STRATEGIES FOR MINIMIZING LEGAL CLAIMS BY STUDENTS AND EMPLOYEES ALLEGING DISCRIMINATION UNDER FEDERAL LAW

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PART ONE: EMPLOYMENT ISSUES

1. AVOID UNLAWFUL INQUIRIES DURING EMPLOYMENT INTERVIEWS

There was a time in the not-too-distant past when almost any question could be asked on application forms or during employment interviews. This is no longer the case, and Colleges now need to be extremely careful about how employment interviews are conducted. Most pitfalls in this area may be avoided if one simple is observed: Only ask questions that elicit information necessary to the hiring decision. It is clear, for example, that questions about age, religion, marital status, number of dependents, sexual orientation, and citizenship are rarely, if ever, relevant to hiring decisions in higher education. Questions that elicit, or tend to elicit, information about these topics should be carefully avoided.
Perhaps the most difficult types of question during interviews relate to disabilities. In general, if an applicant does not have a known disability (i.e., obvious or self-disclosed), questions that tend to reveal disabling conditions should not be asked. For example, questions related to prior workers’ compensation claims or extended leaves of absence should be avoided. However, applicants with known disabilities may be asked to describe or demonstrate how they would perform the essential functions of the position, with or without accommodations. Likewise, although applicants cannot be asked if they have ever been treated for alcohol or drug abuse, they may be asked if they are currently using illegal drugs and even required to take a drug test.

- Train those who interview applicants on appropriate questions and techniques.
- Review all application forms and other material distributed to applicants to be certain that no discriminatory questions or other inappropriate references are used.
- Be certain that the College’s nondiscrimination statement appears on all application materials.

2. COMMUNICATE ACCURATE JOB DESCRIPTIONS TO APPLICANTS FOR EMPLOYMENT.

One of the most frequent causes of dissatisfaction in the workplace, from both the employee’s and supervisor’s perspective, is when an employee
begins work thinking the position is completely different from what it actually is. The causes for this gap in communication may be varied and complex. Perhaps the employee was looking for a position with more authority and status, and just “assumed” or “hoped” that this job would fulfill those dreams. In this mood, the employee didn’t ask enough questions (or at least not the right ones) or filtered out information from the College that conflicted with the dream of a job with greater responsibility and visibility. Many of us may have been guilty of this once or twice in our own careers.

While the College cannot always control how an applicant will perceive a vacant position, the College can develop an accurate job description and direct hiring administrators to cover the description carefully with finalists before making any offers. The problem, too often, is that administrators are anxious to hire a particular applicant and will embellish the job description to meet the applicant’s expectations. Or administrators may make commitments about future levels of responsibility, salary ranges, or departmental reorganization that the College simply cannot deliver upon. All of these cross currents can create a serious gap between the applicant’s understanding and the real duties of the job. When this happens, the seeds for an unhappy employment relationship are sown. Those seeds can grow into discontent and even conflict. This is when the cost and disruption of managing the employee can become more than the position is worth to the College.
Suggestions:

- Have written descriptions of every position.

- Review position descriptions on a regular basis to insure they are current and comprehensive.

- Require hiring officials to review position descriptions carefully with all finalists.

- Avoid making promises or assurances about future levels of compensation or responsibility.

3. EFFECTIVELY COMMUNICATE EMPLOYER POLICIES AND PRACTICES

Almost every lawyer has a story about losing a discharge case before a judge or arbitrator because the discharged employee testified that he or she simply had no idea that the particular conduct at issue violated the employer's rules. One would hope that conduct that violates common sense or even shocks the conscience would be enough to justify discharge. Unfortunately, that is not always the case. What is far more convincing to a judge or arbitrator (or EEOC investigator) is documentation that the policy at issue was communicated to the employee.

To clearly and consistently communicate College employment policies, the preparation of an employee handbook is advisable. It should include a disclaimer which provides that the handbook is intended as a guide to the company's policies and it is not a contract. Employees should acknowledge in
writing that they received the handbook. Don’t put anything in an employee handbook that the College does not intend to fulfill. No handbook should be issued if the President or Board of Trustees is lukewarm about any of its provisions. In order to assure that a handbook accomplishes its objectives -- boosting morale and providing a clear and consistent statement of the terms and conditions of the employment relationship -- the administration must support its provisions in all respects.

