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LEGAL ISSUES AFFECTING PRIVATE COLLEGES AND UNIVERSITIES STATUTES AND REMEDIES

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LEGAL ISSUES AFFECTING PRIVATE COLLEGES AND UNIVERSITIES

STATUTES AND REMEDIES

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BACKGROUND

A basic premise in our legal system provides that public institutions are subject to the authority of the government that created them and private institutions not only are not so subjugated but in fact are protected from governmental control. The analytical issue therefore often becomes: is the conduct being scrutinized that of a public official or of a person or entity acting as a private citizen?

Private schools justify their existence in the marketplace of education by being able to cater to interests (smaller class size, stricter disciplinary or admission standards, religious education, single sex, flexibility in curriculum, recruitment beyond the political boundaries of the state) which their public counterparts cannot address due to legal or political constraints. A private institution may obtain its own perpetual charter of incorporation which the government is prohibited from impairing. Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).[1] Its trustees may be self-perpetuating, raise, keep and spend funds independent of legislative control and meet in private regarding tenure, promotion, salaries and other

sensitive issues.

Public institutions and their officers are subject to the federal and their own state Constitutions in the performance of their duties whereas private colleges and universities and their officers are not, simply because they are not agents of government. Public officials therefore may be exposed to prosecution or litigation for conspiracy and civil rights violations for which private college officials have no such risk. (42 U.S.C. 1983)

THE COURTS

The rights of Americans to keep the influence of government out of their private affairs, including their campuses, has traditionally been protected by the Federal Courts. For instance, in order for a court to apply Section 1983 and Section 1985 civil rights protections as well as those grounded in the Constitution, a finding by the court of "state action" is required. The initial and independent jurisdictional inquiry is whether or not the person or entity involved was acting as an agent of government.

Essentially, the courts have followed three approaches to the state action doctrine. First is the delegated power theory, whereby the private entity has been found to have acted as a governmental agent in performing governmentally delegated tasks. Second, there is the public function theory, by which the private university or college has been found to have performed a function generally considered a uniquely governmental

responsibility. Finally there is the government contacts theory, under which the independent institution has been found to have received prestige, encouragement, and resources from its connection with government. In the case Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974), a research professor had been fired from a governmentally funded research project without being afforded even an informal hearing as due process in a publicly controlled forum would mandate. The court held that state action was not present because the government did not exercise even the slightest bit of managerial control over the project, and thus the professor was not entitled to due process. So, while public funding was present, typical of research grants the project was managed in its entirety by the private sector with no contractual mandate for due process.

The second theory, public function, has been used infrequently in the education context because courts have consistently recognized that education has substantial roots in the private sector and cannot be considered solely a public function.

The third theory, the government contacts theory, is the most utilized of the three. This theory focuses not on the general state involvement with private institutions but rather on state involvement in the particular activity giving rise to the lawsuit. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Research institutions should note that government grants,

joint ventures and contracts are government "contacts" for purposes of this theory and most public funding documents specifically incorporate intrusive legislation as a condition of receipt of public money. Often, the contractually imposed mandates extend far beyond the department actually receiving the funds and permeate much of the institution's internal structure such as the offices of Human Resources and Purchasing thereby requiring affirmative action compliance, bidding, prevailing wages and stringent audits.

Courts are more likely to find state action in age, sex or racial discrimination cases no matter which theory is being applied. See Williams v. Howard University, 528 F.2d 658 (D.C. Cir. 1976).

THE CONGRESS

The Constitution does not offer the same protections afforded faculty, staff and students at public universities to those involved in the private school community. This does not mean that members of the private community have no recourse for a real or perceived deprivation of their rights; while the courts have been reticent to expand state action, Congress hasn't shared that hesitation. Certainly since the sixties, Americans have been given a plethora of non-Constitutional legislative protections, which are available to members of the community at private universities:[2]

a) Title VI of the Civil Rights Act of 1964 precludes discrimination (for the entire college) on grounds of race,

color or national origin in any program or activity receiving federal financial assistance including financial aid sent directly to students. Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d.

b) Title VII of the Civil Rights Act of 1964 offers protection to employees, making it an unfair employment practice for any employer to discriminate against any individual with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, sex, or national origin; affects any employer (including colleges as of 1972) with 15 or more employees. 42 U.S.C. Sec. 2000e-2(a).

c) The Age Discrimination in Employment Act protects people forty years of age and over making it unlawful for an employer to fail or refuse to hire or to discharge any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age; any employer with 20 or more employees is controlled by the ADEA, 29 U.S.C. sec. 621.

