

**Faculty Members with Impairments
Legal Issues under Disability Discrimination Law**

**Laura Rothstein
Professor and Distinguished University Scholar
University of Louisville Louis D. Brandeis School of Law
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“The elimination of mandatory retirement, the difficulty of measuring performance for high education faculty, and a shaky economy have combined to create an increasing number of challenges by faculty members claiming discrimination on the basis of disability. Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions. Although this development is part of a larger societal issue, the uniqueness of employment in an academic setting has required institutions and the courts to address these issues in an unusual context.

[Factors requiring attention] include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies. In addition, uncertainties about the economy and whether retirement benefits will be sufficient have caused more people to delay retirement. The higher education setting gives aging faculty members the opportunity to remain connected to a community of colleagues. This opportunity is particularly compelling considering the benefits of having an office and access to support services, such as long distance telecommunications, clerical support, technology support, computer upgrades, and even travel funding.

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability. These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have implemented detailed systems of post-tenure review and other improved faculty evaluation procedures and practices, those that have not may find themselves in messy and lengthy disputes.”

Laura Rothstein, *Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Heading*, 63 Maryland Law Review 101, 107, 122 (2004) (footnote references omitted).

Discussion Scenarios

1) Faculty member who “appears” to have a disability

Professor A is a popular and long serving faculty member in the political science department. He publishes regularly, receives outstanding student evaluations, and is a good citizen in the department. The Department Chair has recently heard through the grapevine that students say he is acting “odd” in class lately, sometimes discussing topics totally unrelated to the subject. Clerical and support staff members as well as colleagues have noticed that his normally impeccable appearance is not so impeccable. He is frequently unshaven and has not showered. His grades were extremely late in the most recent semester. He had always submitted his grades on time before.

2) Faculty member who requests accommodations in advance

Professor B is in her first year of a tenure track appointment in the biology department. She would be eligible to apply for tenure in her sixth year of the appointment, but could be terminated at any time before that through the institution’s annual review process. She has an excellent research record, which is why she received the appointment initially. Her student evaluations are less than positive for the fall semester in which she taught a class of basic biology to 100 students and a microbiology class to 50 students. She also supervised lab classes for which there is no student evaluation process. After the fall semester evaluations, she made an appointment with the Department Chair, bringing documentation from her psychologist indicating that she has panic disorder and related psychological conditions that make it difficult for her to stand in front of a classroom and teach. She has requested an accommodation to her work assignment requirements -- that she only be required to teach small lab classes, supervise one on one research, and engage in research. She is willing to serve on departmental committees as long as there are no more than about four or five members on the committee and she has requested that she not have to serve with two colleagues who make her nervous.

3) Faculty member who requests accommodations after performance problems

Professor C is a faculty member in the English Department. The tenure track position has an expectation that to be granted tenure (which must be requested no later than the sixth year of the appointment), the individual must have written and published five works in peer reviewed journals. Professor C’s area of teaching and publishing interest is modern fiction. Professor C has received average student evaluations in his classes (with no noted deficiencies in attendance, etc.) and is generally well liked and thought of by her colleagues. Unfortunately, when she applied for tenure in her sixth year, it was denied, based on her publication of only three very short stories in good, but not highly ranked journals. At a meeting with the Department Chair, she noted that during the last six years, her husband had left her, she lost both parents in an unusual car accident, and she has had depression as a result. She provided a letter to that effect, which also noted that she had recently been diagnosed with bipolar disorder and that the

medication she is taking is working well. Shee has requested a two year extension of the tenure clock. What if she had requested this in the fourth year instead of the sixth year after the denial? What medical information can be/should be shared with faculty colleagues who must vote on tenure and promotion?

- 4) Faculty member who justifies performance problems because of impairment

Professor D is a lively and popular classroom professor in the history department. Recently a complaint of sexual harassment by a female student was brought through the institutional grievance process. The complaint was based on an encounter in his office when the student came to review a mid-term exam. Professor D told the Department Chair that he is alcoholic and has a diagnosed condition of sexual disinhibition. He has requested that only male students be allowed to enroll in his classes or in the alternative that he not be required to meet with individual students as part of his responsibilities. He has asked that this accommodation be granted and that the Department Chair verify the adjustment as part of the sexual harassment grievance process. He has provided a statement from a mental health professional about his condition.

Responding to Faculty Members with “Impairments”

In responding to these and other situations, institutions of higher education will need to address the following issues under the Americans with Disabilities Act, the Rehabilitation Act, and the Family and Medical Leave Act. State law may also be relevant in many cases. In addition, these situations often raise sensitive issues about privacy. Reference to internal university and department policies, practices, and procedures will also be necessary.