Suggestions:

- Develop or update employee handbooks for all staff.
- Insure that top administration supports the provisions of the handbooks.
- Avoid statements in the handbooks that cannot be achieved.
- Require employees to acknowledge receipt of the handbook.
- Consider use of special acknowledgement forms for employees in certain positions.

4. DOCUMENT EMPLOYEE MISCONDUCT AND POOR PERFORMANCE

A common and oftentimes very effective type of testimony from a discharged employee is: “But no one ever told me my performance was bad.” When supervisors and co-workers corroborate this testimony, the discharge has a reasonable chance of being reversed. That is why supervisors and other members of management should be required to communicate to employees any instances or patterns of unsatisfactory performance or misconduct. This is not
to suggest that the employee be badgered constantly, but only that repeated or seriously unacceptable performance or conduct be immediately communicated directly to the employee.

Many supervisors favor positive reinforcement of subordinates or are simply averse to confronting employees about problems in the workplace. When there is no feedback to employees, issues can fester until the supervisor finally decides that the employee needs to go (usually immediately!). The discharge then becomes a surprise to the employee (and to co-workers) and is far more likely to result in litigation than a discharge preceded by meaningful feedback.

Experience teaches us that EEOC and state agency investigators are heavily influenced by testimony from co-workers that the discharged employee had no warning. Such testimony not only suggests that the supervisor is unfair, but also undercuts the credibility of the reasons for the discharge. The perception of unfairness stems from the view that employees ought to be given an opportunity to address and correct any performance deficiencies before losing their jobs. The credibility problem arises when the investigator believes the reason the employee was not given a warning is because, contrary to the supervisor’s testimony, there was no previous performance issue with this employee.

In some instances, supervisors may be quite proficient in warning staff members about workplace problems but do a poor job of documenting those
warnings. Although this is a better case to defend than one where no prior warnings were given, it is still not a great record to present to an investigator from the EEOC or a state agency. For one thing, most investigators come from employment settings (such as the state or federal agencies) where documentation is part of the culture. For another, the absence of documentation means that the case must be built solely on testimony. This may not present a problem if the supervisor still works for the College, makes a credible witness, and is corroborated by other witnesses. But, as is often the case, if the supervisor is an ex-employee of the College (and potentially hostile) and there are no other witnesses to the oral warnings, this presents the College with a serious strategic problem. What was a situation where a staff member was clearly terminated for good cause becomes a situation where the College faces a costly severance agreement or the threat of litigation. All this could have been avoided if the supervisor had simply done a better job of documenting the oral warnings given the employee.

Suggestions:

- Make the job of supervisor easier by providing user-friendly forms to record warnings, reprimands and suspensions.
- Routinely review staff members’ files to determine if supervisors are maintaining appropriate documentation practices.
- Repeatedly train supervisors to effectively document staff workplace problems.
• Train supervisors to evaluate employees informally all year long, so that they will not be surprised when they are formally evaluated.
• Train supervisors on how to evaluate performance of employees, including establishing specific goals and performance standards.

5. **ELIMINATE UNLAWFUL HARASSMENT IN THE WORKPLACE**

Sexual harassment in the workplace is now widely regarded as one of the greatest source of liability for employers. However, any type of unlawful harassment – including harassment on the basis of race, national origin, religion, age, or disability – may present significant liability issues. Recent Supreme Court decisions have helped clarify the responsibilities of employers in the area of sexual harassment, and the lower courts are now applying those principles to other types of harassment and discrimination cases. All these decisions underscore the importance of adopting and publicizing a strong policy against harassment in the workplace, along with a clear set of procedures for filing internal complaints.

As important as it is to adopt a harassment policy, it is perhaps even more important that the policy be strictly enforced by the administration. This means that every complaint of harassment must be promptly investigated and appropriate action taken. But it also means that administrators must act on information about potential situations of unlawful harassment, even if that information arrives in some form other than a formal complaint. And it also
means that administrators must be aware at all times of the types of conduct that are taking place in the workplace. By carefully listening and watching events in the workplace, and by responding immediately to inappropriate conduct, many of the legal problems stemming from workplace harassment would be eliminated.

