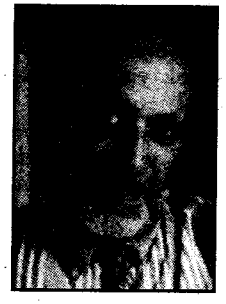
Suing Harvard: Dealing With The Hometown Advantage

BY HARVEY SILVERGLATE



Only a trial lawyer who has actually litigated a case against Harvard in either Suffolk or Middlesex County can understand the disadvantage of having to overcome what in athletics is called the "home court advantage."

It's not so bad if the lawyer can get his case to a jury, most of whose members will not have gone to Harvard. But the commonwealth's Harvard-laden bench, particularly at the appellate level, can be a suspected obstacle to a successful outcome. Or so it sometimes seems.

An application for further appellate review filed by Professor Peter Berkowitz this past July, pending before the Supreme Judicial Court until acted upon Sept. 9, is a case in point. (*Berkowitz v. President and Fellows of Harvard College*, No. FAR-13528)

A Superior Court judge (not a Harvard man but a highly respected trial judge) found sufficient merit to Professor Berkowitz's complaint against Harvard to proceed to the discovery stage, twice denying motions to dismiss filed by the university.

But then, on an interlocutory appeal, a three-member Appeals Court panel consisting of two Harvard grads — with degrees from *both* the college and the law school — unceremoniously threw out the case by resort to a palpably strained line of reasoning worthy of a circus side-show contortionist. But we're getting a little ahead of the story.

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Viewpoint

It's not so bad if the lawyer can get his case to a jury, most of whose members will not have gone to Harvard. But the commonwealth's Harvard-laden bench, particularly at the appellate level, can be a suspected obstacle to a successful outcome. Or so it sometimes seems.

Peter Berkowitz, an expert in the field of political philosophy, joined Harvard College's Department of Government in 1990 as an assistant professor. Four years later he was promoted to associate professor. By 1996 Berkowitz was up for a tenure review, a process governed by the faculty Appointment Handbook.

The Government Department recommended tenure for the rising young star, but the university, in the person of former Harvard President Neil Rudenstine, denied Berkowitz's bid in April 1997. While it is not unheard of for the president to turn down a candidate for tenure in the face of an affirmative recommendation by the relevant department, it does sometimes raise eyebrows. And when it does, there's occasionally a story behind it, more perhaps than meets the eye. Harvard's internal politics and squabbles, after all, have been likened on more than one occasion to those found in a den of vipers.

Berkowitz initiated an internal grievance of his tenure denial, a process governed by the handbook. The manner in which that process was in fact handled, however, led him to file a complaint with the Superior Court in March 2000.

Berkowitz essentially claimed that the procedure set out by Harvard for deciding such cases was short-circuited by a clever abuse of Harvard's own procedures. Those procedures provided that an Ad Hoc Grievance Committee conduct an "inquiry" and, after providing "full and fair consideration of the grievance," issue "reports" that could recommend reconsideration of the tenure denial.

Before such a grievance could get to the Grievance Committee, however, it has to pass through a so-called Docket Committee. Harvard's rules provide that the Docket Committee's authority is limited to conducting a "preliminary screening" in order to eliminate grievances "clearly without merit" from being passed along to the Grievance Committee.

The Docket Committee, however, whose primary role is administrative and whose main task was to set the schedule and organize the agenda for faculty meetings, suddenly took upon itself an extraordinary task. In the guise of performing its "preliminary screening" function, it conducted an *in-depth investigation* into Berkowitz's factual allegations.

That "screening" consisted of a wide-ranging investigation that lasted five months. It included witness interviews conducted in secret and unknown to Berkowitz at the time, confidential consultations with outside legal counsel, secret gathering and weighing of evidence, and an in-depth interview of Berkowitz.

This process resulted in the Docket Committee's writing a nine-page letter to Berkowitz in May 1999, dismissing his petition as being "clearly without merit," thereby keeping it from reaching the Grievance Committee charged with reviewing such applications.

Berkowitz suspected that the Docket Committee had usurped the function that the handbook reserved for the Grievance Committee, in an effort to keep the Grievance Committee from undertaking the job assigned it by the handbook.

He had reason to believe that the Grievance Committee, as it was then constituted in accordance with Harvard's rules, would have been more sympathetic to his claims of

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improper treatment during the tenure process. This is in part because the members of the Docket Committee are appointed by the dean, whose office and whose conduct Berkowitz was challenging.

But the handbook gave Berkowitz the right to appoint one member of the three-member Grievance Committee, and the chair of his department the right to appoint another. The department, it is important to recall, was already on record in favor of granting tenure to the young professor. Hence, the Grievance Committee would likely have viewed Berkowitz's case more favorably, or at least more fairly, than would the Docket Committee.

The Docket Committee's unseemly conduct thus gave off a sense, if not a smell, that it was prepared to abuse its "screening" function in order to keep Berkowitz's grievance from getting to the body entrusted with such a review.

