OVERVIEW OF RECENTLY DECIDED CASES AFFECTING STUDENT AFFAIRS AND ACADEMIC ADMINISTRATION

Presenters:

BARBARA A. LEE
Associate Dean & Professor
School of Management & Labor Relations
Rutgers University
Princeton, New Jersey

And

PETER H. RUGER
General Counsel
Southern Illinois University
Carbondale, Illinois

Stetson University College of Law:

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Barbara A. Lee, Rutgers University
Peter H. Ruger, Southern Illinois University

Introduction

At the close of the year, one is enticed to create lists of the year's best or worst. Of course, David Letterman does it all the time. Our effort is more modest in scope but, hopefully, more beneficial over 1997. We have attempted to identify a number of cases of significance to professionals, including counsel, employed or retained by higher education institutions. Many of these will be discussed in greater depth in other program sessions. Finally, since the urge to predict, like the flu, is so rampant at this time of the year, we list several subject matter areas that probably will require considerable attention by higher education administrators and their lawyers in 1997.

Issues for Faculty and Academic Administrators

Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996).

Francis J. Kelly worked for Drexel University as a buyer in the purchasing department for twelve years. When he had been on the job for six years, he broke his hip, and was left with a limp. Six years later, the head of the purchasing department eliminated Kelly's position as part of a downsizing and reduction in force, occasioned by the university's need to reduce spending.

1Portions of these case summaries are adapted from The College Administrator and the Courts, as well as from A Legal Guide for Student Affairs Professionals: An Adaptation of The Law of Higher Education, 3d edition, by William A. Kaplin and Barbara A. Lee (to be published in the spring of 1997).
Kelly filed a claim of discrimination based on disability and age (he was 68 when his position was eliminated). The federal trial court granted summary judgment for the university, finding that the elimination of Kelly's position was motivated neither by his disability nor his age. Kelly appealed from that ruling.

The court first addressed Kelly's disability discrimination claim. Although Kelly was able to show that he walks with a limp, and that walking is a "major life activity," the issue before the court was whether the hip injury "substantially limited" Kelly's ability to walk. (If a disorder does not "substantially limit" the individual's ability to engage in a major life activity, then the disorder is not considered a disability under the ADA.) In order to make this determination, the court looked to the EEOC regulations that interpret the ADA, and noted that the proper comparison was between the disabled person and "an average person in the general population." Although Kelly testified that he climbed stairs very slowly, he did not use a crutch, a cane, or any other assistive device. Therefore, the trial court had ruled that Kelly's hip disorder did not "substantially limit" his ability to walk.

The appellate court examined several federal appellate cases in which a plaintiff alleged a disability that limited his or her ability to walk. In many of these cases, the plaintiff's impairment was more severe than Kelly's, and yet the courts had ruled that the plaintiffs were not "substantially limited" and thus not protected by the ADA. Simply having an impairment, said the court, was not the equivalent of having a protected disability.

The court similarly rejected Kelly's assertion that his supervisor regarded him as disabled, and that this attitude was
responsible for his selection for layoff. The only evidence that Kelly could bring to bear on this theory was that his supervisor was aware of his limp. Simple awareness of a disorder, said the court, is insufficient to establish that a supervisor regarded the plaintiff as disabled.

The court affirmed, without discussion, the trial court's finding that age discrimination had not been a motivation for eliminating Kelly's position. In making this determination, the court noted the difference between reviewing the validity of Drexel's statement that economic conditions necessitated the elimination of Kelly's position (deferential judicial review), and reviewing an allegation that he was selected for elimination because of a discriminatory reason (full judicial review).

**Taxman v. Board of Education of the Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996)**

In this *en banc* ruling (8-4), the court found that the school board's use of race to choose between two equally qualified teachers in a layoff decision violated Title VII. Both teachers had equal seniority and were equally competent; in prior situations where a layoff decision had been made between two "equal" candidates, a coin toss had been used. In this case, both candidates were teachers in the school's business department; if the black teacher had been laid off, there would have been no minority teachers in the business department. Therefore, the school board selected the white teacher for layoff, and she sued the board under Title VII.

Blacks were not underrepresented in the school district's workforce as a whole, and the school did not have a history of prior segregation or discrimination against teachers on the basis of race, eliminating any remedial argument the school might have
tried to make to justify a race-conscious layoff decision. Therefore, the school board argued that its race-conscious layoff decision was justified by the need to increase the diversity of its teaching force. The board stated diversity was an important educational goal for its students, and its decision to retain the black teacher enhanced the diversity of the teacher workforce, which improved the education of the students.

The trial court had awarded summary judgment to the white teacher, and the U.S. Court of Appeals for the Third Circuit affirmed. Looking to an earlier decision of the U.S. Supreme Court in Weber v. Kaiser Aluminum, 443 U.S. 193 (1979), the court determined that the school board's affirmative action plan was flawed. First, there was no "manifest" racial imbalance in the school system as a whole, invalidating affirmative action remedies for a problem that did not exist. The court apparently ignored the racial imbalance in the business department, looking only at the overall representation of blacks in the teaching force. Secondly, the layoff decision "unnecessarily trammeled" Ms. Taxman's interests because she lost her job. And thirdly, said the court, the affirmative action plan had no ending point, so it was more in the nature of a racially-balancing action than one that was simply designed to respond to underrepresentation.

The court rejected the school board's argument that diversity provided a compelling interest sufficient to overcome the presumed unlawfulness of a race-conscious employment decision. Title VII was not created to increase diversity, according to this court, but to remedy prior discrimination. The court also stated that Regents of the University of California v. Bakke, a U.S. Supreme Court case involving race-conscious student admissions, had no applicability in the employment context (438 U.S. 265 (1978). In Bakke, Justice Powell had stated that
diversity was a compelling interest for a public college; the court precluded the use of this argument by making it inapplicable to race-conscious employment decisions.