d) The Rehabilitation Act of 1973 (Section 504) and its amendments protect handicapped employees stating: No qualified handicapped person shall, on the basis of handicap, be subject to discrimination in employment under any program or activity . . .; requires affirmative action; applies to the entire institution if it participates in student financial aid programs. Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974, 29 U.S.C. sec. 794.

e) Title IX of the Education Amendments of 1972 prohibits the use of sex as a criterion for admissions in any program or activity receiving federal financial assistance including financial aid sent directly to students; applies to entire campus; exemptions for private single-sex undergraduate colleges, military academies and religious affiliates. Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681.

f) Section 1981, which is also a civil rights protective statute, states "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other". 42 U.S.C. sec. 1981.

g) See also:

i) The Equal Pay Act of 1963: prohibits gender discrimination in pay differentials; affects all colleges under the rubric of interstate commerce.

ii) Americans with Disabilities Act of 1990; (affects all employees)

iii) Rehabilitation Act of 1973, Section 503; affects any recipient of government contract in excess of $2,500.00; requires affirmative action.

iv) Vietnam Era Veteran Readjustment Act of 1974;

affects any recipient of government contract in excess of $10,000.00; requires affirmative action.

v) Executive Order 11,246 (affirmative action required of institutions receiving government contracts <u>totalling</u> $10,000 or more in any one year not including grants or loans);

vi) Family Educational Rights and Privacy Act of 1974; affects any educational entity receiving federal educational funds including grants, financial aid or contracts; allows college to write its own compliance policy.

vii) Higher Education Act of 1965; affects participants in federal programs for student financial aid.

a) 1976 Amendments: dissemination of information on financial aid;

b) Student Right to Know Act of 1990; requires disclosure of graduation for the student body, particularly athletes;

c) Campus Security Act of 1990; requires publication of campus crimes and security measures; notification to victim of results of disciplinary proceedings when violent crime is involved;

viii) Drug Free Schools and Communities Act of 1989; requires development and implementation of a program to prevent substance abuse; affects recipients of any federal funds.

ix) Drug Free Workplace Act of 1988; affects institutions receiving federal grants; focuses on employees.

h) And what about some old favorites:

i) Sherman Antitrust Act of 1890; (see: M.I.T. Found Guilty in Antitrust Case. New York Times, September 3, 1992 page A-1); affects all colleges (under interstate commerce theory).

ii) Copyright Act of 1976; affects everyone;

iii) Occupational Safety and Health Act of 1970; affects any employer (under the interstate commerce theory).

i) Statutes promulgated by your own state legislature.

DISCIPLINE CASES

Students and employees of private institutions still have little procedural protections in disciplinary proceedings. They are not entitled to the hearings or administrative reviews that are guaranteed in the public sector. The protections afforded are contractual in nature arising from the institution's policies and the agreements to attend or work at the institution and abide by its published policies. [3]

The courts have traditionally protected students from actions which are clearly arbitrary although still within the private institution's stated policy. Individuals are held only to a standard of conduct which reasonably sets forth the expectations of the institution. Cloud v. Trustees of Boston

University, 720 F.2d 721 (1983). In addressing construction of the contract between the students and university, the court in Cloud stated that the applicable standard was that of "reasonable expectations - what meaning that party making the manifestation, the university, should reasonably expect the other party to give it". Private universities are required to act in the exercise of honest discretion based on facts within the school's knowledge. Carr v. St. John's University, 17 A.D. 2d 632 (1962).

Students at a private university also do not enjoy Constitutional search and seizure protections. As long as government law enforcement officials are not directly or indirectly involved in the search or seizure, and university security officers have not been given public arrest or search powers, the private university is constrained only by its (contract) policy statement. U.S. v. Clegg, 509 F.2d 605 (5th Cir. 1975); People v Zelinski, 24 Cal 3d 357 (1979).

They also are not ensured of any First Amendment freedoms except as are agreed upon in the contract (hate speech constraints; publication of campus newspapers, etc.).