The complaint filed in the Superior Court seemed to be a run-of-the-mill contract claim. Berkowitz was not, after all, asking the court to reverse Harvard's denial and grant him tenure, which arguably would have trenched upon Harvard's institutional academic freedom.

All he sought was that the matter be returned to the Grievance Committee for the kind of review of his allegations promised him in Harvard's own handbook. It was a rather modest sort of relief that sought to invoke, rather than to change or negate, Harvard's own announced rules and procedures.

If a fair tenure process ended up in a denial, Berkowitz was prepared to proceed with his life and with a promising career outside of Harvard. (Yes, Virginia, there *is* life outside of Harvard, even for a leading expert on the philosopher Friedrich Nietzsche!)

Superior Court Judge Raymond J. Brassard read the contract pretty much as any person in Berkowitz's position would have read it. Common sense tells one, after all, that what the Docket Committee did was far more than any sensible person would call a mere "screening" function.

Common sense indicates, too, that any grievance that consumed five months of a Harvard committee's time, much investigatory effort, consultation with a lawyer, a blanket of secrecy, and a nine-page lawyerly letter explaining why the matter was sufficiently clear and simple to be summarily dismissed, could not reasonably have been deemed "clearly without merit."

If this was a mere "preliminary screening" as envisioned by the handbook, then one can only begin to imagine the time and resources that would have gone into consideration of the grievance on its merits!

And yet the Appeals Court announced, "we discern no prejudice to the plaintiff arising out of the docket committee's double-checking of its work through further inquiry." *Berkowitz v. President & Fellows of Harvard College*, 58 Mass. App. Ct. 262, 274-5.

Mere "double-checking"? It seems farfetched, even if one ignores entirely an allegation that Berkowitz had raised as part of his formal grievance that the Grievance Committee never got to investigate. That allegation raised an arguable structural and institutional conflict of interest on the part of Professor of Government Dennis Thompson, who had vigorously opposed Berkowitz's tenure application within the department, was on Rudenstine's staff as an associate provost, was married to Associate Dean for Academic Affairs Carol Thompson who had responsibility for insuring fairness in the tenure process, and, perhaps not so incidentally, whose book Berkowitz had reviewed critically for The New Republic just as his tenure review began.

Ah, Harvard politics!

When a common sense reading of a rather simple contract appears to elude three presumptively intelligent appellate judges, one searches for an explanation. One tries to avoid excess suspicion and cynicism — this being both Massachusetts and Harvard, after all — but it is difficult to ignore the composition of the Appeals Court panel that so sharply disagreed with a respected Superior Court judge.

The panel consisted of George Jacobs (Harvard College, 1955; Harvard Law School (J.D.) 1958); William I. Cowin (Harvard College, 1959; Harvard Law School (LL.B.) 1962); and the author of the opinion, Scott J. Kafker. That's two out of three, leading one to question whether Berkowitz, now an associate professor of law at George Mason University Law School and a research fellow at Stanford's Hoover Institution, might indeed have felt the sting of Harvard's home court advantage.

It reminds me of a case I worked on in 1972 with Harvard Law Professor Alan Dershowitz and Boston criminal defense lawyer Norman Zalkind (then my law partner). We were representing a defendant in a federal bombing-murder case in the Southern District of New York (Manhattan), where all of the defendants were members of the sometimes-violent Jewish Defense League that was at the time battling Soviet refusal to allow the emigration of Jewish dissidents.

A JDL member who had been immunized and was called as a government witness balked, citing the Jewish Talmudic admonition that a Jew not bear witness against a fellow Jew in a "Gentile court." The witness, an orthodox Jew, had raised a First Amendment religion-clause objection to being compelled to testify.

District Judge Arnold Bauman decided to handle the witness's objection on the facts rather than on the law. After observing that the defendants were all Jewish, both members of the prosecution team were Jewish, all of the defense lawyers were Jewish, the witness's lawyer was Jewish, "and I'm Jewish," Judge Bauman concluded that "this is a Jewish, not a Gentile, Court."

The motion to quash the witness subpoena was denied.

Just as sometimes in New York one can appear before a "Jewish court," one can with considerable statistical frequency draw a "Harvard court" in Boston or Cambridge, a suspected disadvantage when one is opposing Harvard.

Berkowitz did indeed draw such a panel. Whether the old school tie accounted for the Appeals Court panel's remarkable interlocutory reversal of Judge Brassard, no one can say for sure. But Berkowitz, an outsider, surely had reason to feel discomfort.

On the other hand, the Appeals Court did not have the final word. Berkowitz filed a petition for further appellate review that was pending for some two months before our esteemed SJC finally acted upon it on Sept. 9.

Reviewing that petition, in addition to justices John M. Greaney, Francis X. Spina and Martha B. Sosman, were justices Roderick L. Ireland (LLM, Harvard Law School); Robert J. Cordy (J.D., Harvard Law School); Judith A. Cowin (J.D., Harvard Law School); and Chief Justice Margaret H. Marshall (M.A., Harvard University, and, just preceding her appointment to the SJC, vice president and general counsel of Harvard). That's four out of seven.

The petition was denied, thereby ending the case.

Even paranoids, as the saying goes, have real enemies. MLW