Suggestions:

- Publish and circulate a policy prohibiting harassment of any type in the workplace, including a specific description of the complaint procedure.
- Investigate and resolve all reports and complaints of harassment.
- Monitor the workplace carefully to determine if harassment is occurring.
- Prohibit retaliation against those who complain about harassment or participate in investigations of harassment.

6. GIVE AN ACCURATE DESCRIPTION OF REASONS FOR DISCIPLINE AND DISCHARGE

When informing a staff member of discipline or termination, college administrators and supervisors are well-advised to give the actual reasons for the actions. If false reasons (common examples are staff reorganization or position elimination) are given, even for the best of intentions, and the decision is later challenged, the College will have to quickly backtrack and document the real reasons for the discipline or discharge. This frequently happens when
the College first responds to the discharged employee's claim for unemployment compensation and later desires to say something different in response to a discrimination or wrongful termination claim. The rule is a simple one: Be truthful and consistent when giving reasons for employment decisions.

There are a variety of reasons why college administrators and supervisors may be reluctant to give employees the actual reasons for discipline or discharge. Sometimes they receive legal advice not to give any reasons. This is based on the view that the law does not generally require an employer to give any reasons for firing an at-will employee or for that matter even to have any reasons. (A typical definition of an at-will employee is one who may be terminated with or without warning and with or without reason.) However, simply because a staff member may not be able to force the College to provide reasons for discipline/discharge does not mean that denying reasons is a strategically sound practice. Some of the reluctance in doing so may stem from the fear that giving reasons is some type of trap or that it will “come back to haunt” the College.

All these apprehensions are outweighed, in our judgment, by the value of having accurate and contemporaneous documentation of the real reasons for the employment action. This is not only the best evidence of the valid, nondiscriminatory reason, but writing the reasons down prior to the actual discharge is one method of testing whether the rationale is really sound. If the
reasons for a discharge cannot be articulated clearly and coherently, and in a manner that is consistent with the underlying facts in the case, then serious consideration should be given to whether discharge is the appropriate course of action.

Suggestions:

- Require supervisors to record clear and compelling reasons for discharging a staff member before the discharge occurs.
- Analyze the rationale for discharge to ensure that it is consistent with all the underlying facts in the case.
- Review the rationale for discharge to ensure that it is consistent with past practice at the College.
- Do not change the “official” reasons for the discharge after it has occurred.

7. PROVIDE EMPLOYEES WITH “DUE PROCESS” BEFORE DISCIPLINE OR TERMINATION

It is good personnel practice to provide staff members an opportunity to respond to the reasons for discharge before making the final decision. It is recommended that this take place in front of an administrator who is above the level of the employee’s immediate supervisor. This demonstrates fairness and openness, and should put the College in a much stronger position later if the discharge is challenged. A pre-termination hearing may also be required, as a matter of Constitutional law, at public schools.
The pre-termination “hearing” provides a unique chance to acquire information about what is really happening in the College’s workplaces. The feedback may be important to the administration in learning how effective the supervisor has been and in determining whether the College’s employment policies are being implemented in a fair and evenhanded manner among the workforce. There may be instances where information obtained at the pre-termination hearing dictates a change in plans and, rather than discharge, a reprimand or suspension is considered a more appropriate response.

Suggestions:

- Except in emergency situations, provide all employees an opportunity to respond in person to a recommendation of termination before making a final decision.
- Urge administrators to retain an open mind about the matter until the pre-termination hearing is concluded.
- Be prepared to modify the discharge if information obtained at the hearing suggests this is the proper course of action.
- Utilize information obtained at pre-termination hearings to monitor the effectiveness of employment policies and the performance of supervisors in the workplace.

8. TREAT EMPLOYEES PROPERLY DURING DISCHARGE

It cannot be emphasized enough that losing a job is often one of the most traumatic events in a person’s life. Everything that a supervisor does and
says during the discharge process can take on exaggerated importance. That is why it is critical that administrators and managers handle the discharge process with great care and, in particular, treat the discharged employee with dignity and respect. It is always useful to imagine that the discharged employee is your mother or father, brother or sister, or son or daughter, and to ask yourself how you would like that person treated under the circumstances of a discharge.

