

**University Employee Misconduct Scenario:
PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

Presenters:

THOMAS P. HUSTOLES

Attorney at Law

**Miller, Canfield, Paddock and Stone, P.L.C.
Kalamazoo, Michigan**

ELSA KIRCHER COLE

University Attorney

General Counsel

**University of Michigan
Ann Arbor, Michigan**

Stetson University College of Law:

**16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 12-14, 1995**

MEMORANDUM

TO: Dr. Karen Foryou, President, Eastern University

FROM: Elsa Kircher Cole, University Attorney
Thomas P. Hustoles, Special Counsel

RE: Howard Shank

DATE: February 12, 1995

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

You have requested us to review the pending termination of Howard Shank, Eastern University's Director of Resident Student Life and Student Conduct Officer, and advise you of the legal strengths and weaknesses in proceeding with that action. You also have asked us to advise you how to respond to the letter from Joe Golden, Mr. Shank's attorney, demanding his reinstatement with backpay, an apology, and removal of all critical references from his personnel file. Additionally, you have requested we advise you about how to best handle a situation like this in the future.

To respond to your requests, we shall first examine the character of Mr. Shank's employment relationship to the University and the grounds that support the proposed disciplinary action. We shall then explore the possible defenses that Mr. Shank may make to the allegations of wrong doing and countercharges he may bring against the University. Finally, we will be prepared to discuss our recommendations on how to best prepare the University to deal with similar situations in the future.

NATURE OF EMPLOYMENT RELATIONSHIP

The first issue to resolve is whether Mr. Shank is an at-will employee, such that he can be fired for any reason not in violation of public policy or laws against discrimination, or if instead he is an employee who can only be fired for just cause.

Critical to this determination is whether what was said by the 1980 Director of the University's ROTC program to Mr. Shank when he was hired as Special Assistant to that program (he assured Shank 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") was a promise of continued employment in whatever position that Mr. Shank might have with the University by someone with authority to bind the University such that Mr. Shank's employment can only be terminated for just cause.

The Supreme Court of our State has yet to rule on the determinative question of whether an oral promise of employment "as long as you choose to work" or "until retirement" can create an enforceable exception to the general rule in the United States that employees are hired "at-will" and can be terminated for any reason not in violation of statute or public policy. Therefore, a review of the law in other jurisdictions on this subject is in order. The general case law rule in the United States that employees are "at-will" and have no expectation to continued employment dates back to at least 1851 [See WOOD, MASTER & SERVANT, Section 134, at 272 (Albany: Parsons, 1877)]. As early as 1871, the United States Supreme Court in Adair v. United States, stated that "[t]he right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee." 208 U.S. 161, 174-75 (1908). In the late 1970s and early 1980s, plaintiffs were notoriously successful in persuading various courts to hold that oral promises of employment "as long as you do your job" or practice, custom, or written expressions to that effect could reasonably give rise to a commitment not to terminate the plaintiff but for cause. See, e.g., Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Weiner v. McGraw Hill, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

In cases specifically involving colleges and universities, although there is a definite national trend towards enforcing express written promises regarding employment such as would be contained in an appointment letter or employee handbook or written policy statement [see, e.g., Gladney v. Thomas, 573 F.Supp. 1232 (D.C. Ala. 1983); Boyce v. Umpqua Community College, 680 P.2d 671, rev. den., 683 P.2d 1370 (Or. App. 1984); Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1988); Law v. Howard University, 558 A.2d 355 (D.C. App. Dist. 1989); Wood v. Loyola Marymount University, 267 Cal.Rptr.230 (Cal.App. 2 Dist. 1990); Arneson v. Board of Trustees McKendree College, 569 N.E.2d 252 (1991); and George v. University of Idaho, 822 P.2d 549 (Id. App. 1991)], there is an equally definite trend against enforcing oral promises. Numerous courts in cases involving colleges and universities have declined to enforce oral promises regarding continued employment on various theories including that only the governing board has the authority to make such commitments, that employment-at-will should be upheld, that employees should not reasonably be entitled to rely on oral promises, and that the traditional theory that employment contracts in excess of one year need to be in writing should be followed. Such cases include Sittler v. Board of Control of Mich.Col. of Mining and Tech., 333 Mich. 681, 53 N.W.2d 681 (1952) [only the Board has the authority to hire and fire]; Beckwith v. Rhode Island School of Design, 404 A.2d 480 (R.I. 1979) [graphic design faculty member's reliance on oral promise of department head rejected]; Roberts v. Wake Forest University, 55 N.C. App. 430, 286 S.E. 2d 120 (1982) [golf coach's claim to oral promise of at least six years employment dismissed]; Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. 1986) [claim of oral assurances did not vary terms of

written contract]; and Konijnendijk v. Deyoe, 727 F.Supp. 1392 (Ka. 1989) [associate director of international grains program at Kansas State University could not rely on oral representations made prior to executing written employment contract].