**Cohen v. San Bernardino Valley College**, 92 F.3d 968 (9th Cir. 1996)

In this case, the appellate court addressed a professor's constitutional challenge to discipline imposed as a result of a finding that the professor had engaged in sexual harassment. A committee had found that Professor Cohen's use of sexually-explicit examples in a class on remedial writing, as well as his requirement that students write a paper defining pornography, violated the college's sexual harassment policy. Cohen challenged the discipline under the First Amendment's free speech clause and the Fourteenth Amendment's due process clause. The trial court awarded summary judgment to the college; Cohen appealed this judgment to the U.S. Court of Appeals for the Ninth Circuit, which reversed the trial court.

Although the trial court had rejected Cohen's claim that the sexual harassment policy was unconstitutionally vague as applied to his conduct, the appellate court agreed with Cohen's theory. The sexual harassment policy contained a three-part definition of conduct that could constitute sexual harassment; the portion of the policy to which Cohen took exception outlawed conduct that "has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment."

The appellate court first considered Cohen's First Amendment claim. The court noted, "Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech. We
decline to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors . . ." Because the court determined that the sexual harassment policy's terms were unconstitutionally vague as applied to Cohen, it did not reach the issue of the boundaries of protected classroom speech.

The court determined that the policy was overbroad, and insufficiently precise to warn faculty precisely what type of speech or conduct would violate the policy. Vague policies violate free speech guarantees, said the court, because (1) they do not provide fair warning; (2) they delegate policy matters to low level officials for resolution on an "ad hoc and subjective basis;" and (3) they discourage the lawful exercise of free speech. The court was primarily troubled by the lack of notice to Professor Cohen that teaching methods he had used for many years were now a violation of the college's policy.

The court made it very clear that it was not striking all sexual harassment policies, or elevating the professor's speech protections over students' rights to an academic environment free of discrimination. The court specifically did not consider whether the college could have punished Cohen if the policy were more narrowly drafted. Characterizing the treatment of Cohen as "legalistic ambush," the court stated: "Cohen was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style--a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College."

The Ninth Circuit's opinion sends a strong signal to college administrators and faculty that they will be required to notify
faculty (and staff) when a policy that provides for discipline if transgressed is either created or revised. In this case, the college apparently did not provide training or interpretation of the policy to faculty; thus Cohen could claim that he was without notice of the now-unlawful behavior. Furthermore, the case makes it clear that the college had tolerated Cohen's sexually-explicit teaching techniques for many years; it was unfair, according to the court, to suddenly punish him for conduct that he had assumed was acceptable because there had been no apparent criticism of it until he was disciplined.

**EEOC v. Catholic University**, 83 F.3d 455 (D.C. Cir. 1996)

Sister Elizabeth McDonough, a nun of the Dominican Order, was hired as an assistant professor in the Department of Canon Law at Catholic University. Sister McDonough was the first woman to hold a tenure track position in the department. She was promoted to associate professor five years later, and shortly afterward submitted an application to be reviewed for tenure.

Tenure applicants must receive a favorable vote from each of three bodies in order to secure tenure: their department's tenured faculty, the School of Religious Studies' Committee on Appointments and Promotions (CAP), and the Academic Senate Committee on Appointments and Promotions. For tenure decisions in the Canon Law department, ecclesiastical authorities must also approve the appointment, according to the University's Canonical Statutes.

The tenured faculty in the Canon Law department voted not to recommend tenure by a split vote of two in favor, three opposed, and one abstention. Sister McDonough appealed this vote to the CAP, which returned the decision to the department in light of
the fact that Sister McDonough had published an additional article since the department's vote. A second vote failed to result in a majority in favor of tenure. Sister McDonough withdrew her tenure application and submitted it six months later; the department again failed to provide a positive recommendation. The application then went to the School CAP, which supported her application. The Senate CAP, however, did not support the application by a clear majority (three in favor, one against, and two abstentions). The academic vice president asked the Senate CAP to reconsider; their second vote was unanimously against tenure on the grounds that the candidate's teaching and scholarship were "marginal."

Sister McDonough, joined by the EEOC, filed a sex discrimination claim against the university. Although a one-week trial was held, the trial judge did not rule on the merits, determining that both the Free Exercise and the Establishment Clauses of the First Amendment would be violated by judicial review of the tenure decision because Sister McDonough's role in the Department of Canon Law was the "functional equivalent of the task of a minister" (856 F. Supp. 1 (D.D.C. 1994)). He also stated that judicial review would entangle both the EEOC and the court with religion, a violation of the Establishment Clause. This appeal ensued.

The court first addressed the Free Exercise Clause issue. Sister McDonough had argued that the "ministerial" exception for federal laws should not be applied to her because she was neither an ordained priest, nor did she perform religious duties. The appellate court responded that ordination was irrelevant; the ministerial exception has been applied to individuals who perform religious duties, whether or not they have been ordained. To her second argument, the court replied that her duties were, indeed,
religious because the department's mission was to instruct students in "the fundamental body of ecclesiastical laws" and, as the only department in the United States empowered by the Vatican to confer ecclesiastical degrees in canon law, the mission of its faculty, including the plaintiff, was "to foster and teach sacred doctrine and the disciplines related to it" (quoting from the University's Canonical Statutes). Furthermore, said the court, it was irrelevant that the tenure denial had not been on religious grounds. The act of reviewing the employment decision of a religious body concerning someone with "ministerial" duties was offensive to the Constitution, regardless of the basis for the decision.