CONCLUSION

The implementation of some simple low budget administrative procedures will assist in an effort to preserve a college's private identity:

a) Have access to some individual (counsel?) who can

identify the rights you have and those that you've surrendered through contracts, grants, etc.:

- review federal and state legislation regularly; Have you written a Buckley policy to minimize (or maximize) the impact of FERPA at your institution?;
- review your contracts and grants from government so you can identify (and comply with) the statutory obligations you may have already assumed. Is someone reading these centrally for you and tracking compliance?
- know what your Section 504 "Agreement to Participate" says;
- educate your faculty and staff on the procedure to alert some one designated source on campus about what rights the institution may have surrendered in order to accomplish a goal (such as obtaining a grant or building a dormitory) even if its (only?) some intellectual property rights or the right to publish at will.

b) Promulgate clear and concise catalogues and handbooks each of which:

- clearly enunciate what conduct you expect and what rights you give to faculty, students, staff, visitors;
- are consistent with each other;
- that avoid the use of the words "due process" and "double jeopardy" and other Constitutionally precise

legal terms unless you understand and mean to abide by these definitions;

c) Develop <u>and use</u> published disciplinary codes for students, faculty and staff which:

- are fair (notice; hearing; advisor; transcript; appeal) or are more than fair;
- are reviewed regularly so as to be current with the current judicial interpretations of what is fair play;
- protect the rights of victims as well as perpetrators (which is a new idea for some colleges);
- will not, if adjudicated, give rise to "bad law" that affects the entire world of academia;

d) Support private college participation in the monitoring of federal and state policy formation (NAICU);

- Be active in establishing accrediting standards for such groups as NCAA, ABA, etc. because they also infringe upon your independence;

e) At least <u>consider</u> not accepting certain state or federal grants or funds to avoid controls attached which are inconsistent with your mission.[4]

f) Develop and be active in consortiums in your region; you can save money, travel time and energy by collective purchasing, training and cross registration for students, faculty and staff.

- Also a unique marketing tool for your catalogues and your search materials.

g) Consider outsourcing some of your campus services; privatization of specialized functions is back!

h) Develop a long range plan and in-house marketing technique for faculty-staff functional crossovers whenever possible.

Special thanks to David Bergen, Director of Residence Life, Fairleigh Dickinson University, Madison, NJ for his advice and assistance in assembling materials regarding the discipline issues.

FOOTNOTES

1. For a comprehensive discussion of the legal implications of the public-private issue see: KAPLIN, William A. The Law of Higher Education. A Comprehensive Guide to Legal Implications of Administrative Decision Making. Second Edition, Jossey-Bass Publishers: San Francisco, California, 1985.

2. For a lucid, usable explanation of the applicability of the federal legislation, see: WEEKS, Kent M. Complying With Federal Law (a Manual for College Decision Makers). College Legal Information, Inc.: Nashville, Tennessee, 1992.

3. The best discussion I've seen on the subject of the rights of the private college and its students regarding discipline is in: Stoner, Edward N. II and Cerminara, Kathy L. Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code. The Journal of College and University Law, Fall 1990, Volume 17, No. 2 pages 89-121. National Association of College and University Attorneys and the Notre Dame Law School, 1990.

4. See MILLER, Beverly W. What's So Special About Being Private? How to Avoid Relinquishing Legal Entitlements Unique to the Private College: From a Private College President's Perspective. Stetson University College of Law Fourteenth Annual National Conference on Law and Higher Education - Issues in 1993: Clearwater Beach, Florida, 1993.

CIVIL RIGHTS AND THE PRIVATELY SUPPORTED INSTITUTION: THE ISSUE OF PREFERENTIAL HIRING

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CIVIL RIGHTS AND THE PRIVATELY SUPPORTED INSTITUTION: THE ISSUE OF PREFERENTIAL HIRING

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The Kamehameha Case: Limitations on Religious Exemptions

On March 31, 1993, the U.S. Court of Appeals for the Ninth Circuit decided the case of EEOC v. Kamehameha Schools/Bishop, 990 F.2d 458 (9th Cir. 1993). This cause arose out of the Will of Bernice Pauahi Bishop, a member of the Hawaiian royal family. When Mrs. Bishop died in 1884, she was the largest landowner in Hawaii. Mrs. Bishop's Will left the bulk of her estate in trust to maintain two schools, "one for boys and one for girls". In addition, the Will directed that "the teachers of said schools shall forever be persons of the Protestant religion". Id at 459.

The schools were duly created and over the years were faithful to this hiring restriction although the schools themselves became essentially secular or neutral as far as religion was concerned. The Plaintiff Carole Edgerton was not a Protestant and was rejected as an applicant for a position as a substitute French teacher. She filed a charge of religious discrimination in employment with the EEOC alleging a violation of the Civil Rights Acts of 1964, 42

U.S.C. Section 2000e-2(a)(1), which prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The schools claimed the right of exemption from the statute.