Given the state of the law, it is more probable than not that a court will decline to enforce the oral promises alleged by Mr. Shank. The foregoing discussion assumes our understanding that there are no pertinent written documents, such as a written contract, written appointment letter, employee handbook, or personnel policy book which would pertain to regulate Mr. Shank's employment status.

Note, also, that if Mr. Shank had an expectation of continued employment, it is arguable that the expectation only was in continuing in his original job at EU, as Special Assistant to the Director of the ROTC program, and not in his current position as Director of Resident Student Life and Student Conduct Officer.

GROUND FOR DISCIPLINARY ACTION

1. Insubordination

We are advised that EU does not have in place a code of conduct or other workplace regulations for its non-instructional staff which include insubordination as just cause for discipline. It can be argued that an absence of such provides insufficient notice to an employee of what conduct might subject that employee to disciplinary action.

However, insubordination is such a generally accepted basis for employee discipline it can be argued that Mr. Shank should have understood that insubordinate behavior could possibly subject him to disciplinary action even in the absence of a written code of conduct.

Whether Mr. Shank was insubordinate is a mixed question of law and fact. The facts that support a finding of insubordination, in descending order of strength, are:

- A. His statement in several one-on-one meetings with his supervisor, Dr. Liz Baldizan, Vice-President for Student Affairs, 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," when she was appropriately counseling with him to explain the necessity for changing EU's housing and student conduct policies.
- B. His expressing in two memos to Dr. Baldizan his strong objection to her request that he enroll in mediation training.

- C. His insistence in two memos to Dr. Baldizan that any plan to implement changes needed further discussion.

"Insubordinate" is defined by the RANDOM HOUSE UNABRIDGED DICTIONARY as "not submitting to authority; disobedient."

Using this commonly understood plain meaning as a test, it appears that a strong case exists, particularly in the first and second instances described above, that Mr. Shank was insubordinate.

The third fact is the weakest because Mr. Shank may justify his statements as only stating his opinion in an area he believed still to be under discussion. However, at that point, reasonable minds would conclude that the discussion stage was over since Dr. Baldizan had received regental approval for the changes, and Mr. Shank appears to have flouted a direct request from Dr. Baldizan to implement the changes.

Assuming for the purposes of argument that Mr. Shank was not an at-will employee, it is very well established that insubordination constitutes just cause for discharge from employment. See Elkouri and Elkouri, *HOW ARBITRATION WORKS* (Bureau of National Affairs; 4th Ed.), p. 695, for 21 citations to arbitration cases where discharge was upheld as a penalty for insubordination, and p. 141 of the supplement to the 4th Edition for an additional 13 citations.

College and university cases sustaining discharge for insubordination or similar neglect of duty include Chung v. Park, 377 F.Supp. 524 (M.D. Pa. 1974) [intransigence with respect to dealing with superiors at Mansfield State College and incompetence constituted cause for discharge]; Kowtoniuk v. Quarles, 528 F.2d 1161 (4th Cir. 1975) [failure to serve on departmental committees at Virginia State College and to work cooperatively with members of the department]; Shaw v. Board of Trustees of the Frederick Community College, 549 F.2d 929 (4th Cir. 1976) [failure to take part in mandatory college functions]; Stastny v. Board of Trustees, 647 P.2d 496 (1982) [professor's action in ignoring a warning and absenting himself from duty at Central Washington University after the denial of his request for a brief leave of absence constituted insubordination]; Kelly v. Kansas City Community College, 648 P.2d 225 (1982) [evidence established conduct detrimental to the nursing program and inability to cooperate with and maintain harmony among the staff]; Smith v. Kent State University, 696 F.2d 476 (6th Cir. 1983) [conduct which persistently flouted the authority of the department head and refusal to meet scheduled classes constituted cause for dismissal]; Josberger v. University of Tennessee, 706 S.W.3d 300 (Tenn.App. 1985) [dismissal appropriate where plaintiff failed or refused to carry out the assigned task of developing two graduate courses]; Robinson v. Boyer, 825 F.2d 64 (5th Cir.

1987) [security officer of Mississippi State Valley University terminated for refusal to comply with orders of superior].

2. Disruptive Behavior

An employee whose conduct is disruptive to the efficient functioning of an office can be disciplined for that behavior. In the absence of such behavior being prohibited in a code of conduct, EU should argue that it is generally known and understood in places of employment that such behavior is not tolerated.

The specific behavior that was disruptive was:

- A. Mr. Shank's numerous memos and activities after the decision to go ahead with changes, necessitating Dr. Baldizan to devote her energies to them rather than to the new plans.
- B. His obstreperous behavior at meetings before the decision was made, that is, long speeches opposing change.