The Establishment Clause, said the court, forbids the government from becoming "entangled" in the affairs of religious organizations. Although Sister McDonough was denied tenure on the basis of the quality of her scholarship, the court found that her scholarship was about religious issues. The external experts who reviewed her scholarly work were clergy or members of religious orders. Said the court, "there was the inevitable risk that the persons assessing the scholarship of a particular paper would consider whether her conclusions were in accord with what the Church teaches or what, in their judgment, the Church ought to teach (83 F.3d at 466). After a week of trial, noted the appellate court, the trial judge could not "filter out the religious elements from the secular ones sufficiently to avoid unwholesome and impermissible entanglement with religious concerns" (quoting 856 F. Supp. at 12). Given the fact that all the tenured faculty in the Canon Law department were priests, the decision clearly rested, at least in part, on religious issues, which the court was not permitted to review.
The appellate opinion also affirmed the lower court's ruling on a third ground. The university had argued that the Religious Freedom Restoration Act (RFRA) (42 U.S.C. sec. 2000bb, et seq.) protected its employment decisions concerning canon law faculty from judicial or regulatory review. The plaintiff argued that the RFRA was unconstitutional because it advanced religion, a violation of the Establishment Clause. The Act establishes a "compelling interest" test for any governmental burden on the free exercise of religion. Citing the U.S. Supreme Court's opinion in Amos (483 U.S. 327 (1987)), the appellate court distinguished between a federal law that endorses religion and one that merely accommodates religion. The RFRA did not exempt religious organizations from all federal laws, said the court, but merely attempted to accommodate the free exercise of religion unless the government's interest in preventing that free exercise was compelling.

Blistein v. St. John's College, 74 F.3d 1459 (4th Cir., 1996)

Burton Blistein was the "artist in residence" at St. John's College (Maryland) for twenty years. In 1991, the college sustained a sizable budget deficit, and developed a plan for cutting costs. One of the elements of the plan was the elimination of the artist-in-residence position. Although the position was to be eliminated effective December 31, 1992, Blistein was notified in June of that year, and decided to retire before July 1, 1992 because the college had decided to eliminate certain retirement benefits for retirements occurring on or after July 1 of that year.

Blistein received health benefits, tuition assistance for his children, four months of severance pay, medical benefits for his dependent children, and art studio space. Blistein signed a
letter of resignation in return for the college’s written promise to provide the benefits he had requested.

A few months after accepting his retirement benefits, Blistein filed an age discrimination claim with the Maryland Commission on Human Rights, which was forwarded to the Equal Employment Opportunity Commission. Although Blistein initially agreed to withdraw his charge from the EEOC he instead filed lawsuit under the federal Age Discrimination in Employment Act. The college filed a breach of contract counterclaim.

The district court granted summary judgment for the college, finding that Blistein had failed to establish a *prima facie* case of age discrimination, and that he had also failed to show that the college’s retirement offer was a pretext for age discrimination. An appeal by Blistein ensued.

The dismissal was affirmed with the court determining that Blistein had waived his right to bring an ADEA claim and that the retirement package was not a pretext for age discrimination.

The court looked to the amendments to the Age Discrimination in Employment Act contained in the Older Workers Benefits Protection Act of 1990. That law lists the elements which must be present in a waiver in order for an employee to effectively waive his or her rights under the ADEA in return for a retirement package. Those elements were not present in the agreement between Blistein and the College. However, said the court, their absence did not void the agreement; Blistein could ratify an otherwise invalid agreement by conduct he took after the agreement was made.
By accepting the benefits from the college, Blistein ratified the agreement. To allow Blistein to claim that the agreement was now invalid, said the court, would permit him to "have it both ways"—to retain the benefits afforded by the agreement while simultaneously challenging the validity of that agreement. That, said the court, was not the intent of Congress in formulating the Older Workers Benefit Protection Act.

Although the court's determination of the waiver issue made it technically unnecessary to determine the merits of Blistein's case, the appellate court reviewed the determination of the trial court that Blistein failed to demonstrate age discrimination. The crux of Blistein's argument was that the college's decision to change its retirement benefits policy to a less favorable one "forced" him to retire before the effective date of the new policy. The court rejected Blistein's argument that he had "no choice" but to resign—simply because it was in his economic interest to retire prior to July 1 did not mean that he was forced to do so.

Furthermore, since the college had decided to eliminate Blistein's position, its willingness to grant him "gratuitous" benefits was not coercive. In fact, said the court, the college was not required to notify Blistein in June that it intended to eliminate his position in December; this early notification enabled Blistein to take advantage of the more favorable retirement package. Therefore, Blistein did not establish that his resignation was forced by the college.

With regard to Blistein's contention that the retirement was a pretext for age discrimination, the court asserted that, although Blistein's age was clearly related to his eligibility for the retirement benefits, the college's decision to eliminate
the artist-in-residence position was not related to his age, but
to the fact that the position was not closely related to the
curriculum of the college. In closing, the court noted that this
type of lawsuit "threatens to undermine, rather than advance, the
laudable objectives to the antidiscrimination laws" (p. 1473).

Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 677
A.2d 1378 (Conn. App. 1995)

On August 12, 1986 the Foundation agreed to participate in a
matching grant program that would provide need based merit
scholarships to disadvantaged students for medical related
education on a continuing basis. Shortly thereafter, the
university accepted the offer of the matching grant, and
eventually raised the funds necessary for the match. By June of
1998, the plaintiff had transferred $250,000.00 to the university
to provide scholarships to students in its nursing program.
However, on November 21, 1991 the Foundation was informed that
the university had closed its nursing school on June 20, 1991.

