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Legal Issues Department Chairs Often Face

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Kansas State University
32nd Academic Chairpersons Conference

Legal Issues for Department Chairs

February 6, 2015
Austin, Texas

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I. Academic Decision-making and Leadership

Achievement of high office or leadership should never be the sole aim of academic administrators and those aspiring to become such. Every academic decision should be a principled decision. It is not enough to comply with the law but to remain faithful to a higher set of ethical standards. In the nineteenth century, Lord Moulton described ethics as obedience to the unenforceable. Every decision an academic administrator or leader makes should consider the following questions as he or she ponders a course of action, particularly if the action impacts others:

- Is it just or fair? Does it treat people equally?
- Is the decision, truthful, civil, and humane?
- Does it inflict physical or emotional harm upon others? Can that harm at least be mitigated in achievement of the administrative objective?
- Does it benefit others directly or indirectly?
- If it benefits me, does it do so without harming others?

These principles complement and augment the discussion of the legal concepts outlined in the pages that follow.

A. Lawyer and Client: A Collaborative Venture

1. *The Client's Role:* To decide the goals and objectives to be served by the representation and to determine the general methods employed by the lawyer to accomplish the same.
2. *The Lawyer's Role:* To “take such action on behalf of the client as is impliedly authorized to carry out the representation” and to “consult with the client as to the means” to accomplish those goals and objectives. *American Bar Association, Model Rules of Professional Conduct, Rule 1.2(a).*

B. Averting Disputes

Colleges and universities and their subunits have rule-making (or policy-making) authority. A lawyer, human resources or equal employment opportunity professional should prove helpful in drafting clear and precisely defined rules, policies, and handbooks. When it is engaged in this rule-making authority, a college or university essentially is exercising a legislative function.

C. Leading Early Intervention and Conflict Management

A good leader can avert many formal grievances, civil rights agency filings, and lawsuits by simply keeping an open mind and listening to a contrary position. When it engages in this process of informal (or formal if a grievance has been filed) problem-solving, an institution is exercising judicial or dispute resolution functions. An effective and prudent leader, including a college or university administrator, does not entrench him or herself in a position (at least before listening to all the facts to be presented by all the parties to a dispute). The reason should be obvious—if one “digs in” before hearing the facts, one may later face a grim choice—to retreat and lose face or to adhere to a legally dangerous course.

Approaching a dispute, a three-step process is helpful:

1. *Analyze the Facts:*

a. Assess the situation:

- What happened?
- What facts are relevant?
- What information is needed for an informed decision?
- What methods of obtaining the information are available?
- What documentation exists?

b. Assess the actors

- Are there inconsistencies in a person’s story?
- Are these inconsistencies important?
- Is the person providing the facts credible or believable?
- Can the facts be corroborated?

2. *Apply the Rules:*

a. Identify the issues

- Whose rights and/or interests are at stake?
- Who should be consulted or informed and when?
- Have college or university policies been violated?

b. The Governing Authority

- What procedural rights apply, and who is entitled to them?
- Who is the initial decision-maker?

- To whom should any appeal be made?
- Is another authority involved (e.g, criminal justice system)?

3. *Ethical and Privacy Considerations:*

a. *Ethics* (essential to effective leadership)

- Does some state licensing statute apply?
- Does a code of professional responsibility apply?
- Who could be hurt if the situation is not properly handled?
- Do I have the authority and means to resolve the situation?
- Is the process respectful of the individual's integrity?
- Is my decision just?

b. *Privacy*

- Are someone's privacy interests implicated?
- What are those interests?
- Do I have a conflict of interest or bias that:
 - Impedes my ability to resolve the situation fairly;
 - Renders the resolution suspect; or,
 - Unnecessarily expose myself, others, or the institution to criticism or legal action?

D. Framing a Defense: Following Advice of Legal Counsel

1. *Consult early and often.* For several reasons, college and university administrators should consult often and early with legal and other professional advisors because:

- a. They may point out what the policy options are as well as the advantages and disadvantages of each option;
- b. They may have practical advice, for example, how to handle the meeting during which the employee is given the bad news;
- c. They may assist in drafting a proper termination letter.

2. *Tell the truth, the whole truth, and nothing but the truth.* Oftentimes, an administrator tells his or her lawyer and other professionals the good but omits the bad and the ugly. This tactic may be successful in the short run, for example, in securing their cooperation and assistance in accomplishing the policy objective, such as issuing a terminal contract; however, if litigation

ensues, one may rest assured that opposing counsel will scrutinize the administrator's actions and motives much more thoroughly.