In our opinion, the latter example will not likely be sufficient alone to support discipline. Rather, it can be characterized as Mr. Shank voicing his opinion in an appropriate place (a committee meeting to explore possible change) at an appropriate time (pre-decision).

We will need more information of the amount of time subsumed by responding to memos and dealing with Mr. Shank's activities before we can determine how well the first example supports disciplining of Mr. Shank.

Numerous cases decided in the college and university context support discipline up to and including discharge for disruptive conduct. These include several of the cases cited above in the discussion regarding insubordination and Harden v. Adams, 841 F.2d 1091 (11th Cir. 1988) [professor at Troy State properly terminated for actions including conduct which caused disruption and disharmony among faculty]; Klein v. President and Fellows of Harvard College, 517 N.E. 167 (Ma. App. 1987) [director of department of health policy and management terminated for just cause due to strained and acrimonious relationship with faculty and reference to a faculty member in words of "vehement disparagement"]; Rinehimer v. Lucerne City Community College, 539 A.2d 1298 (Pa. 1988) [discharge appropriate where employee disagreed with college policymakers and disrupted its administrative operation]; and Kosik v. Cloud County Community College, 827 Pa.2d 59 (Ka. 1992) [conduct supported discharge where director of library was subject of complaints about

his relationship with students and faculty resulting from strict enforcement of rules and abusive behavior].

3. Inappropriate Conduct

One of the strongest bases for disciplining Mr. Shank is his inappropriate conduct towards students, to wit, in descending order of seriousness:

- A. He approached students accused of violations of the student code of conduct and offered to agree not to prosecute them in return for their written support of his position on the code and housing.
- B. He called students into his office who opposed his views and shouted and berated them for opposing his views.
- C. At a meeting of the resident student association he alleged a student conspiracy to discredit him and damage his reputation.

Even in the absence of an EU or other code of professional conduct, Mr. Shank's behavior in the first instance above was clearly inappropriate. The AAUP Policy Statement on Professional Ethics, adopted and endorsed in 1987, includes provisions that acknowledge that professors are to "demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors" and "avoid any exploitation, harassment, or discriminatory treatment of students." AAUP POLICY DOCUMENTS AND REPORTS (1990 Edition; p. 76). Student conduct officers should be held to no less a standard. A student conduct officer can never appropriately condition a decision to prosecute on anything other than factual and procedural issues. To condition it on the granting of a personal favor is clearly wrong, and should be good grounds for discipline.

The second instance is extremely strong, especially as Mr. Shank has admitted that he was abusive to students verbally when he was angry. It is very intimidating for a student to be called into a university official's office, and the berating of a student under such circumstances for failing to support his view is an abuse of his power and authority and is a clear failure of Mr. Shank to understand properly his role as a university official.

The third instance is not as strong as the other two. Mr. Shank did not threaten or abuse any individual, rather he addressed a student group at a meeting where presumably attendees were allowed to speak to issues that concerned them, and he voiced his opinion, correct or not, that students were conspiring against him.

However, even if one were to assume that the third instance does not rise to the level of inappropriate conduct, it is at the least a clear example of poor judgement. He has made an accusation in public that will be disruptive to his future relations with students with whom he will have to deal and which may well jeopardize his ability to effectively do his job.

Cases supporting discharge for generally inappropriate conduct toward students include Harden v. Adams, cited above [discharge supported in part by conduct which involved students in disputes]; Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) [Midland College faculty member can be discharged for using profane language towards students in a classroom]; Goss v. St. John's County School Board, 601 So.2d 1232 (Fl.App. 5th Dist. 1992) [bus driver, without intent to hit, swerved the bus toward the student in retaliation for extreme provocation; this was found to be appropriate cause for discipline]; Kosik v. Cloud County Community College, cited above [cause for non-renewal included strict enforcement of rules and abusive behavior toward students].

4. Sexual Harassment of Students

Three women students allege sometime between 1985 and the present Mr. Shank solicited sexual favors from them in return for his promise to withdraw charges against them arising out of violations of the code of student conduct. If true, (note that Mr. Shank has admitted that he has a problem dealing with misconduct by women) this would be quid pro quo harassment by an EU employee towards a student and would generally be considered misconduct by Mr. Shank. Again, EU's sexual harassment policy, if any, and its non-instructional code of conduct will have to be examined to see if this type of behavior is prohibited. If not, again it is arguable that employees should generally be on notice that this type of conduct will subject them to discipline. If that hurdle is overcome, the issue then will be whether the complaints are timely under either EU procedure or federal or state law such that they can be the basis of disciplining Mr. Shank.

Under Title IX of the Higher Education Amendments of 1972, an educational institution is strictly or automatically liable to a student if there is quid pro quo sexual harassment (promising an advantage or threatening a disadvantage in return for sexual favors) by a teacher to a student. In Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 117 L.Ed.2d 208, 112 S.Ct. 1028 (1992), the Supreme Court held that:

"[u]questionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis

of sex.' Meritor Savings Bank, FSB v. Vinson, 477 US 57, 64 L Ed 2d 49, 106 S Ct 2399 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student."