The Foundation brought an action seeking to segregate the
$250,000.00 from the general funds of the university and, if the
original purpose of the grant could not be fulfilled, transfer
the funds to another foundation in the Bridgeport area. The
plaintiffs relied upon the Connecticut Uniform Management of
Institutional Funds Act to bring its action. The defendant
university moved to dismiss the suit because the plaintiff lacked
standing. The trial court held that the Act did not provide a
donor with the right to enforce restrictions contained in a gift
instrument and, therefore the plaintiff lacked standing to bring
suit. The trial court was of the opinion that the attorney
general was proper party to bring the suit.
The Court of Appeals held that the Uniform Management of Institutional Funds Act gave a donor the right to enforce restrictions contained in a gift instrument.

The court reviewed the traditional definitions of standing, noting that one bringing an action has to have some real interest, or a legal or equitable right in the subject matter of the controversy. It then focused on a provision of the Connecticut Uniform Management of Institutional Funds Act ("Act") which stated: "With the written consent of the donor, the governing board may release, in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund." The foundation maintained that this provision gave it standing to enforce the restriction. The university argued that the attorney general was the only party who could enforce the provisions of the gift on behalf of the public. Authority for that proposition was derived from another provision of the Act which allows restrictions to be released when they are obsolete, inappropriate or impracticable. In such a proceeding, the attorney general is named by the statute as the opposing party and the one, presumably, responsible for insuring that the public interest is served.

The court took the position that the donor of an irrevocable gift, like the one at issue here, has no property interest in the gift. However, the court found that the donor had a protectable statutory interest for the purpose of standing. The distinction the court drew was as follows: "A property interest is one in which an individual or entity has an ownership or share of some tangible or intangible item. A protectable interest is one in which an individual or entity is enable to defend or to preserve." Since the latter interest was involved, according to the court, it necessarily followed that then the donor, in
addition to the attorney general, had the right to bring an action to protect the use of the gift.

Ignoring the argument of the defendant that a grant of standing would lead to extensive litigation from disgruntled donors, the court attempted to make its ruling as narrow as possible. The court stated that the issue did not involve an heir's statutory standing to bring suit or a suit to return the gift to the plaintiff. The inquiry was whether or not the donor had a right to challenge the apparent removal of a restriction without its consent. In concluding that the donor could initiate suit to raise the issue of the improper removal of a restriction, the court noted: "It would be anomalous for a statute to provide for written consent by a donor to change a restriction and then deny that donor access to the courts to complain or a change without such consent."²

The Taxation Trio: Illini Media Co.; University of Michigan; and Washington and Jefferson College


The Illini Media company, a not-for-profit corporation created by the University of Illinois, was denied a property tax exemption for its property used for its operations. It operates a radio station and publishes the university newspaper, the university yearbook, and a technical journal. The corporate purposes of Illini Media are "to publish and distribute student publications, to educate University of Illinois at Urbana-Champaign students in the field of mass communications, and to operate other related student enterprises in the field of mass communications." All of its activities are subject to the authority of the chancellor of the university and membership on
its board of directors is limited to university students and faculty members.

At the administrative hearing level, it was found that Illini Media "is not a school" since the student workers did not receive college credit for their work. Therefore, the hearing officer ruled that exemption was improper.

The relevant statute exempts from property taxation "all lands...used for public school, college, theological seminary, university, or other educational purposes...".

The trial court's reversal of the department's ruling denying exemption was appealed unsuccessfully.

The court of appeals examined that portion of the statute that stated that property may be exempt as used as a school or for "educational purposes." The statute is written in the disjunctive and, at the department of revenue level, it was not properly interpreted. To be entitled to the educational exemption, an activity need not be a school in a traditional sense. The court further criticized the lack of logic in a decision denying exception because that decision stated that the property was "primarily related to the goal of educational development." The Court of Appeals noted that that finding was synonymous with educational purposes, and, therefore, exemption should have occurred.

Other factors supporting the grant of exemption was the considerable involvement of students and faculty in the management of the not-for-profit organization. The close ties of the university to the organization were also emphasized. In addition, a prior decision had granted property tax exemption to
the University of Illinois Foundation which engaged in activities that, arguably, were less educational than those before the court in this case.


The Michigan Department of Treasury assessed sales tax in the amount of $62,829.46 and use tax in the amount of $17,030.91 against the University of Michigan. The sales tax assessment against the university covered photocopies costing five cents each made by students or others at photocopier machines placed at the university’s libraries, student dormitories and student union; replacement diplomas ordered by graduates, costing $5.00 each; meals provided to participants in the Executive Development Program and meals provided to participants in summer sports camps for students 8 to 18. Use tax was assessed on the use of overnight guest rooms and cots at the Martha Cook Residence Hall. The university paid the assessments under protest and sought review and a refund by the Court of Claims. The Court of Claims upheld some of the assessments and denied others.

The Michigan Sales Tax Act imposes the sales tax on “all persons engaged in the business of making sales at retail.” The court applied this principle, and those related to it, to the activities conducted by the university. Elaborating upon the statute, the court observed that the sales tax was a tax upon sellers for the privilege of engaging in the business and making retail sales of tangible personal property. Inherent in the concept of business is the intent to make a profit. Relying a Wisconsin case in which the cost of photocopies made by a law firm and charged to the clients were found not to be subject to the sales tax because they were incidental to the legal services provided, the court observed that the photocopy charge, and the
convenience of copying, was an incidental part of the operations of an academic library. Additionally, the five cent per page charge closely approximated the actual cost of a photocopy and was not construed to be profit making.