Suggestions:

- Don't fire an employee after a heated argument or major dispute.
- Don't delegate the difficult task of informing an employee of termination.
- Don't inform the employee of termination by letter or e-mail unless that is the only means of communication.
- Don't insult or belittle the employee during a termination session. Stick to the facts regarding the unsatisfactory performance or misconduct, and outline the benefits that will be provided with the termination.
- Don't characterize the reasons for an employee's work problem. That is, don't use terms like laziness, lack of motivation, lack of intelligence, etc.
- Don't discuss the employee's personal problems, home life, or other factors not directly raised by work performance. For example, don't get into matters of drinking, drugs, marital problems, etc. Simply describe the unsatisfactory performance or misconduct.
PART TWO: STUDENT ISSUES

1. SOURCES OF LIABILITY

Federal law certainly applies to higher education, both public and private. Conditions surrounding the receipt of federal funds make discrimination prohibitions applicable to both the public and private sector. Additionally, the concept of "state action" makes federal constitutional provisions applicable to public colleges and universities.

Several federal laws prohibit discrimination against students. Section 1981 of the Civil Rights Act of 1866 applies to racial discrimination; Title VI of The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin. Discrimination on the basis of sex, including sexual harassment and program participation, is precluded by Title IX of the Education Amendments. The scope of Title IX institutional liability in student-faculty sexual harassment situations was recently clarified by the U.S. Supreme Court in Gebser v. Lago Vista School Dist., a 1998 case. This year, the Supreme Court will address the dimensions of liability for student v. student sexual harassment in the Davis v. Monroe County case. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of
1973 address disparate treatment based upon actual or perceived disabilities. The Age Discrimination Act is also applicable, precluding age as criteria for participation in programs or activities receiving federal financial assistance. Finally, provisions (free exercise of religion, establishment of religion, due process, equal protection, etc.) of the U.S. Constitution prohibit a conduct by public institutions that impacts groups or persons differentially.

2. POLICY REVIEW PREVENTS PROBLEMS

Policy creation is normally triggered by events outside the campus, such as a new law, regulation or judicial decision. A serious campus or event will also frequently generate a policy. Often much time elapses due to involvement of campus constituencies, in the policy process. Compromise, group drafting and devotion to detail often produce policies that satisfy the need of the moment but prove difficult to administer, or understand, afterwards. Practices and policies should be periodically reviewed to insure that they meet institutional needs and objectives and are in compliance with applicable law.

In addition to those seminal reasons stated above, policies should be reviewed for clarity and internal consistency. Many of our policies are so poorly written that they undermine our assertions of academic excellence. Colleagues we encounter at this conference and others can provide examples of their policies, as can national higher education organizations. Many institutional policies are now on the Internet.
If your more significant policies require approval by your Board of Trustees, or various campus constituencies, bifurcate the enactment process. Insure that the policy is short, direct and clear. For example, prohibit sexual harassment explicitly and directly. But put the procedures for implementing the policy in another document that can be readily changed, without the complexity of the policy creation process. The policy may need Board approval but let the Dean of Students (or other officer), with appropriate consultation, adopt or modify the procedures when necessary.

While, ideally, policy review should be periodic, review and change is often necessitated by federal or state enactment, or judicial decisions. When faced with a review and revision process that will be lengthy, due to constituency (faculty, student, staff) involvement, consider promptly making the change, on a provisional basis, to insure compliance. The government will impose institutional liability: that the student body hasn’t ratified the change is no defense.

3. POLICIES THAT CAN MINIMIZE DISCRIMINATION CLAIMS BY STUDENTS

   A. Infectious Disease\textsuperscript{1}: To create or revise an infectious disease policy, the following questions should be asked:

      1) What laws, judicial decisions apply? Section 504; ADA; laws regarding HIV and other diseases; disclosure of medical information; cases-

\textsuperscript{1} This segment delineates the process that can be used in creating or reviewing the other policies noted in this section.
negligence; duty to warn; duty to others; invasion of privacy; emotional
distress; defamation.

2) What is the institutional interest? Balancing the rights of the
community to be free from disease vs. the rights of the individual to
privacy and pursuit of student objectives.