Using the same reasoning, an educational institution will likely be equally liable for sexual harassment committed by one of its employees who is in a position of power over a student, such as Mr. Shank was to the alleged harassed students in his role as Student Conduct Officer.

Even if Title IX were not interpreted to apply to this situation, there may be state laws against discrimination that may deal with this type of situation. Additionally, EU has the authority to make its own work rules for its employees that can be more strict than state or federal laws as long as they do not violate public policy or rights of the employees. EU's sexual harassment policy needs to be examined to determine if it forbids employee to student harassment as that would be an additional basis to discipline Mr. Shank.

Note that under the Franklin decision, EU will be liable to the students for compensatory damages for the harassment. EU can limit the amount of those damages by taking prompt action reasonably calculated to end the harassment. Since EU has just learned of the harassment, it should immediately investigate the allegations and determine if they have been timely made and whether there is sufficient evidence to support them. Mr. Shank should be relieved of his duties as Student Conduct Officer during the investigation.

If the allegations are untimely but appear true, it will probably be difficult to use this material as grounds to discipline Mr. Shank. However, it may be possible to use them in some way to show a pattern and practice of misbehavior by Mr. Shank.

Numerous cases in the college and university setting uphold the proposition that sexual misconduct, including sexual harassment, toward students constitutes cause for discipline up to and including discharge. These include Korf v. Ball State University, 776 F.2d 1222 (7th Cir. 1984) [inappropriate sexual advances and gifts to male students]; Levitt v. Moore, 590 F.Supp. 902 (W.D. Tex. 1984) [improper sexual advances toward female students in classes]; and Corstvet v. Boger, 757 F.2d 223 (10th Cir. 1985) [solicitation of sexual activity in a student union restroom].

POSSIBLE DEFENSES AND COUNTERCLAIMS BY MR. SHANK

1. Retaliation for Exercise of First Amendment Rights

Mr. Shank may claim that he is being unlawfully disciplined for exercising his first amendment rights by speaking out on a matter of public concern. He may so characterize his comments on housing and student discipline issues at EU committee meetings, the meetings with students in his office to discuss these issues, and the resident student government association meeting. In those instances he will argue he was trying to prevent the University from wasting money on "lavish student apartments" and "shielding students from accountability for their misbehavior," both matters of public concern.

Additionally, he may claim retaliation for telling the newspapers that there is a plan to develop student housing for private gain and that EU's new administration may be "crooked."

[AUTHORS' NOTE: The fact scenario deliberately leaves open the question of whether EU is a public or private university. If EU were private, then the First Amendment would not directly apply. Some courts have applied constitutional claims to private entities on public policy tort theories. The following discussion assumes that EU is a public university.]

The Supreme Court of the United States has recently decided a case which is analogous to the situation here, and which buttresses an employer's rights to discharge an employee for disloyal, disruptive speech and conduct. In Waters v. Churchill, 511 U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994), the Court considered a claim by a discharged public hospital nurse that her First Amendment rights had been violated. She had criticized the hospital's cross training policy, and later complained to another nurse about the hospital's staffing policies and supervision. The 7th Circuit Court of Appeals had found that when a public employer fires an employee for engaging in speech which is later found to be protected under the First Amendment as a "matter of public concern," then the employer is liable for violating the employee's free speech rights regardless of what the employer knew about the speech at the time of the termination.

The Supreme Court vacated that opinion, and remanded the case for further hearings on what the motivation of the employer was. If the employer's motivation was the nurse's earlier, general criticism of cross-training policies, then the discharge would violate the First Amendment. But if the motivation was the employer's reasonable belief after a reasonable investigation that the nurse had engaged in a conversation with a colleague that criticized her supervisor and discouraged the transfer of that colleague, then the discharge

would not violate the First Amendment since such criticism was potentially disruptive to the efficient operation of the hospital, and as such, was unprotected speech.

In an opinion authored by Justice O'Connor which announced the judgment of the Court and was joined by three other justices, the Court reviewed and endorsed in part three of its most important prior decisions balancing an employee's free speech rights against the right of a public employer to efficiently provide public services. The Waters Court summarized Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983) to hold "that the First Amendment protects a government employee's speech if it on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees." Although the landmark decisions of Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) and Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968) were cited, this Opinion disagreed with the proposition (advanced by Justice Scalia) that they should be read to hold that an employer's mere "good faith" conclusion that motivation for the discharge was not retaliation for speech on a matter of public concern is enough to preclude further judicial inquiry.

Rather, the O'Connor Opinion sets forth the following test which for now is the guiding standard for judging whether EU's investigation and disciplinary decision in this matter is appropriate:

"...Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision of the sort involved in the particular case. In situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion, many different courses of action will necessarily be reasonable, and only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable."