The replacement diplomas were characterized as a customized service to which the tangible paper was merely incidental. The personalized nature of the replacement diploma, and the absence of a profit motive, invalidated the assessment of the replacement diplomas. The court, in declaring sales tax inapplicable to sales of food to participants in the executive development program and in summer sports camps, the court rejected an attempt by the revenue officials to characterize such students as other than "bona-fide enrolled students." The statute exempted "bona-fide enrolled students" and the court interpreted that to include students enrolled in a non-degree granting program and high school and elementary student enrollees attending summer sports programs.

The attempt of the Department of Treasury to analogize, the purposes of use tax, dormitory room and cot rental to membership in an exclusive club was rejected by the court and exemption was upheld. The decision observed that "providing housing for the programmed students was not done with the object of gain, but to facilitate the educational purpose of the program through on-side residence." The court further pointed out that the accommodations were not available to the general public. The rooms and cots were not provided as a business enterprise, but were supplied as an adjunct to the students non-taxed dormitory rooms. This clear nexus with the educational enterprise defeated the assessment. The Court of Appeals concluded that the various activities were not subject to tax.
City of Washington v. Board of Assessment, 666A.2d 352  
(Pennsylvania Commonwealth 1995)

In August of 1994, a trial court held that Washington and Jelleson College (W&J), a private institution, was not a charitable enterprise and, therefore, not entitled to property tax exemption. The elements of a charity, as established by state law, are that an entity must: advance a charitable purpose; donate or render gratuitously a substantial portion of its services; benefit a substantial and indefinite class of persons who are legitimate subjects of charity; relieve the government of some of its burden; and operate entirely free from private profit motive.

The trial court found that the college met only the last of the criteria. This ruling, ominous for the entire charitable sector, was appealed and was reversed but review by the Pennsylvania Supreme Court is pending.

The Commonwealth Court, an appellate court, reviewed the elements necessary for a charitable exemption and, by a 4-3 margin, reversed the trial court.

The decision affirmed the traditional view that education is a charitable purpose. The large amount of financial aid provided as well as a plethora of free cultural and sporting events satisfied the requirement that the college render a substantial portion of its services gratuitously. The fact that W&J served an indefinite public—all qualified to enroll—satisfied that element of the charitable definition. Relief of government’s burden of educating over 1,000 students in public colleges was apparent to the majority of the court. An absence of profit motive was confirmed.
Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996)

In this case, four individuals who were denied admission to the University of Texas Law School sued the state and the Law School under the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment, Sections 1981 and 1983 of the federal civil rights statutes and Title VI of the Civil Rights Act of 1964, claiming that they were denied admission on the basis of their race.

The law school's affirmative action admissions program gave preferences to black and Mexican-American applicants only, and used a separate committee to evaluate their applications. "Cut-off scores" used to allocate applicants to various categories in the admissions process were lower for blacks and Mexican-Americans than for other applicants, resulting in the admission of students in the "minority" category whose college grades and LSAT scores were lower than those of some white applicants who had been rejected.

Under the strict scrutiny standard, which is used to review claims brought under the Equal Protection Clause, the defendant must establish (1) that it has a compelling interest that justifies the "discrimination," and (2) that its use of racial classifications is narrowly tailored to achieve its compelling interest. The law school had presented five justifications for its affirmative action admissions program, each of which, it argued, met the compelling state interest test: (1) to achieve the law school's mission of providing a first-class legal education to members of the two largest minority groups in Texas; (2) to achieve a diverse student body; (3) to remedy the present effects of past discrimination in the Texas public school system;
(4) to comply with the 1983 consent decree with the Office of Civil Rights, U.S. Department of Education, regarding recruitment of black and Mexican-American students; and (5) to comply with the standards of the American Bar Association and American Association of Law Schools regarding diversity.

Although the federal district court ruled that the portions of the law school's admissions program that gave "minority" applicants a separate review process violated the Fourteenth Amendment, that court had found, using the strict scrutiny standard, that two of the law school's justifications for the program (numbers 2 and 3) passed constitutional muster. Thus the trial court had held that the affirmative action plan furthered the compelling interest of attaining diversity in the student body, and that it served to remedy prior discrimination by the State of Texas in its entire public school system (including elementary and secondary schools). A three-judge panel of the appellate court rejected these justifications, finding that each failed one part of the strict scrutiny test.

The appellate panel first addressed the law school's argument that its admissions program was justified because it increased the diversity of the student body. It examined the opinion of Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and his response to the university's argument that a race-conscious admissions program was necessary to ensure a diverse student body for the medical school, and that attaining a diverse student body was a compelling governmental interest. Although Justice Powell had stated that setting aside places in the medical school for which only minorities were eligible did not meet the strict scrutiny standard, he did state that attaining a diverse student body was a "constitutionally permissible goal for an institution of higher
education (438 U.S. at 311). The Fifth Circuit panel rejected Justice Powell's argument, however, stating that "achieving a diverse student body is not a compelling interest under the Fourteenth Amendment" (78 F.3d at 944), and noted that Justice Powell's opinion had never gained the support of a majority of the Supreme Court—in Bakke or in any subsequent case. Furthermore, "no case since Bakke has accepted diversity as a compelling state interest under a strict scrutiny analysis" (78 F.3d at 944). Under recent Supreme Court precedent, said the court, racial classifications are only permissible for remedial purposes.

The court then addressed the district court's finding that the law school's admission program had a remedial purpose. Although the court recognized that the state of Texas had discriminated on the basis of race and ethnicity in its public education system, the law school's admission program was not designed to remedy that prior unlawful conduct because the program gave preferences to minorities from outside Texas and to some who had attended private school. Furthermore, said the court, in order for the admissions program to comply with Constitutional requirements, the law school would have had to present evidence of a history of its own prior unlawful segregation. "A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny" (78 F.3d at 951). Once prior discrimination had been established, the law school would then have to trace present effects from the prior discrimination, to establish the size of those effects, and to develop a limited plan to remedy the harm. The "present effects" cited by both the law school and the district court—a bad reputation in the minority community and a perceived hostile environment in the law
school for minority students—were insufficient, said the court, citing the Fourth Circuit's opinion in Podberesky v. Kirwan.

