

**Sunday, February 12, 1995
1:30 - 4:30**

Plenary Session

**How to Respond to Employee Misconduct Without
Creating Liability Under Employment
Discrimination Laws;
Employee Misconduct Which Affects Student Rights**

Faculty:

Liz Baldizan	Joseph Golden
Howard Bell	Thomas Hustoles
Elsa Cole	Michael York

Interrogator:

Robert Bickel

SEATING CHART



Mr. Golden
Attorney for
Howard Shank



Mr. Hustoles
University Counsel
for Labor Issues



Ms. Cole
University
Counsel



Mr. Bell
Vice
President
Admin. &
Finance



Ms. Baldizan
Vice President
Student Affairs



Mr. York
Media
Representative



Prof. Bickel

OPENING PLENARY SESSION

How To Respond To Employee Misconduct Without Creating Liability Under Employment Discrimination Laws Employee Misconduct Which Affects Student Rights

FACT SCENARIO

Howard Shank was hired by Eastern University in 1980 as a Special Assistant to the Director of the University's ROTC program. He was, at the time, 35 years old, and had retired from active duty to reserve status in the United States Army. Shank is a graduate of the United States Military Academy at West Point, and has served 13 years of active duty, including combat duty in Vietnam, and administrative duty in Washington, D.C., where he completed an M.A. degree in Political Science at George Washington University. When Shank was hired, the Director of the ROTC program praised Shank's accomplishments as a soldier, and orally assured him that he would be happy at EU, "as long as you choose to work here. We feel fortunate to get a man of your ability, and we hope you wish to be with us until your retirement."

In 1985, Shank was hired by Mr. Foster Ryspek, the Vice-President for Student Affairs at EU to serve as a Director of Resident Student Life & Student Conduct Officer. Shank was hired into this position because it was felt, at the time, that his military experience, including responsibilities for base housing and

recruit training, would be suited to the management of the University's residence halls, and to the enforcement of a "stern, no-nonsense" code of student conduct which was the Vice-President's desired model. The Vice-President himself was a former military officer, who was critical of what he called "the over-reaction of universities to the 1960's student rights cases." In hiring Shank, Ryspek announced a commitment to the re-creation of a code of civility which would insure the student's devotion to his or her education, with a "no-tolerance" approach to distraction or disruption of educational endeavors of faculty or other students.

During the next several years, Shank implemented an extremely cost-effective student housing program. First and second year undergraduate students were required to live on campus, and were housed in early 1960's era residence halls which placed two residents in a room, and utilized one multiple shower/toilet bathroom per hall/floor, each serving approximately 20 students.

Shank also drafted and enforced a detailed, stern code of student conduct, which clearly emphasized penalties, rather than counseling or education models, to deal with improper student behavior. During his tenure, he suspended and expelled a record number of students, and his approach to student discipline was widely discussed and criticized among students and student affairs professional staff. At the same time, he was praised by certain members of the local community, and certain faculty, for his return to "old-fashioned" values and his use of suspension and expulsion to send the message that students who are less than serious in their educational commitment, and who distract others, are not welcome at EU.

In 1991, Eastern University selected a new President, Dr. Karen Foryue. During the selection process, the issues of quality of resident student life and student conduct and discipline became noteworthy subjects of discussion. Many faculty and students demanded attention to student retention; a student conduct model which stressed peer involvement in student judicial affairs; an emphasis on mediation of student disputes, rather than upon "guilt-innocence" adjudication; and an ultimate concern that the disciplinary process seek to educate, not merely punish students who engage in unacceptable behavior. Students also petitioned the Board of Regents to modify student housing rules, abolishing the requirement that first and second year students live on campus, or remodel "barracks-type" dormitories to create "suites," where two-four students could be housed with a bathroom in each "suite."

Following her appointment, Dr. Foryue asked for, and received Mr. Ryspek's resignation. Dr. Foryue appointed a search committee to seek candidates for the position of Vice-President for Student Affairs, and that committee ultimately selected Dr. Liz Baldizan, a nationally known student affairs professional whose teaching and scholarship advocates peer mediation of student disputes, and the creation of residential colleges, to include apartment style residence halls, where both students and faculty would be in residence.