In a very significant guideline to employers, Justice O'Connor expressly rejected the Court of Appeals approach to the investigation of these cases, which would have required the employer to follow evidentiary rules of court, and stated:

"...The Court of Appeals' approach gives insufficient weight to this interest [the government employer's interest in achieving its goals as effectively and efficiently as possible], since it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules in court, whereas employment decisions are frequently and properly based on hearsay, past similar conduct, personal knowledge of people's credibility, and other factors that the judicial process ignores."

Of interest is that the U.S. Supreme Court used the Waters case as the basis to send back to the U.S. Court of Appeals for the Second Circuit the case of Jeffries v. Harleston, 21 F.3d 1238, cert. granted and judgment vacated by 115 S.Ct. 502 (1994).

That case involved Professor Jeffries' claim that his out of classroom remarks disparaging Jews were the basis for his removal as chair of his department at CUNY. The Supreme Court told the Second Circuit to reexamine its decision, upholding the trial court's ruling that Professor Jeffries' First Amendment rights were violated by CUNY's action, in light of the Waters decision. Because Mr. Shank's remarks were made while in the course of his duties, as opposed to those made by Professor Jeffries, EU should have an even stronger argument that the Waters case should apply to the facts here.

In addition to the above cited cases, there have literally been scores of prior judicial decisions interpreting this difficult balancing test between protected matters of public concern vs. the public employer's interest in achieving its goals efficiently and effectively. For the purposes of illustration by example, pertinent cases in the education arena where the plaintiff's free speech claims were rejected or qualified include Dougherty v. Walker, 349 F.Supp. 629 (W.D. Mo. 1972) [protest at the University of Missouri may not be carried out in a way that disrupts the educational mission]; Watts v. Board of Curators, University of Missouri, 363 F.Supp. 883 (W.D. Mo. 1973) [statements directed towards persons with whom an employee is working and which would effect harmony among co-workers or the maintenance of discipline by an immediate superior are not protected speech]; Peacock v. Board of Regents of the Universities and State Colleges of Arizona, 380 F.Supp. 1081 (D. Ariz. 1974) [verbalization of aggressive conduct is not protected speech -- a university has a right to expect a professor to follow instructions and work harmoniously and cooperatively with other members of the faculty]; Shaw v. Board of Trustees of the Frederick Community College, 549 F.2d 929 (4th Cir. 1976) [violation of policy manual not justified by motivation to protest tenure change]; Harris v. Arizona Board of Regents, 528 F.Supp. 987 (1981) [expressions of opposition to the candidacy of another person to fill a vacancy are not

protected speech since this is an internal matter, not a matter of public concern]; Stastny v. Board of Trustees, 647 P.2d 496 (Wash.App. 1982) [professor must meet job related requirements -- action consisting of a persistent course of willful defiance in refusing to obey a reasonable direct or implied order given by authorities constituted unprotected insubordination]; Smith v. Kent State University, 696 F.2d 476 (6th Cir. 1983) [petitioning for the removal of the department head which interfered with the administration of the department was not protected speech]; Franklin v. Stanford University, 218 Cal. Rptr. 228 (Cal.App. 6 Dist. 1985) [speech which called for a strike to shut down some of university's activities and interference with a police dispersal order was not protected speech or conduct]; Robinson v. Boyer, 825 F.2d 64 (5th Cir. 1987) [security officer's discharge for repeated refusal to comply with superior's orders and recommendations regarding the role of security on campus not retaliation for expression of first amendment rights]; Colburn v. Trustees of Indiana University, 739 F.Supp. 1268 (1990) [methods used by a department committee in making personnel decisions are a private, personal matter, not free speech]; Barnhill v. Board of Regents, 479 N.W.2d 917 (Wi. 1992) [employee speech unprotected where employee allowed a newspaper reporter to examine survey questions regarding a matter in litigation -- the public employer may justify a discharge by showing that the employee speech will have a substantial and detrimental impact on the employer's long term operations].

As you might guess, there is an equally long list of decisions going in the other direction on different facts, which Mr. Golden will be able to summon up. There are no simple "bright-line" tests for determining this question.

2. Retaliation for Whistleblowing

Although Mr. Golden has not raised this as a defense, Mr. Shank's course of conduct in sending copies of his objections to the charges and his prior memos to the newspapers, his suggestion to newspaper reporter York that York investigate an alleged plan to develop university housing projects for private gain and alleged "crookedness" of the administration, and his suggestion to Vice President Bell charging that you were pushing the new residence hall project because your brother would stand to profit as an architect, all indicate that he is trying to set up a "whistleblowing" claim as a defense to his termination.