The court next addressed the issue of which party bore the burden of proof on the issue of damages. The law school had argued that the plaintiffs had to demonstrate that they would have been admitted to the law school even if the affirmative action program had not existed. The plaintiffs, on the other hand, argued that, once a constitutional violation is established (as it was in this case), the burden of persuasion on the issue of damages shifted to the law school to show that the plaintiffs would have been denied admission even without the affirmative action program. The court, citing Mt. Healthy City School District v. Doyle, adopted the plaintiffs' argument, noting that the law school would thus have "a second chance of prevailing by showing that the violation was largely harmless" (78 F.3d at 957). Should the law school fail to demonstrate that the plaintiffs would have been rejected anyway, the court would award appropriate equitable and/or monetary relief.

One appellate judge, although concurring in the result of the plaintiffs' constitutional claim, disagreed with the majority's statement that diversity could never be a compelling state interest. The lack of Supreme Court precedent on what constitutes a compelling interest and on whether diversity could provide such an interest in a public graduate school program, convinced this judge that the proper approach was to assume, without deciding, that diversity was a compelling state interest, and to consider whether the law school admissions program was narrowly tailored to achieve diversity. The judge's concern was that "diversity," as defined by the law school, covered only two groups: blacks and Mexican-Americans. Limiting the program to these two groups, said the judge, "more closely resembles a set
aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity" (78 F.3d at 966).

The United States Supreme Court rejected the law school's request that it review the Fifth Circuit's opinion (___ S. Ct. ___ (1996)), a decision that leaves the legal status of racial or other minority preferences in public college admissions decisions in limbo. The decision of the Fifth Circuit is binding on public institutions in the states that comprise the Fifth Circuit—Louisiana, Mississippi, and Texas—but is not binding on public institutions in other states until and unless federal courts in other circuits, or the state courts themselves, make similar rulings. Given the Fourth Circuit's rejection of race-based financial aid at public institutions in Podberesky, however, it is possible that that Circuit would adopt the reasoning of Hopwood should a relevant case reach that court.


Therese Reilly was a student at Indiana University School of Medicine. During the final examination in her Medical Pharmacology course, two of the course professors noticed that Reilly was acting in what they believed to be a suspicious manner. They believed she was attempting to copy from another student's test paper. Halfway through the test, one of the professors asked that student to cover his test paper more thoroughly. The "suspicious" behavior on Reilly's part ceased when the other student left the room.

The professors compared the test papers of the two students; the first seven pages were nearly identical, but the similarities ceased halfway through the exam. A statistician advised the
professors that there was one chance in 200,000 that Reilly and the other student could have had the same incorrect answers on their multiple choice questions without cheating having occurred. The professors gave Reilly an F on the exam, sending her a letter that outlined the suspicious behavior and the statistical comparisons. Reilly sent a letter of protest to the professors, who reaffirmed their decision. Reilly was permitted to bring a lawyer with her to meet with the professors to rebut their charges. As a result of that meeting, the professors had a second statistical analysis run on the two test papers, which resulted in a lower, but still significantly high probability that the similarities were not a result of chance.

Because Reilly had received one other grade of "F," also as a result of cheating on a final exam in another course, she was informed that she was entitled to a hearing before the Student Promotions Committee prior to dismissal from medical school. She was permitted to be assisted by her attorney, and was allowed to present her version of the facts. The committee voted to recommend her dismissal. Reilly appealed the committee's decision, but they reaffirmed their recommendation. The dean then dismissed Reilly from medical school.

Reilly filed a lawsuit, alleging that the university denied her due process and equal protection. The alleged due process violation was her lack of opportunity to question the course professors at the hearing; the vagueness of a rule that forbids "the appearance of cheating," and the committee's failure to use the "clear and convincing" standard of proof. The court did not address whether the dismissal was on academic or disciplinary grounds because it found that the medical school had afforded her sufficient due process for either type of dismissal. Even had the dismissal been on disciplinary grounds, said the court, she
had no right to formal cross-examination of her accusers; she was fully aware of the evidence against her and had been given the opportunity to discuss it with the professors. The vagueness claim was dealt with by noting that Reilly had been dismissed because the committee had determined that she cheated, so the "appearance of cheating" rule was irrelevant to her dismissal. And the court stated that only "substantial evidence" was necessary to uphold the dismissal; the committee was not required to use the "clear and convincing" standard of proof.

Reilly also challenged her dismissal on equal protection grounds, asserting that students in other units of the university were given certain rights that she, as a medical student, was not, including the right to cross-examine witnesses and the use of the clear and convincing evidence standard. The court, noting that the equal protection clause does not require that all persons be treated identically, and requires only that an individual be treated the same as "similarly situated" persons. Reilly was treated the same as other medical students, said the court; she was not "similarly situated" to undergraduates or students in the law school. The court affirmed the trial court's denial of the preliminary injunction sought by Reilly.

Gay Law Students v Board of Trustees, 673 A.2d 484 (Conn. 1996)

The Gay and Lesbian Law Student Association at the University of Connecticut School of Law sought a permanent injunction to prohibit the University of Connecticut from permitting the military to use on-campus employment recruiting facilities or other employment services of the law school replacement office. A lengthy stipulation of fact was created by the parties that stated, in part, that all employers who use the services of the office of career services at the law school,
except military recruiters, are required to abide by the law school’s non-discrimination policy. The parties further stipulated that the military discriminates against gay men and lesbians in hiring and employment.