A. What Kinds of Conditions Are In Question?

In order for faculty members to succeed in discrimination claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, or Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, they must first establish that they have a “disability.” The definition of disability is virtually identical under both statutes. An individual must have an impairment that substantially limits one or more major life activities, have a record of such an impairment, or be regarded as having such an impairment. Supreme Court cases from 1999 and 2002 had interpreted that definition narrowly, and in 2008 Congress amended the definition to be read more broadly. The ADA Amendments Act no longer allows mitigating measures to be considered in deciding whether an individual is currently substantially impaired. The ADAAA also broadens and clarifies what qualifies as a major life activity. Of significance is the broader reading of “regarded as,” which allows coverage where the individual is subjected to prohibited discrimination because of an actual or perceived impairment *whether or not the impairment limits or is perceived to limit* a major life activity. 42 U.S.C. § 12102(3). If, however, an individual only meets the third prong of the definition, there is no right to reasonable accommodations, only a prohibition against discrimination.

While many advocates believed that the ADAAA would mean that there would be very little discussion of whether someone met the definition of coverage, judicial interpretation to date indicates that is not always the case. So, for faculty members claiming discrimination or seeking accommodations, it is still critical to meet the definition. Conditions most likely to be scrutinized for coverage include alcohol and drug problems, depression and other psychological conditions such as schizophrenia and bipolar disorder, cancer and other health impairments, Alzheimers and related impairments, and HIV and other diseases.

For example, in *Weigart v. Georgetown University*, 120 F. Supp. 2d 1 (D.D.C. 2000) (a pre ADAAA case), a university research assistant with claustrophobia and neurological disorders was not disabled. The court also held that the dismissal was based on rude and abrasive interactions with other employees, not on any “perceived as” condition.

The post ADAAA scrutiny by higher education institutions and providers of standardized tests on documentation of a disability might well be relevant and instructive in a faculty context. The recent attention is primarily about the qualifications of the evaluators, the relationship of the disability to the requested accommodations, and the currency of the evaluation. So, while the definition has been “broadened,” proving that one meets the definition has perhaps been narrowed.

For the faculty member seeking accommodations for depression, substance abuse, mental illness, and other impairments, institutions may be more likely to scrutinize the professional documentation. There is virtually no case law on this issue yet, so it is too early to know whether that will, in fact, be the case.

B. What Kinds of Misconduct and Deficiencies Are In Question?

In addition to meeting the definition of being “disabled,” a faculty member must also be otherwise qualified. That means being able to carry out the essential requirements of the program, with or without reasonable accommodation. Examples of faculty expectations that might be at issue are the ability to teach a full course load, not being impaired by drugs or alcohol (both on and off the job), not meeting publication expectations, not meeting teaching expectations (such as grading, meeting with students), and behaving in appropriate ways with colleagues, staff, and students.

For example, in *Horton v. Board of Trustees*, 107 F.3d 873 (7th Cir. 1997), a professor was found not to be otherwise qualified after failing to return to work after absences due to chronic muscular headaches and stress. In *Motzkin v. Trustees of Boston University*, 938 F. Supp. 893 (D. Mass. 1996), the court held that psychological problems did not excuse performance problems that resulted in termination. The denial of promotion was not based on alcoholism, but on a history of nonperformance that was related to drinking problems in *Curtis v. University of Houston*, 127 F. 3d 35 (5th Cir. 1997). And in one of the few cases in a higher education context, the court addressed off duty misconduct. In *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), an

assistant football coach who has charged and convicted of a DUI had his employment terminated. The court held that it was not because of his claimed disability of alcoholism, but because as a coach his conduct was important as a role model for players, even when off duty.

C. What Reasonable Accommodations Might Be Required?

The reasonable accommodations that might be requested will, of course, depend on the situation. For a faculty member in the early years of an appointment, it might be delay of the period for tenure and promotions (or leaves that “stop the clock”). For others it might be excusing misconduct or deficient performance when an impairment is identified after the deficiency. For example, this could occur when a faculty member is diagnosed as having bipolar disorder or another impairment that affected performance. For a more senior faculty member, it might be a leave of absence that extends past the Family and Medical Leave Act time for cancer treatment or another health condition.

The general requirement is that it is the responsibility of the individual to make known the disability. As noted previously, employers are not required to make accommodations when the faculty member only meets the third prong – “regarded as” – part of the definition. This could be important if the faculty member claims that he/she was regarded as having a mental illness.

Accommodations need not be provided that are unduly burdensome or fundamentally alter the program, which will require a factual inquiry into the specifics of the situation.

References

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Susan Kemper, *Older Professors: Fewer, and Better, Than You Think*, The Chronicle of Higher Education A88 (November 19, 2010). Commenting that “eliminating mandatory retirement has not resulted in a geriatric faculty,” and further noting that “Recent analysis of the relationship between age and creativity, however, has found it is ‘career’age, not chronological age, that determines research and productivity.” She further noted that while age may result in the decline in general abilities, “expertise may continue to develop over long professional career.”

Laura Rothstein, *The End of Forced Retirement: Dream or Nightmare for Legal Education*, 24 ABA Syllabus 3-4 (Winter 1993)

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