Our State does not have a "whistleblowing" statute, nor has our State Supreme Court decided the question from a public policy tort judicial standpoint, so it is necessary to generally review the law in the nation as a whole. Whistleblowing as a claim has been generally defined as follows:

"'Whistleblowing' is the act of an employee who reports to superiors or outsiders the commission of illegal activity by his employer or fellow employees. It falls within the 'public policy' exception to the at-will doctrine because, although no law compels an individual to step forward and communicate his suspicions regarding criminal activity, public policy clearly favors the exposure of crime." 82 AM.JUR.2d Section 55, p. 729.

This same survey of law across the country, in sections 55-72, pps. 729-749, contains an excellent review of numerous decisions relating to whistleblowing.

Our preliminary assessment is that since your decision to terminate Mr. Shank preceded his reporting of the alleged illegal activities to the newspapers and to Vice President Bell, it would be extremely difficult to sustain a claim that your decision was motivated by retaliation for his reporting of these matters. This assessment presumes, of course, that there is no truth to the assertions that he made to the newspapers and Vice President Bell, and we will need to meet with you to discuss whether there is any basis whatsoever for his assertions in order to give you informed advice on this question.

[AUTHORS' NOTE: Whistleblowing is covered by statute in an increasing number of jurisdictions, including, for example, Colorado, Indiana, Louisiana, Maryland, Michigan, New Jersey, New York, Oklahoma, and Washington. Statutes typically have relatively short limitation periods within which to bring an action, but otherwise vary radically as to coverage, applicability to both public and private sectors, and whether they limit judicial action beyond the scope of the statute. Where there is no statutory coverage, many jurisdictions have judicially embraced the "public policy tort" theory which allows wronged plaintiffs to sue institutions for civil damages based upon action that contravenes public policy, e.g., terminating even a private sector employee for reporting illegal acts to government authorities. It is beyond the scope of this paper to do a comprehensive survey of national law, but the AMERICAN JURISPRUDENCE citation above is a good place to start for such a review.]

A final note of caution in this area. You should advise all your administrators involved with Mr. Shank's case not to talk to newspaper reporters or anyone who does not have an absolute need to know about Mr. Shank's misconduct in defense of his allegations to the newspapers. Mr. Golden is very skilled at adding a defamation count to a wrongful termination lawsuit.

3. Tortious Termination/Breach of Contract

Although Mr. Golden did not raise this in his initial demand letter, most sophisticated plaintiffs' attorneys will typically plead every tort theory they can

colorably claim, since breach of contract damages are generally limited to reinstatement and back pay, whereas successful tort or civil rights claims also may involve consequential damages including damages for mental distress.

This theory, although often pled, is difficult for a plaintiff to establish. Courts have set forth heavy burdens of proof in order to prevail. Typically, the theory is pled either as "tortious interference with business relations" or "tortious interference with or inducement to breach a contract."

A New York court, when faced with both claims by a terminated art instructor who alleged she received negative evaluations and a non-renewal decision because she rejected the sexual advances of her department head at a community college, set forth the following burdens of proof. As to tortious interference with a contract, the plaintiff would have to show (1) the existence of a valid contract between plaintiff and another contracting party; (2) defendant's knowledge of the contract; (3) defendant's intentional procurement of breach of that contract by the other party; and (4) damages. As to tortious interference with business relations, the plaintiff would have to show (1) the college would have renewed her contract but for the department head's interference; and (2) the department head acted solely to injury the plaintiff or that he used unlawful means of interfering with business relations between the college and the plaintiff. The court found that since the plaintiff's contract was terminable at-will at the end of its term, no claim could be made for tortious interference with contract, but found that a claim was stated for tortious interference with business relations. See Bernard v. Dutchess Community College, 28 E.P.D. Par. 32,540, at 24,394 (S.D. N.Y. 1982). See also Marwil v. Baker, 499 F.Supp. 560 (E.D. Mich. 1980) [court rejected claim of engineering professor that department chairs were liable for tortious interference with contractual relations, since plaintiff could not show that the defendant intentionally and without reasonable justification induced a breach of contract and intentionally did a wrongful act, illegal in character, and without justification]; Williams v. Northwestern University, 147 Ill.App.3d 374, 497 N.E.2d 1226 (1986) [professor not wrongfully forced to resign from tenured position by reduction of privileges and benefits since tenure contract defined the relationship]; Werblood v. Columbia College of Chicago, 129 Ill.Dec. 700, 536 N.Ed.2d 750 (Ill.App. 1 Dist. 1989) [court rejected claim of tortious interference with prospective economic advantage since plaintiff could not show that any institution of higher education in the area contemplated hiring plaintiff]; Kwan-Sa You v. Roe, 387 S.E.2d 188 (1990) [court rejected claim by researcher at Duke University that the director of laboratory interfered with his contractual relationship by seeking his dismissal -- appointment letter did not create contractual right to laboratory space in certain location].