The trial court limited its initial review to the applicability of the various exemptions, and rendered summary judgment for the defendant.

The Court of Appeals overruled the decision on the basis that the Kamehameha schools had insufficient religious characteristics to qualify for any exemptions to the Civil Rights Act of 1964. In effect, the schools reflected an orientation which was primarily secular. In so ruling, the Court considered the applicability of the following exemptions to the Civil Rights Act:

1) Section 2000e-1 excepts "religious...educational institutions".

2) Section 2000e-2(b)(1) excepts employment in which religion is a bona fide occupational qualification (BFOQ).

3) Section 2000e-2(e)(2) excepts institutions whose curriculum is directed toward the propagation of a particular religion.

In November, 1993 the U. S. Supreme Court declined review.

The Kamehameha case was decided by an analysis of these three exemptions. There is a fourth exemption which the parties recognized as inapplicable to this set of facts:

4) Section 2000e(e)(2) applies to institutions substantially supported, controlled or managed by a particular religion.

At the outset, it should be recognized that an exemption will be recognized if the employer is a religious entity, even though the particular position may be secular. Corporation of Presiding Bishop v. Amos, 483 U.S. 329 (1987). In this case the Plaintiff was a building engineer in the Deseret Gymnasium, a non-profit facility run by the Mormon Church. Section 2000e-1 was found applicable.

The more vexing issue arises when the employer is neither wholly religious nor wholly secular.

The purpose of this paper is to examine three cases decided in the Seventh Circuit in an effort to ascertain what factors a court might consider "...to determine whether the corporation's purpose and character are primarily religious", EEOC v. Townley

Eng. and Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988), the approach affirmed in the Kamehameha case.

In the Kamehameha case, the Supreme Court analyzed the educational institution with regard to ownership and affiliation, faculty, student body, student activities, and curriculum. Based on this analysis, the Court of Appeals found that the very real requirement of at least nominal Protestant faculty was insufficient to offset the secular characteristics present in the other areas. A similar method of analysis yielded different results in the federal district courts of Illinois and Wisconsin.

District Court Cases Recognizing a Religion Based Exemption

Pime v. Loyola University of Chicago, 803 F.2d 351 (7th Cir. 1986). As its name indicates, Loyola is an institution founded under the auspices of the Society of Jesus. As the Ninth Circuit noted at page 466 of the Kamehameha case, the Pime decision "...approved a Jesuit 'presence' in the Philosophy Department of Loyola University, a school with 'a long Jesuit tradition' and a largely Catholic student body". It found on these facts that a BFOQ existed in order to insure a Jesuit presence in the Philosophy department. Judge Leighton at the trial level, however, specifically declined to find an exemption based on substantial

control by the Society of Jesus. The Court of Appeals found it unnecessary to consider this latter issue. It was thus left to Marquette University to raise the issue of preferential hiring in religiously oriented institutions in litigation before the Federal District Court in Milwaukee.

Glenn Tagatz v. Marquette University, 681 F.Supp 1344 (E.D. Wis.), aff'd., 861 F.2d 1040 (7th Cir. 1988). The Plaintiff in this case is a full professor in the School of Education. He brought an action alleging discrimination by this Jesuit affiliated institution because of age and religion (Episcopalian). One of the counts alleged that a search for a new dean of Education had been limited to qualified members of the Society of Jesus. The defendant admitted this allegation, and claimed the right to Jesuit preference for any faculty position. It asserted this claimed right by filing a Motion for Partial Summary Judgment, citing Section 2000, as well as 2000e(1) (bona fide occupational qualification) and 2000e(2). The latter exemption applies to educational institutions substantially "supported, controlled or managed by a particular religion", or to one whose "curriculum is directed toward the propagation of a particular religion".

In support of its Motion, Marquette University submitted a number of exhibits to demonstrate that it met the statutory requirements.

Exhibit A consisted of Articles I and II of the Amended By-Laws of Marquette University. These documents declare the religious mission of the institution. Thus, Article I provides that "the University shall be governed as an independent private corporate entity of the State of Wisconsin, conducted under the auspices, and consonant with the educational principles of the Society of Jesus".

Article II, Section 1 of the Marquette University By-Laws set up a governing board of twenty-nine trustees, eight of whom must be Jesuits. Since a three-quarter's vote is required to change the By-Laws, or elect a trustee, the Jesuit members have the power to block board action of this type.

