

UE on Appeal

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Decisions Featured in This Issue:

Court Affirms Remedies Available for Student Alleging Disability Discrimination **1**

University Social Media Policy Held to High Standard for Blocking Posters on X **3**

Professor Fails to Prove University Denied Him Tenure Because of His Race **5**

United States Court of Appeals for the Eleventh Circuit

Court Affirms Remedies Available for Student Alleging Disability Discrimination

Despite receiving many reasonable accommodations, a former medical student claimed a school improperly administered his note-taking accommodation during his first two years of school. In a novel theory, he contended the school's failure to provide the accommodation prevented him from absorbing foundational information taught his first two years, caused his later academic dismissal, and, as a result, he should receive a do-over with a clean academic record.

Medical Student Receives Numerous Accommodations for ADHD

During his first two years at Morehouse School of Medicine (MSM), medical student James Gregory Howell received many accommodations to ameliorate the effects of his disability, attention-deficit/hyperactivity disorder (ADHD).

Accommodations MSM provided included:

- Private testing rooms
- Designated notetakers in Howell's classes
- Access to audio and video recordings of lectures
- Double time for exams and in-class assignments
- Breaks during exams and in-class assignments
- Preferential seating in class

During Howell's third year, he was dismissed for academic deficiencies.

He sued MSM in federal court alleging, among other things, failure to accommodate claims under Title III of the Americans with Disabilities Act (Title III of the ADA), which governs places of public accommodation, and the Rehabilitation Act (RA). Specifically, Howell alleged MSM didn't administer his note-taking accommodation effectively during the first two years because he didn't receive notes for every class, and when he did receive

notes, they weren't always delivered within the 48-hour turnaround time the school allegedly promised. Despite MSM rectifying issues with the note-taking accommodation by Howell's third year, he struggled even more in classes, ultimately failing multiple courses. That led to his dismissal.

Howell admitted that during his third year he "really had to disengage from medical school" while researching his legal rights and "looking through over two years of emails." While ostensibly preparing for the lawsuit he eventually filed, Howell attested he didn't study, attend classes, or even take exams. Howell, however, claimed that, because his note-taking accommodation was ineffective during his first two years, he never absorbed the foundational medical knowledge required to succeed in later coursework.

Consequently, he argued he was entitled to special monetary damages and the relief of having his entire transcript wiped clean and permitting him to start medical school "afresh."

After allowing Howell to amend his complaint twice, the district court granted the school's motion to dismiss. Howell filed a motion for reconsideration and a third motion to amend the complaint. The district court denied both motions.

He appealed to the Eleventh Circuit.

Erasure of Academic Record Isn't a Viable Remedy for Disability Discrimination

The Eleventh Circuit agreed with the lower court's "well-reasoned" orders dismissing Howell's claims and denying his motion to amend his complaint a third time. Howell argued he was entitled to monetary damages for MSM's failure to accommodate his disabilities under Title III of the ADA and the RA. However, Title III of the ADA provides a private right of action for injunctive relief but doesn't provide a private right of action for damages. To be eligible for monetary damages under the RA, a plaintiff must prove the conduct violated the law and the school was deliberately indifferent, which requires knowledge of likely harm and failure to act on the part of a policymaker who is capable of

making an official decision on the organization's behalf.

However, the district court found that, taking Howell's factual allegations as true, he hadn't plausibly alleged any individuals who knew of likely harm were also policymakers capable of making official decisions on the school's behalf. The Eleventh Circuit agreed Howell wasn't entitled to money damages under Title III of the ADA or the RA for failure to provide a reasonable accommodation.

Howell also argued he was entitled to injunctive relief in the form of restarting his entire medical education with a deletion of his prior academic record. However, the district court held, and the Eleventh Circuit agreed, that even if Howell could demonstrate a failure to accommodate, it would be improper for the court to enter an order requiring such relief under the ADA or RA. Given that Howell had no disputes with how the accommodation was administered in his third year of medical school, the district was "unable to contemplate in what manner it could grant any further relief to Howell with respect to the note-taking accommodation."

The Bottom Line



Accommodations aren't static and can be adjusted. Bear in mind that the interactive process should be ongoing. Taking proactive steps to remedy a particular issue with an accommodation, such as MSM did with respect to note-taking, not only will let the student get full access to educational benefits but also will help mitigate against a future claim. If litigation ensues, it's useful to know that while certain injunctive relief may be awarded in disability discrimination cases, the Eleventh Circuit has now at least twice held that courts are precluded from removing a grade as a remedy.

Howell v. Morehouse School of Medicine, Inc., Case No. 22-13778 (11th Cir. April 4, 2024), reh'g denied en banc (June 5, 2024) (unpublished).

Related UE Resource

- [Accommodating Students With Disabilities in Clinical Programs](#)
- [Invisible Disabilities](#)

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University Social Media Policy Held to High Standard for Blocking Posters on X

The Ninth Circuit Court of Appeals held the University of Oregon's social media policy was insufficient to demonstrate a professor who alleged he was wrongly blocked from one of its X accounts was unlikely to be subjected to the same wrongful treatment in the future.