4. Failure to Accommodate a Disability

In an effort to defend his actions, Mr. Shank in his letter to Dr. Baldizan suggested his problems were brought upon by stress and requested counseling or other accommodation for stress. He also submitted a letter from his psychiatrist indicating that he suffered from mild traumatic stress syndrome perhaps caused by his encounters with the administration, and from a history of clinical depression. Mr. Golden in his demand letter alleges discrimination based on disability in violation of the Americans with Disabilities Act 42 U.S.C. Section 12101 et seq. (the "ADA") and Section 504 of the Rehabilitation Act of 1973.

Since EU is a significant federal contractor, and a federal grant recipient, the University has been subject since 1973 to both sections 503 and 504 of the Rehabilitation Act which prohibit discrimination on the basis of disability, and also require affirmative action in this area. 29 U.S.C. Sections 793, 794. EU is also clearly subject to the ADA. Our state does not have an independent statute regulating discrimination on the basis of disability, so we need not address state law here.

The area of the extent to which stress and mental disabilities are protected is a developing one. The Congressional Office of Technology Assessment has instructed the EEOC to offer additional guidance on discrimination based on mental disorders, which currently account for approximately 10% of all complaints filed with the EEOC under the ADA. Cases involving mental impairments are perhaps the most difficult disabilities to address. In addition to the fact such disabilities are often hard to substantiate, their nature also makes accommodation problematic. Courts so far seem to acknowledge that there are reasonable limits on what an employer can be required to do where a mental disability disrupts the workplace.

For example, in Welshans v. Boatmen's Bancharas, 872 S.W. 2d 489 (Mo. App. 1994), the court held that an employer was not required to continue employing a bank vice president after a craniotomy for a cerebral aneurysm where the employee's difficulties with problem solving and memory would interfere with the performance of his job, even with aids such as calendars, computers, and memory techniques.

In a case that is sure to mitigate employers' greatest fears, and which is very helpful in our situation, the court in Carrozza v. Howard County, 847 F.Supp. 365 (D. Md. 1994), held that a job does not need to be modified to strip it of its inherent stresses. Therefore, the employer was not required to restructure to job "as to change its fundamental requirements, such as the ability to cope with its inherent stressors," provide additional leave time during periods of

stress, or relocate the employee away from a demanding supervisor. In addition, the court held that the employer had the right to terminate an employee for outbursts directed toward her supervisor, even though the outbursts were caused by a bipolar disorder (i.e., manic depression).

One of the key issues in mental impairment cases is that of notice. In a case interpreting the Texas Human Rights Act, a court held that an employee who failed to notify his supervisors that he was being tested for depression prior to being discharged for poor work performance cannot claim discrimination, even though the employee knew that he had been on an extended medical leave for an unspecified ailment. McIntyre v. The Kroger Co., 2 A.D.Cas. (BNA) 117 (N.D. Tex. 1994).

The above cases are very helpful to the defense of Mr. Shank's claims. The fact that he did not put EU on prior notice will give rise to a strong defense on this issue.

5. Age, Sex and Vietnam Era Veteran Status Discrimination

Mr. Shank is patently a member of certain other groups protected by federal civil rights law. Since he is over the age of 40, he is protected by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sections 621-634. Since he is male, he cannot be discriminated against on the basis of his sex according to the Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e - to 2000e-16. And since he is a veteran of the Vietnam War, and EU is a federal contractor and grant recipient, he has protected status pursuant to the Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. Section 2012.

Mr. Shank's burdens' of proof for all practical purposes under federal discrimination law are essentially the same for different kinds of discrimination. According to the seminal Supreme Court case of McDonnell-Douglas v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the plaintiff's initial burden of proof is to show (1) that he belongs to a protected class; (2) that he was qualified for the job; (3) that despite his qualifications he was rejected; and (4) that the job remained open. When this burden is met, the burden shifts to the University to articulate a legitimate business reason for the employment action. If that burden is met, the plaintiff then must prove that the legitimate business reason is a "pretext" and retains the overall burden to prove that the University was motivated by a specific intent to discriminate. As suggested by Schlei and Grossman, in their leading treatise entitled EMPLOYMENT DISCRIMINATION LAW (BNA), "McDonnell-Douglas Corp. v. Green's 'order and allocation of proof' has been applied to all kinds of cases -- discharge, discipline, ***, and retaliation -- which arise under the 'disparate treatment'

theory of discrimination." Since Mr. Shank's allegations squarely present a disparate treatment case (as opposed to "disparate impact"), the above burden and allocation of proof would apply.

There is no evidence which has yet been presented to us that any decision regarding Mr. Shank had anything whatsoever to do with his age, sex, or Vietnam era status. Therefore, although Mr. Shank may be able to meet his initial burden of proof, EU will be able to articulate legitimate business reasons for its actions, centered upon Mr. Shank's insubordination, disruptive conduct, and harassment. In order to prove a "pretext," Mr. Shank would have to demonstrate to a trier of fact that these reasons were not the "real" reasons for EU's actions toward him, which upon the state of the evidence as has been presented to us at this time, would be difficult.