The relationship of Marquette University with the Society of Jesus is also reflected in its contract with Marquette Jesuit Associates, Inc. The headquarters of this Wisconsin Corporation is in a former apartment building on West Wisconsin Avenue in the heart of the campus. This also serves as the residence for some 50 Jesuits who serve Marquette University. Marquette Jesuit Associates, Inc. receives the salaries of its members, and uses these funds to defray the members' expenses. Any surplus is returned to the University for its unrestricted use. In the

calendar year 1993 the Associates returned the representative amount of $462,500. Year in and year out, Marquette Jesuit Associates, Inc. is one of the largest supporters of the University.

In his Affidavit, a document of critical importance in this case, Dr. Quentin L. Quade, the Executive Vice President of the University, states that although Marquette University welcomes the financial support, "[e]ven more cherished...is the moral and intellectual contribution which these Jesuits make to the purpose and mission of the University."

Plaintiff Tagatz argued that the degree of management and control, or level of financial involvement by the Jesuits, was insufficient to qualify Marquette University for an exemption. In order to test the issue, Marquette University filed a Motion for Partial Summary Judgment on the Jesuit Preference issue. In an unpublished opinion Judge Warren granted Defendant's motion in an opinion dated July 16, 1985.

> The Court finds the Plaintiff's arguments unpersuasive. In terms of "support", the statute does not specify that only financial contributions be considered. The defendant has shown that a significant number of persons on its Board of Trustees are Jesuits, in addition to showing that the top two executive officers of the University are Jesuits. Since

> the defendant may prevail by demonstrating that it is <u>either</u> owned, supported, controlled or managed in substantial part by the Jesuits, the Court finds that it has easily satisfied this requirement by proving that Jesuits both control and manage the University.

<u>Tagatz v. Marquette University</u>, No. 82-C-812, Mem. Op. at 7 (E.D. Wis. 1985).

The decision on Marquette University's motion was not published, and the Plaintiff's ultimate full trial resulted in judgment for Marquette University, which was affirmed on appeal. The appellate court avoided the religion issue by finding that Plaintiff's poor record of teaching, research and service did not warrant promotion or further salary increases.

<u>Marjorie Maguire vs. Marquette University</u>, 627 F.Supp. 1499 (E.D. Wis. 1986), 814 F.2d 1213 (7th Cir. 1987). Plaintiff Marjorie Maguire brought a Title VII case alleging sex discrimination in hiring for Assistant Professor of Theology (Systematic and Ethics). She also sought to have the Marquette University policy of Jesuit Preference declared illegal.

Marquette University answered, alleging that the white male hired had superior qualifications for the position. The University also filed a Motion for Partial Summary Judgment on the "Jesuit Preference" issue. Exactly the same exhibits were submitted as in the <u>Tagatz</u> proceedings and that case was cited as authority.

In the course of discovery, Plaintiff became aware of two very significant documents in her dossier. The first was a letter dated November 29, 1980, from Father Joseph T. Lienhard, S.J., an Associate Professor of Theology, who was a member of the executive committee which selected the finalists for the theology position. Father Lienhard stated to Rev. William J. Kelly, S.J., Chairman of the Theology Department, that he considered the Plaintiff to be an inferior candidate. He then goes on to explain his additional reservations as to her attitude and philosophy:

> As I recall from reading Ms. Maguire's dossier, one of the letters of recommendation states that she should not be invited to teach in a Catholic college or university since she is not sympathetic to the goals and values of the Church. Her letters, published in newspapers, and reports of talks she has given elsewhere, demonstrate rather clearly to my mind, at least, that the principal theme of her work is criticism of, and resistance to, the institutional Church. I do not believe that Marquette is in any way obliged to appoint a critic of its religious stance to the Department of Theology.

Based upon this information, Plaintiff filed a motion to supplement her complaint adding a count alleging that the "perceptions and/or misperceptions of agents of the defendant Marquette University concerning the Plaintiff's views respecting the moral theology of abortion and/or the public policy of abortion

in a pluralistic society and the relationship between the two has substantially motivated it to refuse to hire her into its Theology Department". Marquette immediately admitted this allegation stating that "[e]ven if Marquette University were to find the Plaintiff's academic record competitive, her application for employment would have been rejected because of her perceived hostility to the institutional church and its teachings, and to the goals and missions of Marquette University".

Marquette University recognized the significance of this pleading and in its reply memorandum stated that on the basis of her own admissions, "Plaintiff has subjected her entire cause of action to summary dismissal".