During the academic year 1992-93, Dr. Baldizan put together an extensive study, with the co-operation of her staff, and the University's Divisions of Administration & Finance, Campus Security, and Development & Alumni Relations.

The plan called for an extensive renovation of all student housing, financed through a program of private fund raising and state matching funds. **Dr. Baldizan** also recommended a total redraft of the University's student conduct code and the implementation of a system of residential college boards of students and faculty, along with a centrally administered dispute resolution office, which would offer mediation, counseling and related services as a replacement for the adjudicatory/punishment model of student discipline administered under the prior student affairs administration.

Shank was included on all committees which explored both the student housing and student discipline issues, and throughout committee discussions, he was a vocal critic of change. His position at meetings was best characterized as obstreperous, and he engaged in longsome speeches calling for the preservation of a more conservative approach to student discipline, with himself in a "hands-on" role. At various times during these discussions, **Dr. Baldizan** counseled privately with Shank, attempting to explain the necessity for changing EU's housing and student conduct policies. She informed Shank of EU's concern for student retention, in a period of rising tuition, and she offered Shank literature on the subject of student retention and residence life, as well as several books and articles on the subject of alternative dispute resolution and mediation. Shank frequently argued with **Dr. Baldizan** during these sessions, and he reminded her on occasion that "I've been here a long time, and I don't intend to let this Division become a laboratory for your theories and publications." **Dr. Baldizan**, in turn, made it clear

to Shank that it was her goal to establish a student life environment which reflected recent trends in both residence life and dispute resolution, and that, as a member of her Division, Shank was obliged to work toward the implementation of her recommendations.

Dr. Baldizan's recommendations were subsequently endorsed by each of the University's offices, and gained approval of Dr. Foryue and the Board of Regents. **Dr. Baldizan** then issued a series of memoranda announcing the substance and timetable for her program of change. She specifically delegated to Shank the responsibility of personally completing formal training in mediation, and developing the structure and procedures for the residential college boards and the central mediation office.

Shank responded to **Dr. Baldizan**, in writing, with two lengthy memoranda, in which he objected to **Dr. Baldizan's** recommendations. He made strong objection to her request that he enroll in mediation training, and he insisted that any plan to implement changes in the conduct code which would involve peer resolution of students disputes, or otherwise remove him from a personal role in the adjudication of student misconduct and penalties, needed further extended discussion. He restated his view that the creation of mediation models, and the like, would represent an abdication of the University's authority and responsibility to insure student civility and safety. For example, he wrote in part, to allow fraternities to "mediate" instances of misbehavior by members or pledges would "...allow the fox to guard the henhouse."

Shank defended "barracks-type" residence halls, as the "best vestige left of a style of living which demands respect for others," and argued, that, "Dr. Baldizan's housing models were 'nice theory,' but cost-prohibitive." He characterized student concern for privacy as the whining of "...spoiled brats used to a fancy lifestyle with mom and dad" ...and "as a ploy to hide bad behavior behind closed doors." He argued that individualized living quarters would only increase the problems of student abuse of alcohol, sexual misconduct, and the like.

Shank attempted to solicit student support for his position. His methods included approaching students accused of violations of the student code of conduct, and offering an "agreement not to prosecute" in return for written support of his position. In other instances, he called prominent students opposing his views into his office, where he argued with them, sometimes shouting at them and berating them for opposing his administrative views and actions. On one occasion, he attended a meeting of the resident student government association, and engaged in a lengthy speech, alleging a "student conspiracy" to discredit him and damage his reputation.

When other students found out about Shank's solicitations and threats, certain students came forward with allegations of harassment by Shank extending throughout his term as an employee of the Division of Student Affairs. The most serious complaints came from three women students who claimed that Shank had, during "adjudication" sessions in matters of their alleged misconduct, solicited sexual favors in return for his "withdrawal" of charges.

Shank's memos and activities, and the student responses and complaints soon became a serious distraction to Dr. Baldizan, and the energies Dr. Baldizan desired to give to her plans for revamping her Division were subsumed by her dealing with the charges and countercharges of Shank and his detractors and accusers.