PRACTICAL GUIDELINES FOR CHAIRS

A faculty or employee handbook, rule or policy document should:

- **Articulate the force of authority it carries, including whether or not it is binding contractually;**
- **State that it is subject to change without notice (if it is not contractual);**
- **State who the appointing authority is, generally the governing board, and that no administrator may bind the institution without the appointing authority's permission;**
- **State that tenure entitles a faculty member to continued employment absent termination for good cause;**
- **State that tenure does not create an entitlement ("property right" in legal terms) in any of the attributes of a faculty position beyond the base salary (and incidental benefits, such as health insurance), including promotion, laboratory space, a particular office, teaching graduate students, or use of research materials or equipment.**

A prudent college or university administrator:

- **Practices temperance or restraint in assessing a conflict by simply stating, "I'll need to take that under advisement and get back with you."**
- **Solicits advice of legal counsel early in a dispute because the administrator knows that the factual nucleus of the dispute is being framed at this stage and that good facts lead to favorable legal outcomes while bad facts lead to negative legal outcomes.**
- **Knows that consultation with and reliance upon advice of legal counsel will provide the administrator with a virtually airtight defense in the event of a lawsuit, provided the lawyer has been given the unvarnished facts.**

II. Judicial Review of Administrative Actions

It is a maxim among these lawyers that whatever hath been done before may legally be done again, and, therefore, they take great care to record decisions against the common reason of mankind and these, under the name of precedents, they use to justify the most iniquitous opinions, and the judges never fail of decreeing accordingly.
Jonathan Swift, Gulliver's Travels, A Voyage to the Land of the Houyhnhnms

Whatever the motivation, the federal and many state courts have utilized three mechanisms which greatly increase a university defendant's prospects of a favorable outcome: a) Giving great deference or weight to academic decisions made in accordance with internal college or university processes; b) disposing of cases by summary review of the facts prior to trial; and, c) honoring the common law and statutory immunities of academic administrators and summarily dismissing cases prior to trial.

A. Judicial Deference for Academic Decisions

The courts historically have shown great reluctance to intervene in the academic decisions of college and university administrators, even if they disagree with those decisions. This judicial deference has "common law roots," in that it been called "an integral part of our tradition of academic freedom, and it has won unanimous endorsement in recent years from the United States Supreme Court." *T. Schweitzer, "Academic Challenge' Cases: Should Judicial Review Extend to Academic Evaluations of Students?" 41 American University Law Review 267, 271 (1992).*

Because judges often find academic processes to be arcane, complex, and involving the exercise of technical or professional discretion, the courts generally have been reluctant to substitute their judgment for an academic judgment they believe was properly made, even if they disagree with the academic outcome. This second judicial mechanism, inuring to the benefit of academic decision-makers, may be simply described as "deference."

1. *El-Ghori vs. Grimes, 23 F. Supp. 1259 (D. Kan. 1998).* A professor, denied tenure because of alleged deficiencies in teaching and research, sued his dean, two colleagues opposing his tenure, the president, and the university, claiming defamation, gross negligence, and conspiracy to deprive him of equal protection of the laws. The quality of his performance was debated throughout the tenure review process and contested in court in a battle of experts. Declining to overturn the university's decision to deny tenure, the court concluded that "a federal court should respect the faculty's professional judgment and may override the decision only if it departs so substantially from accepted academic norms as to indicate the faculty did not actually exercise that judgment."

2. *University of Baltimore vs. Iz*, 716 A.25 1107, 1117 (Md. App. 1998). A female professor, denied tenure and promotion, sued for breach of contract and violation of civil and constitutional rights. The tenured faculty in her department, the dean, and the provost recommended against granting tenure while both her department chair and the college tenure and promotion committee supported her application. After investigating her claims of discrimination, the president denied tenure. The court asserted that “[t]he evaluation of the performance of a college professor and of his or her suitability to educational needs, goals and philosophies of a particular institution necessarily involves many subjective, non-quantifiable factors,” the assessment of which is “best performed by those closely involved with the life of the institution, not by judges.”
3. *Berkowitz vs. President and Fellows of Harvard College*, 789 N.E.2d 575,581 (Mass.App.Ct. 2003). A Massachusetts appeals court, in a tenure denial case, observed that the university’s mission to create and transmit knowledge requires that it possess “wide discretion in making the initial tenure award” because such decisions “necessarily hinge on subjective [judgments] regarding the applicant’s academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement.”
4. *Linkey vs. Medical College of Ohio*, 65 N.E. 2d (Ohio 1997). In a case involving an exception to judicial deference, a professor’s academic appointment commenced on July 1 of each year and ended on June 30 of the following year. Both by policy and practice, his appointment was considered renewed unless the college gave 90 days written notice of its intent not to renew. One year, the college gave notice on May 24 that the appointment would be extended to August 22 of that same year at which time his untenured employment would end. The Ohio Court of Claims found that the medical college breached the terms of its contract with the professor and ordered that a trial be scheduled to determine what his damages were.
5. *Analysis*: The distinction between the three university cases and the medical college case discussed above is that, in the university cases, an established evaluation policy was followed and a judgment made to deny tenure. The court declined to overturn this judgment. By contrast, while the medical college had the discretion to discontinue the appointment, it violated its own notice policy to the professor’s detriment. The court was unwilling to allow the college to violate its own policy.