3) Who is involved in developing policy? Possible participants include:
student affairs; attorney; health service; counseling service; housing;
human resources; admissions; public relations; infectious disease
specialists; athletics; student leaders.

4) Develop issues: medical testing; program eligibility; will disclosure be
required; will student be counseled-by whom; when; if disclosure to
whom; what about people in contact-testing-who pay; room
assignments; community notification?

B. Affirmative Action in Admissions and Financial Aid: See 1997 Stetson
Conference outline by Mary Elizabeth Kurz and Lawrence White From
Philosophical and Political Debate to Reality: How to Ensure Equal
Opportunity in Admissions and Employment Decisions Following Court
Decisions Rejecting Traditional Approaches to Affirmative Action. Particular
attention should be paid to scholarship funds that are obsolete (e.g.
encouraging women to enter the nursing profession) or those so loosely
administered (as in Podberesky) to undermine the arguably lawful purposes of
the aid program.
C. Sexual harassment: Several recent (1998) decisions of the United States Supreme Court compel examination of your employee sexual harassment policies. The need for review of student policies is less urgent, due to a decision favorable to higher education in Gebser v. Lago Vista. The Oncale v. Sundowner Offshore Services, Inc. decision ruled that same-sex harassment is unlawful. If one is subjected to wrongful terms and conditions of employment that persons of the other sex were not, liability can exist. Although the Supreme Court has not ruled on the issue, several U.S. Courts of Appeal have ruled, based on Title VII principles, that same-sex harassment is prohibited by Title IX. Your policies should explicitly include a prohibition of same-sex harassment by students, if you choose to address this issue.

The interest in policy review generated by the employee cases can be directed toward a review of policies protecting students against harassment. Is your policy clear? Does it include all legally prohibited forms of harassment? Is it part of your “regular disciplinary procedure” or is the complaint process against other students a separate track? Have you addressed consensual relationships between students and faculty and students and graduate assistants?

D. Student fees: On August 10, 1998 a panel of the U.S. 7th Circuit Court of Appeals ruled in Southworth v. Grebe that the University of Wisconsin’s student fee allocation system violated the constitutional rights of certain students because portions of the mandatory student fee was used to support groups that were “political and ideological.” The Court also ruled that a refund system for that portion of objectionable fees was inappropriate, ruling instead
that a system had to be devised to insure that students, on an individual basis, would not be burdened with fees to support “political and ideological” student groups. The court ordered the Wisconsin Regents to come up with an appropriate plan.

Although further appeals may occur (Wisconsin has sought review by the U.S. Supreme Court), student affairs officers should carefully examine the decision and determine whether it would be prudent to examine their student fee system in anticipation of challenges by their students, or questions from their trustees. The decision has mandatory effect for public institutions of higher education in Illinois, Indiana and Wisconsin.

E. Indemnification of Students

When your students are sued by other students, staff or faculty, do you provide a defense and pay any adverse judgment? In reaching this decision, you first must determine whether your institution has the legal authority to provide indemnification. Another question that must be asked is whether the conduct in question was within the scope of the potential indemnity’s responsibility to the institution. Finally, you must identify the relevant institutional considerations. Can the practice be sufficiently narrow? What are the institutional interests served? Does the failure to indemnify discourage use of university procedures?

F. ADA and Fundamental Program Requirements

Do your faculty understand their rights and responsibilities in dealing with students with disabilities? Do you have an effective staff to assist students and faculty? See Tom Flygare’s Students with Learning and Psychiatric Disabilities: New Challenges for Colleges and Independent Schools, published
by United Educators Risk Retention Group, Inc. Insure that faculty and students understand the concept of fundamental program requirements.

G. Space Use and Campus Disruptions

Probably 25 years has passed on most campuses without a review of the campus disruption policy. Politically motivated protest may have been more acceptable than recent alcohol related debacles. Policies may be more cumbersome and protective of student protesters than necessary or prudent now.

Related to this is the use of public campus space. Have we unwittingly allowed placid gatherings to transform non-public areas into public fora, thus limiting our ability to control events in those spaces?

H. Student Discipline

Do we permit too much due process? See 1999 Stetson Conference outline concerning this topic. Have we developed procedures to promptly remove dangerous or disruptive persons without inviting ADA claims?