Professor Blocked from University of Oregon's @UOEquity X Account

A controversy began when Bruce Gilley, a Portland State University professor, found himself blocked on the social platform X, formerly known as Twitter, by Tova Stabin, Communication Manager for the University of Oregon's Division of Equity and Inclusion. Stabin, using the university's @UOEquity X account, posted a "racism interrupter" prompt designed to show users ways to respond to racist comments, which was open to comments by other X users. Gilley posted the phrase "all men are created equal." Stabin responded by blocking Gilley from the @UOEquity account, which prevented Gilley from viewing, replying to, or reposting @UOEquity posts.

During the two months Gilley was blocked, he filed a public records request, seeking information on any policies governing his blocking. The university denied any policies existed.

Gilley sued Stabin in her personal *and* official capacities, alleging two causes of action:

1. Stabin's actions in enforcing viewpoint discriminatory X blocking, including viewpoints critical of the ideology of diversity, equity, and inclusion, violates Gilley's and others' First Amendment right to free speech (the as-applied challenge).
2. The university's policies or practices lack objective workable standards and therefore invite officials to use subjective content-based criteria when deciding whether to block a user in violation of the First Amendment right to free speech (the facial challenge).

Gilley also filed a motion for preliminary injunction. In response, the university unblocked Gilley and later produced a copy of a social media policy that had been in place but that Stabin didn't adhere to when she blocked him.

Gilley filed an amended complaint, adding two new causes of action for as-applied and facial challenges to the social media policy procedural safeguards to prevent violations by rogue employees.

The university filed a motion to dismiss the amended complaint as moot. The court considered the motion at the same time as Gilley's motion for a preliminary injunction. The district court denied both motions, leading to appeals from both parties.

Court Rejects Mootness/Standing Challenges to Professor's Motion for Injunctive Relief

On appeal, the court first addressed the university's argument that Gilley's request for prospective injunctive relief was moot because he had since been unblocked from the X account. The court rejected this argument, invoking the voluntary cessation doctrine; that is, a defendant can't render a case moot simply by ending its unlawful conduct once sued. To succeed in its mootness claim, the university had to meet the "heavy burden" of demonstrating the challenged conduct wasn't reasonably likely to recur.

The court held that given the social media policy's lack of formality and relative novelty, easily reversible nature, and lack of procedural safeguards to protect from arbitrary action, the university failed to meet its burden to show the challenged conduct wasn't reasonably likely to recur.

The court also rejected a challenge to Gilley's standing to seek an injunction for prospective relief for his as-applied challenge. The court reaffirmed that standing is assessed at the time the complaint is filed. Since Gilley was blocked when he filed his complaint, he had standing to seek an injunction to prevent future blocking. And importantly, since the voluntary cessation doctrine applied, Gilley's standing wasn't negated by the university's subsequent unblocking.

The appellate court remanded to the district court to reconsider whether Gilley had standing to seek pre-enforcement relief for his facial challenge to the policy under the proper standard.

The appellate court reminded the district court to be “mindful” that such pre-enforcement review is allowed when the threatened enforcement is “sufficiently imminent” and noted that when the threatened enforcement involves First Amendment rights, “the inquiry tilts dramatically toward a finding of standing.”

Court Finds University's Social Media Policy Lacked Necessary Procedural Safeguards

Turning to the standards Gilley must show to demonstrate he is entitled to a preliminary injunction, the appellate court affirmed he had shown he was likely to succeed on the merits of some of his claims, but it rejected the district court’s conclusion he was unlikely to suffer irreparable harm in the absence of preliminary injunctive relief.

The Ninth Circuit found Gilley readily demonstrated irreparable harm because:

- Gilley had been blocked for two months before seeking injunctive relief.

- The university had denied the existence of a policy while he remained blocked.
- The university later disclosed a social media policy with criteria for blocking users that was operative when Stabin blocked him.
- The policy apparently was insufficient to prevent departures from it by a rogue employee.

The Bottom Line



This Ninth Circuit decision highlights challenges institutions may face in defeating a plaintiff’s request to preliminarily enjoin enforcement of a policy implicating the plaintiff’s First Amendment rights. The decision also underscores the importance for colleges and universities to develop, maintain, and disseminate clear and robust social media policies with sufficient procedural safeguards to prevent violations by rogue employees.

Gilley v. Stabin, Case No. 23-35097 (9th Cir. Mar. 8, 2024), pet. for reh’g denied (May 15, 2024) (unpublished).

Related UE Resource

- [Manage Risks Associated With Faculty Use of Social Media](#)
- [Surviving the Digital Normal on Campus](#)

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Professor Fails to Prove University Denied Him Tenure Because of His Race

The District of Columbia Circuit Court of Appeals determined student evaluations reporting teaching below university-set standards provide a legitimate, nondiscriminatory reason for denying a professor tenure. The court also concluded the professor failed to present evidence demonstrating the decision was pretextual.