Connecticut, in 1991, enacted “an Act concerning discrimination on the basis of sexual orientation” that, among other provisions, required that “all services of every state agency shall be performed without discrimination based upon sexual orientation.” Specifically exempted from the provisions prohibiting discrimination on the basis of sexual orientation were ROTC programs.

Another statute (Section 10(a)-149(a) provided in relevant part: “notwithstanding any other provision of law to the contrary, each constituent unit of the state system of higher education, . . . shall. . . . provide the same directory information and on-campus recruiting opportunities to representatives of the armed forces of the United States of America and state armed services as are offered to nonmilitary recruiters or commercial concerns.” (Emphasis added).

The trial court granted a permanent injunction, finding that the law school has given the military “the license to discriminate through the use of the school services and facilities.” The trial court found that the gay and lesbian members of the law school were offered fewer placement opportunities than heterosexual students and that they have “suffered stigma, humiliation and the loss of professional educational benefits as a result of the defendants’ unlawful conduct.”
The state Supreme Court held that the plaintiffs had standing to maintain the action and that the phrase "notwithstanding any other provisions of the law to the contrary" in an enactment addressing military recruiting did not take precedence over the general law prohibiting discrimination on the basis of sexual orientation.

In a 3 to 2 decision, the Supreme Court of Connecticut ruled that the state's law prohibiting discrimination on the basis of sexual orientation precluded the school of law from making its facilities available to military recruiters. In determining whether the plaintiffs had standing, the court engaged in a two-part analysis. First, they determined that, for the association to maintain the action, its individual members would have to possess the right to maintain an action. Shifting to the individual analysis, they utilized a test created by the United States Supreme Court to determine individual standing. First, a plaintiff must demonstrate an "injury in fact." This must be the invasion of a legally protected interest that is actual or real rather than "conjectural or hypothetical." Next, there must be a casual connection between the defendant's conduct and the alleged injury. Finally, the alleged injury will "likely" rather than "speculatively" be remedied by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In applying this test, the university argued that the student group had not satisfied this test because it failed to claim that any of its members had been denied an interview with the military or any member had been denied a service by the law school's placement office.

The court concluded that standing existed because the group's members "had been denied equal placement opportunities
because the Career Services Offices had allocated resources to the military, which would not, regardless of their abilities and talents, hire them." The court also, in reaching the standing conclusion, adopted the trial court's belief, apparently unsupported anywhere in the record, that members of the group were stigmatized and suffered anger and humiliation.

The court then analyzed the construction of the "notwithstanding" clause and rejected the argument of the defendants that the use of the phrase "notwithstanding any other provision of law to the contrary" mandates that military recruiters be afforded the same recruiting opportunities as civilian recruiters, regardless of any contrary laws, such as antidiscrimination laws. The court adopted the view of the plaintiff, which was that the statutory provision meant that military and nonmilitary recruiters are to be afforded equal and identical recruiting opportunities. The effect of this is that neither can use state, college and university facilities if they discriminate on the basis of sexual orientation.

To reach its conclusion, the majority opinion, like the principal dissent, engaged in an extensive and detailed analysis of the legislative history of the various measures being examined. Since only ROTC had been exempted from the gay rights law, the majority opinion presumed that the legislature did not intend to excuse the law school from complying with the gay rights law in its placement activity. "Had the legislature wanted to excuse state schools from complying with the gay rights law, it could have included such a provision."

The majority study of the legislative history caused it to conclude that the section specifically addressing recruitment on campus was designed to provide equal access to military and
civilian recruiters, not preferential access. Thus, the majority reasoned, the military should be subjected to the same conditions other employers faced (affording gay rights) in recruitment. The majority required a stronger showing than it found in examining the legislative history to reach a conclusion that the "notwithstanding" language was intended to override a measure of the perceived social significance afforded the gay rights law. The provision containing the "notwithstanding" language was enacted prior to the gay rights law, suggesting to the court that it would be unlikely that the legislature would have intended the prior law to overrule its subsequent enactment.

The principal dissent reviewed the legislative history and comes up with a different conclusion. The provision containing the "notwithstanding" language was enacted in direct response to a situation that existed in the mid '80s at the University of Connecticut Law School in which the law school faculty had prohibited the military from recruiting on campus because of the military's policy of discriminating against homosexuals.

Thus, according to the dissent, the legislature had previously addressed the issue currently before the court. The dissent further points out that the majority opinion "deprives" the "notwithstanding" clause of the statute of all meaning. In so doing, the majority departs from normal principles of statutory interpretation. The dissent concludes that the only valid interpretation of the "notwithstanding" clause is that it provides the military with a "unique" exemption from the anti-discrimination laws for the limited purpose of recruiting.

A doctoral student at Colorado State University completed his coursework but the defense of his dissertation was canceled because two members of his committee determined that he should do more research. Later, several members of his graduate committee left the university and the student was told to replace them.

About that same time the student submitted an article to an academic journal in which he stated in a footnote that the article was “based on a Ph.D. dissertation in process in the Department of Physiology at Colorado State University.”

The student was told by the department head that since he did not have a committee and was not actively enrolled as a graduate student, that “Until further notice, you will not represent yourself as a student of the Department of Physiology or utilize resources of the Department of Physiology including stationary, mailing privileges, or other privileges given an active graduate student.”

About a month later the student again submitted an article to another academic journal which contained a substantively identical footnote as the previous article. After learning of this second article submission, the department head summarily dismissed the student from the graduate program.