B. Summary Dismissal of Cases

Today's federal and state judges are much more willing than their 1960's and 1970's predecessors to use summary judgment or summary dismissal of a case - that is, at the pre-trial stage, they examine the facts, based upon sworn depositions and statements (and supporting documentation). If they discover that those facts are not disputed, they can dismiss the case without fear of reversal because the courts of appeal seem to share a like judicial philosophy.

Twenty or 25 years ago, it was difficult for a defendant to win an employment law case in federal court on a pre-trial motion to dismiss because the judges reasoned that the courts of appeals would reverse anyway, especially if the record was ample, and give a plaintiff his or her day in court. Accordingly, such cases were tried. Today, defendants, including institutions of higher education, are not only winning in federal court but winning without even suffering the annoyance of a trial.

Whether this is attributable to a changing federal bench with a more conservative judicial philosophy, to the burgeoning judicial caseload, or to some other cultural factor or social demographic is not clear; however, the words of the Chief Justice of the Supreme Court may be viewed as a judicial barometer. Chief Justice William H. Rehnquist has noted the increase in filings in the various courts of appeals and offered that one approach to the problem is to "begin limiting the appeal as of right from the trial court to the court of appeals . . ." He juxtaposes the observation that the Judicial Conference of the United States, which is the policy-making body for the judiciary, "is strongly opposed to unlimited expansion of the federal judiciary .." ("*1995 Year End by Chief Justice William H. Rehnquist on the Federal Judiciary*," <http://www.uscourts.gov/ttb/jan96ttb/1yearend.html> .) The message to federal judges appears to be that resources for additional judges are not forthcoming and that the caseload may be alleviated by curtailing access to the courts. Three years later, speaking of the trend of Congress to federalize crimes, he expressed his own "states-rights" judicial philosophy:

The pressure in Congress to appear responsive to every publicized social ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether *we want most of our legal relationships decided at the national rather than local level* (emphasis added).

(*"The 1998 Year-End of the Federal Judiciary," Newsletter of the Federal Courts. Volume 31. Number 1 (January 1999)*).

In summary, while difficult to quantify, universities and their administrators appear to be the direct beneficiaries of the increasing conservatism of the courts, which, absent a clear violation of law or policy, are reluctant to overturn decisions of academic administrators.

C. Immunity for Academic Administrators

The third judicial mechanism, benefiting academic and other employers who must make difficult personnel and other decisions, is the common law doctrine of qualified immunity. Simply stated,

1. *Qualified Immunity*: The doctrine of qualified immunity shields public employees, including college and university administrators, who are sued in their individual (or private citizen) capacities for actions or omissions arising from their employment. It protects such officials from legal liability on two conditions:

- They performed discretionary functions; and,
- They did not violate someone's "clearly established" rights.

Discretionary (versus ministerial) functions involve the exercise of judgment. Further, a right is "clearly established" if:

- It is "clearly established" at the time of the alleged violations;
- A reasonable person would not have known it to be guaranteed right.

Subjective intent does not determine the conduct's reasonableness.

2. *Supervisor Liability*: Thus, administrators, who perform discretionary functions--that is, duties calling for the exercise of judgment--may not be held liable for civil damages, provided their actions are determined to have been objectively reasonable. *Williams vs. Baumer, 180 F.3d 699, 703 (5th Cir. 1999)*. To recover under federal civil rights laws, a plaintiff must show that:

- The supervisor acted under color (authority) of state law, **and**,
- Deprived the plaintiff of his or her federal rights, **and**,
- Did so with deliberate indifference to those rights.

Deliberate indifference is disregard of known/obvious consequences of one's acts and must involve some level of participation or involvement in the wrongful conduct. Merely inept, erroneous, ineffective, or negligent actions do not create liability.

