sup>59</sup> In adopting language similar to that of courts recognizing a qualified privilege,<sup>60</sup> the *Rollins* court sug-

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51. See *Privileged Communications*, *supra* note 10, at 1628 (privilege would create an insurmountable barrier to proving discrimination).

52. See *Kunda v. Muhlenberg College*, 621 F.2d 532, 550 (3d Cir. 1980) ("the legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements."); *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 114 (3d Cir. 1985) (citing *Kunda*).

53. See *Gray*, 692 F.2d at 909 (privilege can operate as "a veil for censors"); *In re Dinnan*, 661 F.2d at 430 (could serve as a "double edged sword" threatening the values it protects); Comment, *supra* note 7, at 344 (privilege would "fail to afford protection where it is needed most").

54. See *In re Dinnan*, 661 F.2d at 432.

55. *Privileged Communications*, *supra* note 10, at 1627.

56. See 8 WIGMORE, *supra* note 10, at § 2285.

57. 108 F.R.D. at 720.

58. See *supra* note 48 and accompanying text.

59. See *supra* notes 36-40 and accompanying text.

60. See *supra* notes 16-24 and accompanying text.



gested that, despite semantic differences, similar results would follow from each of the differing approaches.

*J.A.P.*