In his letter of dismissal to the student, the department head stated that the university could potentially suffer irreparable damage if the student continued to represent himself as a student in the department or to submit manuscripts implying that the content was consistent with the university’s standards. The student availed himself of the grievance procedures of the graduate school but his dismissal was ultimately upheld by the provost and academic vice president.
The court answered affirmatively the query: was the student’s dismissal disciplinary, rather than academic, thus requiring a pre-termination due process hearing. But the dismissal did not violate his First Amendment rights.

The court first reasoned that the dismissal of the student was disciplinary, rather than academic. The student was dismissed for failure to obey an order by the department head not to represent himself as a graduate student in the Physiology Department of Colorado State University. The court declared that the student’s "evaluation" "...with its letters, warnings, and subsequent grievance proceedings, looks, walks and quacks like a disciplinary determination." Since the student’s dismissal was disciplinary, requiring a pre-termination hearing, the student’s due process rights were violated.

As to whether the student’s First Amendment rights had been violated, the court noted that the "speech" to which the university objected was a footnote on the cover of the student’s manuscript which he submitted for publication. The court reasoned that this "speech" was not a matter of public concern. However, it further reasoned that even if it were a matter of public concern, the university’s interest in prohibiting such "speech" in this particular case outweighs the student’s interest in stating his affiliation.

The court declared that the university "...has an interest in ensuring the work its students disseminate to the public reflects the quality and standards consistent with its program. That interest is especially implicated when a probationary student who has no graduate committee or advisory
with whom he can consult is the one attempting to publish his work."

Cohen v. Brown University, _____ F.3d _____ (1st Cir. 1996).

This well publicized and closely watched litigation moved to its conclusion with the second decision of the Court of Appeals. This class action charges Brown University with discrimination against women in the operation of its intercollegiate athletic program in violation of Title IX. The suit began as a response to the "demotion" of the women's gymnastics and volleyball teams from university funding to donor funded status. Lesser privileges accompanied that status. The District Court found that Brown violated Title IX in the operation of its intercollegiate athletics program. The Court of Appeals, in a 43 page opinion, affirmed that analysis but found error in the specific relief awarded.

The decision's principal holdings were that: OCR's interpretation of Title IX was entitled to substantial deference; donor-funded teams were property excluded from the District Court's calculation of participation opportunities offered by the University; the District Court's interpretation of a three-part test of institutional compliance with participation opportunity requirements of Title IX was not a requirement of numerical proportionality or the imposition of a gender-based quota system; the University's "relative interests" approach to the allocation of athletic resources was not a reasonable interpretation of the three-part test; the University's allocation of resources to women's programs based upon the "relative interests" approach failed to accommodate fully and effectively women's interests and abilities, and that the District Court's order satisfied constitutional requirements.
Much of the decision discusses the three-part test contained in federal regulations and upheld by the court over the strenuous and creative objections of Brown. In summary, the test, as applied to Brown, inquires: (1) whether opportunities for athletic competition are provided for students proportionate to make and female enrollment; or (2) whether programs are expanding and are responsive to "the developing interest and abilities" of women; or (3) of expansion can't be whoen, that the interests and abilities of women have been "fully and effectively accommodated by the present program." The decision scathingly rejected Brown's interpretation of the test and observed: "Brown simply ignores the fact that it is required to accommodate fully the interests and abilities of the underrepresented gender...."

Back to the Future: Emerging or Continuing Issues and Notable 1996 Cases

**ADA:** Signifcant litigation continues as the scope of this statute is defined. Strict scrutiny of claims is occurring, with judgments for defendants common. The definition of disability is being strictly applied in many cases. The academic discretion standards of *Ewing* were applied in *Ellis v. Morehouse*, 925 F. Supp. 1529 (N.D. Ga. 1996).

**Anti-trust:** A sleeping giant, not to be aroused. An interesting case was *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 937 F. Supp. 435 (E.D. Pa. 1996), which held that the ABA didn't violate anti-trust law when it expressed its views on the quality of education provided by law schools.

**Community Relations:** See *Duke v. American University*, 675 A. 2d 26 (D.C. App. 1996) in which a neighborhood group was
unsuccessful in an attempt to block construction of a new law school building.

**Layoffs:** Courts have been busy addressing legal issues involved in RIFs in the business world and these standards are applicable to higher education as well. See, for example, *Herrero v. St. Louis University Hospital*, 929 F. Supp. 1260 (E.D. Mo. 1996).

**Religion:** The vitality of the 1st amendment was demonstrated by a free exercise case, *Goehring v. Brophy*, 94 F. 3d 1294 (9th Cir. 1996) and *Tanford v. Brand*, 932 F. Supp. 1139 (S.D. Ind. 1996), which involved an alleged violation of the establishment clause by the use of an invocation and benediction in a commencement ceremony.

**Sexual Harassment:** The materials for the plenary session cite the leading Title IX cases. An excellent compilation of those cases is contained in *Burrow v. Postville Community School District*, 929 F. Supp. 1193 (N.D. Iowa 1996). Title VII cases are trying to apply the *Harris v. Forklift Systems* tests in a coherent way.

**Tort:** A judicial reluctance to expand doctrines of liability was observed, even in the face of difficult factual situations. For example, see *Gebhart v. College of Mt. St. Joseph*, 665 N.E. 2d 223 (Ohio App. 1995) and *Shapiro v. Butterfield*, 921 S.W. 2d 649 (Mo. App. 1996). Foreseeability of injury, as in *Pitre v. Louisiana Tech. Univ.*, 655 So. 2d 659 (La. App. 1995), where 15 sledding accidents happened the prior year, continues to be a factor imposing liability.

**Unique and Amusing Cases:** *Zahavy v. Univ. of Minnesota*, 544 N.W. 2d 32 (Minn. App. 1996) is certainly one. Find out why, and hear about others, at the session.