4. ADDRESSING STUDENT COMPLAINTS

Most of the advice for dealing with employee issues is applicable to student complaints as well. Attentiveness, reasonableness and civility can resolve many issues. When necessary, a prompt, appropriate and thorough investigation will be effective in preventing liability. Keep the student informed periodically. To the extent reasonable, maintain confidentiality.

Obviously, much of your effort should be directed toward diverting the student away from the judicial system. The most common forms of alternative dispute resolution are arbitration and mediation. An arbitrator is, in effect, a private judge
who will make a decision after what usually resembles a mini-trial. Mediation is assisted negotiation where a neutral person, from within or without the organization, aids the parties to the dispute to reach a mutually satisfactory outcome. It can be particularly effective in resolving disputes within an institution. Indeed, student affairs personnel, and campus counsel, mediate informally frequently.

Considerable litigation has addressed whether institutions can mandate use of alternative dispute resolution before resorting to the courts. No clear answer has emerged although the most recent decision, Bercovitch v. Baldwin School, Inc., upholds such a requirement.

For additional information on alternative dispute resolution\(^2\), contact:

Center for Public Resources, Institute for Dispute Resolution
366 Madison Avenue
New York, NY 10017-3122

http://www.cpradr.org

Society of Professionals in Dispute Resolution
815 15\(^{th}\) Street NW, Suite 530
Washington, DC 20005

http://www.spidr.org

National Institute for Dispute Resolution
1726 M St. NW, Suite 500
Washington, DC 20036

\(^2\) This list was compiled from resources suggested by Laura A. Kumin in Is Employment Litigation Inevitable? (United Educators Insurance Risk Retention Group, Inc., Winter 1997).
The Mediation Information and Resource Center

440 East Broadway, Suite 340

Eugene, OR 97401

http://www.mediate.com

For a website that lists campus mediation centers, contact http://www.mtcls.wayne.edu/CMC.html
EXERCISES

A. Design a sexual harassment complaint procedure for your employees (E) and students (S):

1) To whom are complaints made?
   E- S-

2) To whom does that person report?
   E- S-

3) Time limit for complaint?
   E- S-
   Who investigates?
   E- S-
   How investigated?
   E- S-

4) Who decides?
   E- S-

5) Hearing? If so, who is on panel; how does it run; similar procedure for both E & S; role of attorneys; record other issues.
6) Sanctions?
   E-                        S-

7) Appeal and scope of appeal
   E-                        S-

8) Monitoring
   E-                        S-

9) Role of counsel
   E-                        S-

B. You receive an application for admission from a prospective student who discloses on his application that he is completing a prison sentence for rape. He also discloses that he is hearing impaired and is HIV positive due to prison encounters. His ACT and SAT scores exceed the median for your institution.

1) Do you admit him?

2) Do you need additional information? Assume you admit him. Your ADA coordinator verifies that he needs accommodation, including signing and note taking. You rely on a local charitable organization, consisting entirely of women, for this function. Several classes meet in the evening, in remote campus locations. What do you do?

3) Wanting to experience college life fully, he applies for dorm housing. What do you do?

4) He applies for financial aid, especially loans that have an initial payment not due until 10 years after graduation? Do you award it? What if you’ve awarded similar aid to minorities?
C. Describe how you would go about firing someone.

D. Your public university has a recognition policy. A student group, to be recognized and receive university funding, must agree to abide by the university’s non-discrimination policy, which includes sexual orientation. The group asserts that due to its adherence to religious doctrine, it cannot accept gay members but wants to be recognized anyway. Do you recognize them?

E. Your basketball program, men’s and women’s, have been weak for several years. You depend on men’s basketball to generate attendance and revenues to support most of the athletic program, including your full array of women’s teams. After a national search, you hire two new coaches. Both were assistant coaches at their former institutions. The female coach, hired for the women’s team, is to be paid $70,000 per year and the male, $125,000. Any problem?

F. You are the chair of your institution’s Board of Trustees. You learn that the President of the college/university has engaged in oral sex with a student, who became enamored of him. He has repeatedly denied wrongdoing, and asked his secretary to help cover up . . . . NEVER MIND!