6. Due Process Concerns

In Mr. Shank's final memo to the President of the Faculty Senate, he demanded "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."

These requests require an analysis of what process is due to Mr. Shank. So far, we understand that you implemented Dr. Baldizian's recommendation that Shank be notified in writing by Dr. Baldizian that his contract was in jeopardy of being terminated for cause for insubordination and sexual harassment; and that such written memorandum was hand delivered to Shank.

Given our preliminary conclusion regarding Mr. Shank's employment status, he is not entitled to "due process" as a matter of law. This is so because as recognized by the Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), constitutional due process requirements attach only to public sector employees who have a property interest in continued employment (such as tenure). Due process does not attach as a matter of law to private sector employees, or to employees such as Mr. Shank whose employment is "at-will."

However, affording Mr. Shank basic due process regarding his termination as a matter of university policy or practice is strongly recommended for many reasons. First, "due process" is the norm at academic institutions. Private sector institutions which are not bound to it by law have generally adopted policy statements affording it. Second, it provides a guideline for fair treatment to employees. Third, providing essential due process in the context of

discipline or termination is extremely important if this matter is submitted to a trier of fact, whether it be the EEOC, a judge, or a jury. How the institution treats the plaintiff is often the central factor in how the trier of fact decides the case.

The Supreme Court has set a reasonable standard for what process must be afforded prior to terminating a public sector employee with a property interest in continued employment, which EU can apply by analogy here. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), the Court stated that pre-termination due process requires at a minimum (1) notice of the charges regarding the employee's misconduct; (2) an explanation of the evidence supporting the charges; and (3) an opportunity for the employee to tell his side of the story.

EU has met the first prong by the notice of the charges sent by Dr. Baldizian. We need to examine that memo and discuss with you whether there was enough detail in that memo to provide a reasonable explanation of the evidence supporting the charges. The third prong, an opportunity for the employee to respond, has obviously not yet been met.

Once again, there are legal and practical answers to the specific requests that Mr. Shank has made as to how that opportunity should be afforded. There are hundreds of cases outlining due process parameters, but in summary of the weight of the law, even if due process applies as a matter of law, the majority of decisions have held that Mr. Shank is not entitled to have his counsel present, nor to have a court reporter present. However, as a practical matter, and given Mr. Golden's apparent reputation for reasonableness, and particularly since the termination has not yet been finalized, it might well be prudent to allow Mr. Golden to be present. We would recommend that you have Dr. Baldizian send Mr. Shank another communication offering him the opportunity, with his counsel present, to present any response he wishes to the previous charges communicated to him. This communication should indicate that a court reporter will not be present, but that if he wishes the meeting will be recorded. It should notify Mr. Shank that his request for "collegial hearings" is denied [although typical for faculty discharges, such hearings are not typical for administrative discharges]. It should further notify Mr. Shank that his request to question the president is premature, and will be discussed at the meeting with his counsel. We need to meet with you and Dr. Baldizian to discuss whether or not the prior communication of charges is complete, and how you feel about subjecting yourself to questioning by Mr. Shank or his counsel at this meeting or in a subsequent session.

7. Agenda For Our February 12th Meeting

In addition to discussing with you the above practical concerns as to how to structure Mr. Shank's "opportunity to respond" meeting, we would like to discuss with you the following items:

- A. Given Mr. Shank's long service to EU, and his prior personnel record of excellent service, and in spite of his conduct which would justify termination, termination might not be the wisest solution in this instance. Adverse publicity, legal costs, and administrative burdens and costs, all need to be weighed before this decision is finalized.
- B. If after hearing Mr. Shank's response you decide that termination is the only alternative acceptable to you, then there are methods of alternative dispute resolution, which we are familiar with, and which we know Mr. Golden has used in the past, to resolve this matter short of a federal or state court jury trial. These include mediation and arbitration. We should discuss the pros and cons of these alternatives.
- C. We need to address some ethical concerns we have with Mr. Golden's behavior in contacting EU employees directly without contacting University Counsel first. Depending upon which direction resolution takes, raising these at this time might not be constructive.
- D. In order to implement your concerns about total quality management, and not making the same mistake twice, we have several suggestions for future policy changes which will facilitate handling disciplinary matters in the future. These include consideration at the very least of adopting a resolution that only you and the Board have the authority to make oral promises regarding employment; and of adopting a comprehensive personnel policy manual for administrative employees, which would include chapters on unprofessional conduct, sexual harassment, and a grievance procedure setting forth due process expectations.

We are available to meet with you at your convenience to discuss any questions you have about the issues raised in this memorandum, and look forward to our meeting on February 12th.

KZFS1\121929.1-099999-50030