The Court seized on this issue and sua sponte dismissed the entire cause. In the decision Judge Reynolds followed the analysis in Tagatz and found that Marquette University was entitled to a statutory exemption as a religious employer, Maguire vs. Marquette University, 627 F.Supp. 1499 (E.D. Wis. 1981).

As expected, Plaintiff proceeded to the Seventh Circuit Court of Appeals where Judge Reynolds' decision was sustained, but not on statutory exemption grounds. As Judge Cummings stated:

> The district court conscientiously grappled with the difficult and complex issue concerning the scope of the religious - employer exemption... Fortunately, we need not determine whether Marquette qualifies as a religious employer.

Maguire vs. Marquette University, 627 F.Supp. 1499 (E.D. Wis. 1986), aff'd., 814 F.2d 1213, 1220 (7th Cir. 1987).

Thus the Court of Appeals found it unnecessary to determine whether Marquette qualifies as a religious employer because Marquette had offered legitimate non-discriminatory reasons for rejecting the Plaintiff. The Court went on to say that "even if one assumes that sex plays a role in Marquette's refusal to hire the Plaintiff, it is clear, by the Plaintiff's own admission and proof, that her sex was not 'the motivating or substantial factor'". Maguire v. Marquette University, 814 F.2d 1213, 1222 (7th Cir. 1987). In other words, the Plaintiff failed to meet the test, that "but for" sex discrimination, she would have been hired.

It should be noted that the "reason for not hiring" seized on by the Court was in fact the perceived hostility of Plaintiff to Catholic principles. In view of this, it is submitted that a proper analysis of this opinion demonstrates that in taking action the Court did exactly what it says was unnecessary, i.e., permits

Marquette University to base a hiring decision on an applicant's perceived views on Catholic teachings. In order for this to constitute a legitimate reason, the Court must first find that the employer is in some way "religious". Quite clearly if a secular University were to advance such a proposition, it would be held in violation of Title VII for religious discrimination. Only if one accepts the premise that Marquette does have a religious orientation does the Court of Appeals decision make sense. Utilizing this analysis, the appellate court decision rests upon a broad First Amendment basis rather than a narrow statutory exemption.

It is our contention that the District Court decisions in Maguire and Tagatz stand for the existence of a constitutionally protected right to be religiously selective in hiring. It also makes clear that this right accrues not just to seminaries or bible colleges but to institutions like Marquette University whose organization, goals and purposes reflect a religious orientation.

Since this constitutional right exceeds the federal statutory exemption, it is binding upon state agencies also. The State of Wisconsin Equal Rights Division recognized such a right in the Kovach case. Kovach v. Marinette Catholic Central High School and

Green Bay Diocese (LIRC, 6/12/86), citing Dayton Christian Schools v. Ohio Civil Rights Commissions, 766 F.2d 932 (6th Cir. 1985). There, the state recognized the constitutional right to preferential hiring for a parochial high school. This case was cited as authority when the State dismissed Dr. Maguire's complaint to the Wisconsin Equal Rights Division.

Conclusion: In this presentation, I have tried to indicate relevant religious criteria for those institutions such as Marquette University which are neither secular nor seminary. It is to be expected that future decisions will clarify the boundaries. In the meantime, Tagatz and Maguire can be a beginning point.

Finally, one cannot overemphasize the importance of this cause to us and similar institutions. I tried to convey this to the Court in my brief in Tagatz. I referred there to decanal hiring, but the views are equally applicable to faculty:

> Marquette University believes that the record now before this honorable court is sufficient to invoke the exclusion on its behalf. The University acknowledges what the Plaintiff will not: that any definition of "religion" contains complex components of philosophy and theology. Surely, Congress could not have intended to entangle courts in these thickets where such a full compendium of evidence as

has been presented is on the record. In a social organism inherently free, as this University is free, fulfilling educational and religious promises must be done in the normal choices and actions taken in the day-to-day life of the institution. With constant respect for the canons of academic life, the institution's leadership must use the positive opportunities available to it, and hiring of deans is an obvious crucial opportunity, to give life and meaning to its pledges. The law cannot endorse the <u>end</u> of religious freedom for colleges and universities and then deny the <u>means</u> which prudence requires. In this connection, it should be noted that it is Marquette University's experience that some equivalent form of religious preference is espoused by each of the twenty-eight Jesuit supported institutions of higher education in the United States. Thus, what is at stake here is not merely an appointment at Marquette, but the values of a long standing system of education.