Associate Professor of Forensic Chemistry Denied Tenure for Failure to Demonstrate Teaching Excellence

In 2014, Dr. Mehdi Moini, an Iranian chemist, was hired as a tenure-track Associate Professor of Forensic Chemistry in George Washington University's Department of Forensic Sciences within the Columbian College of Arts & Sciences. Moini was placed on a "fast track" to tenure due to his experience, meaning he was entitled to receive a tenure decision within three-and-a-half years rather than the usual seven.

In 2015, the university amended its Faculty Code to require tenure applicants to demonstrate "excellence" in teaching, whereas previously, only "professional competency" was required. Beginning in fall 2015, students could evaluate faculty individually. Before Moini submitted his tenure application in September 2016, he received individual student evaluations in four courses. In three of the courses, his overall rating as an instructor fell below the department average.

Concerned about Moini's teaching record, the department sought to extend the tenure clock to provide Moini more time to demonstrate teaching excellence required for tenure promotion. Following the denial of this request by higher-level university leaders, the department unanimously voted in favor of granting Moini tenure.

However, the tenure committee, the Dean, and the Provost disagreed, stating Moini's application lacked evidence of teaching excellence. The Faculty Senate Executive Committee next found "extenuating circumstances" made Moini's teaching environment difficult and recommended his tenure clock be extended by two years so he could improve his teaching.

However, the then-university President disagreed, stating Moini had two decades of teaching experience prior to coming to the university, which gave him ample time to develop teaching skills. After this decision, the Provost informed Moini he would be denied tenure.

Moini pursued an internal grievance process to appeal the decision. It was unsuccessful. While the appeals panel found it

was arbitrary to deny him tenure based solely on student evaluations of a one-credit required seminar course, the Provost overruled the panel's determination, concluding again that Moini failed to meet the excellence-in-teaching standard. Ultimately, the Executive Committee of the Board of Trustees voted to uphold the tenure denial. Moini's employment with the university ended in September 2018.

Moini filed a *pro se* complaint in October 2019 alleging, among other things, the decision to deny tenure constituted racial discrimination under 42 U.S.C. § 1981. Both parties filed motions for summary judgment. The district court granted the university's motion and denied Moini's motion. Moini appealed.

Court Finds Legitimate, Nondiscriminatory Reason for the University's Decision to Deny Tenure

To prevail on his claim, Moini needed to present evidence the university intentionally discriminated against him based on his race. The appellate court found no direct evidence of statements showing racial bias in the employment decision with respect to Moini. While he cited comments a colleague made allegedly denigrating immigrants and foreigners, the appellate court determined these general remarks didn't constitute direct evidence showing racial bias in his denial of tenure.

The court next assessed indirect evidence of racial discrimination, focusing on the second and third steps of the analysis. The court determined the university offered a legitimate, nondiscriminatory reason for denying Moini tenure, namely that Moini failed to demonstrate teaching excellence. The court noted the university had considered at various stages of the tenure process his below-average teaching evaluation scores and negative comments from students who complained of "overwhelming material, lack of organization, poor pace, and quizzes that seemed more like tests."

Moini attempted to show the university's rationale was pretextual based on alleged deviations from the university's established procedures for evaluating tenure applications. He

argued the department Chair deviated from established procedures by assigning him to teach a graduate seminar course with a history of low student evaluations in an effort to set him up for failure, failing to provide him with a mid-tenure review, and failing to alert him to concerns with his teaching.

The court, however, was unpersuaded. Evidence showed the Chair had, in fact, strongly supported Moini's tenure application and encouraged decision-makers to look past Moini's negative student reviews. Moini didn't provide evidence that the Chair harbored racial animus toward him or that the university deviated from its usual practice by considering student evaluations. Evidence also showed the prior department Chair had decided not to provide a mid-tenure review to Moini after being told by the Associate Dean that such reviews weren't necessary for fast-track faculty, but Moini had not alleged either of them harbored racial animus.

Moini also sought to demonstrate pretext by arguing three non-Middle Eastern professors were treated differently in the tenure process and were granted tenure despite below-average teaching evaluations. The court, however, found the professors weren't appropriate comparators because their employment situations weren't "nearly identical" to Moini's, including with

respect to the timing of their tenure decisions, the composition of their teaching loads, and the upward trends that were evident in their student evaluations.

Accordingly, the D.C. Circuit affirmed the district court's grant of summary judgment to the university.

The Bottom Line



Faculty who have been denied tenure may have an uphill battle demonstrating the decision was discriminatory. Courts often defer to the institution's academic judgment in applying the institution's standards for promotion and tenure. It also can be challenging for a professor to find comparators with a "nearly identical" employment situation who were treated differently in the tenure process given potential differences in timing, department standards, fields of expertise, and decision-makers at each step of the process. Nonetheless, institutions can best protect themselves by carefully following established procedures and being able to provide legitimate, non-discriminatory reasons for deviations.

Moini v. Granberg, Case No. 22-7101 (D.C. Cir. May 1, 2024) (unpublished).

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