Following separate meetings with members of her staff and the complaining students, Dr. Baldizan met with Dr. Foryue and recommended that Shank be discharged. Dr. Foryue agreed that Shank's conduct was disruptive of University objectives, and could subject the University to liability. She accepted Dr. Baldizan's recommendation that Shank be notified, in writing, that his contract of employment was in jeopardy of being terminated, immediately, for cause. Dr. Baldizan prepared a memorandum to this effect, charging Shank with insubordination, and sexual harassment. The memorandum was delivered to Shank over Dr. Baldizan's signature.

Shank wrote Dr. Baldizan, denying all charges of misconduct. He alleged that he was the victim of retaliation for his objection to the University's plans to waste money on "lavish student luxury apartments," as well as his objection to "liberal notions of shielding students from accountability for their misbehavior." He accused the complaining students of a "campaign" to get rid of him. Shank admitted that he was sometimes abusive to students verbally, when he was angry. He also admitted that he had a problem dealing with misconduct by women. Shank explained that these tendencies were brought on by stress, and he urged that, if

his behavior was improper, the University had an obligation to offer counseling, or a similar form of accommodation or treatment, prior to dismissing him. In support of his disclaimers, he offered a letter from Dr. Jane Systre, a psychiatrist, who indicated that Mr. Shank was a patient, and that he was in the early stages of counseling for what appeared to be a mild form of traumatic stress syndrome, perhaps arising from recent "battles" with his superiors in university administration. More importantly, she indicated, Shank had a history of depression, and that she had been treating the depression clinically for about two years.

Shank sent copies of his objections to the charges, and his prior memos, to all local newspapers, including to **Michael York**, who had written a feature story on the University's budget, in a recent Sunday edition of the area's largest daily newspaper. He suggested that York investigate "a large scale plan to develop university housing projects for private gain, and the possibility that EU's new administration is 'crooked'".

Howard Bell, the University's Vice-President for Administration and Finance, also received a copy of Shank's objections to the charges of misconduct. In his memo to **Mr. Bell**, Shank added an addendum, charging that the University president was "pushing" the new residence hall project because her brother was an architect whose firm was in the business of designing university housing. He asks **Mr. Bell** to look into the matter, and to protect him from retaliatory termination. **Mr. Bell** also received several memos and phone calls from University personnel who expressed concern that Mr. Shank's exemplary character as a

former military officer, member of the University's ROTC staff, and his long time service to the University were being summarily discounted because of student dislike for his "military style." Mr. Bell examined Shank's personnel file, which noted that Shank was a highly decorated soldier, who had served in combat in Vietnam, and who had an excellent record within the University's ROTC unit as a faculty member-administrator. Indeed, Mr. Bell noted that Shank had, in 1982, received the University's "Golden Falcon" award, an honor given annually to the three employees of the University who typify excellence in effort and in their upholding of the University's image in the community.

Shank sent one final memo, to the President of the University's Faculty Senate, demanding collegial hearings on all charges against him, with detailed specifications, access to all complaining students, the presence of legal counsel for Shank at any and all hearings, a court reporter, and the right to question the University's president about any and all matters relative to the new student housing projects. Shank sent a copy of this memo also to York.

Shank then retained the services of Joseph Golden, of the law firm of Sommers, Schwartz, Silver, and Schwartz, P.C.. Mr. Golden interviewed Shank, Ryspek, and several other employees of the University who remained loyal to Shank and his position. Following these discussions, Mr. Golden notified Dr. Foryue that, if Shank is dismissed, he will file a complaint with the Equal Employment Opportunity Commission, and other federal agencies, and ultimately if necessary, bring suit in state and/or federal court, alleging breach of contract, wrongful

termination, age discrimination, and discrimination on the basis of disability, in violation of Section 504 of the Rehabilitation Act and the Americans With Disabilities Act. Mr. Golden demands that all critical comments be removed from Shank's file, and that he receive a written apology from the University

Shank is the only employee in the Division of Student Affairs over the age of 40 years. Dr. Baldizan herself is 36 years old, and Dr. Foryue is 46 years of age. All other members of the staff of the Division of Student Affairs are between the ages of 27 and 35. Shank is the highest paid member of EU's student affairs staff, except Dr. Baldizan herself.

Upon receipt of Mr. Golden's demand letter, Dr. Foryue consults with Dr. Baldizan, Mr. Bell, Ms. Elsa Cole, the University's "in house" attorney, and Mr. Thomas Hustoles, the University's Special Counsel in matters of labor relations and litigation.