3. *Case Example*: Denied admission because of a policy favoring long-term state residents, applicant sued a state medical school and the admissions committee co-chairpersons, both in their official and individual capacities. The trial court found that the co-chairpersons should have known that they

were denying the applicant a clearly-established right to travel and refused to dismiss the complaint against them. The federal appeals court dismissed her claims against the co-chairperson, finding that the applicant's right to travel was not clearly established. The court opined that, when the immunity defense is raised, the plaintiff has two burdens: 1) to demonstrate that the law was clearly established when the alleged violation occurred; and, 2) to prove factually the government official violated the law. The court stated that "[a] denial of qualified immunity may be immediately appealed because immunity protects defendants not only from liability but also from having to endure the 'burdens of litigation.'" *Buchwald vs. University of New Mexico School of Medicine*, 159 F. 3d 487, 492 (10th Cir. 1998).

PRACTICAL GUIDELINES FOR CHAIRS

In making decisions, academic administrators should bear in mind that:

- **The courts generally will defer to academic decisions and are reluctant to substitute their judgment for the judgment of academic administrators.**
- **Being lawyers, judges value following process and will reverse an academic decision in which the institution failed to follow its own rules.**
- **Absent a showing of malice, bad faith, or conduct that a reasonable person should have known violates another's rights, an academic administrator is unlikely to be held personally liable for his or her discretionary decisions.**

As to their legal immunities, college and university administrators should consider:

- **Criticism of their decisions, including lawsuits, today is just part of the business of higher education administration.**
- **If they work for a state public institution and are sued in their official capacities, they are the government and may not be sued in federal court (or in most state courts).**
- **They enjoy qualified immunity for good faith, discretionary decisions made in the course and scope of their employment. Exceptions to this immunity are based on two conditions:**
 - a) **That the plaintiff prove his or her constitutional rights were violated;**
 - b) **That those rights were clearly established at the time, that is, that a**

reasonable administrator would have known his or her conduct was unlawful.

- **Good faith implies pure motive, a decision made for the good of the institution, rather than a decision motivated by malice, spite, or ill will toward another individual. Simply put, it means doing the right thing for the right reason.**
- **A discretionary decision is one requiring the exercise of judgment, a decision in which a policy (or set of rules) does not proscribe or direct the administrator's course of action.**
- **Consultation with and reliance upon advice of legal counsel provides a nearly airtight defense to a lawsuit brought against the individual administrator.**

III. The Employment Relationship: The *Fourteenth Amendment* and Due Process

A. Relationship between Faculty and the Academy

Thomas Jefferson reputedly founded the University of Virginia because he was unable to secure what he believed to be adequate public control of the College of William and Mary. He argued that public institutions must answer to the public. The American Association of State Colleges and Universities (“AASCU”) notes that, in the generation since Watergate, the public has demanded greater management accountability from colleges and universities, a manifestation of which is the fact that by the mid-1990's more than a third of the states linked assessment and resource allocation. AASCU observes that, coupled with “the campuses’ own adoption of efficiency measures,” this mood of accountability has made “most public colleges and universities . . . far leaner institutions . . . [t]hey have shrunk faculty, programs, and staff and reallocated resources internally.”

1. *Public versus Private Institutions:* The relationship between faculty and the academy has been governed by contract and/or by federal (and/or state) statutory or constitutional law. In the case of private institutions, the primary relationship is contractual although private institutions may be bound by federal laws, such as the *Civil Rights Act of 1964*, which prohibit race, color, religion, national origin or sex discrimination and, consequently, circumscribe the ability of the institution to impact faculty rights. Conversely, public institutions may be governed by contract, but the protections conferred by the United States *Constitution* or by the constitutions and laws of the various states are often more critical in defining the relationship of faculty and their employing institutions.

2. *What a Contract Is:* A contract is a document, formalizing an intent by two (or more) willing parties to bind themselves to each other in exchange for something of value (customarily called “consideration”). The contract can be oral or written. It can be evidenced by a formal document (such as an appointment letter), by an oral representation by an institution official with apparent authority to bind the institution (for example, a department chair or dean), or by the terms of a faculty handbook or other policy manual. Letters of appointment are the documents most likely to give rise to a contract claim, especially if procedures outlined in the faculty handbook for termination of a faculty member are not followed. Many handbooks require the giving of advance notice (commonly one year) of intent not to renew a faculty member’s appointment. Oral contracts are sometimes created unwittingly when an administrator expresses an intent or promise of continued employment, which is relied upon by the faculty member and becomes the “basis of the bargain.” Finally, sometimes a faculty handbook or similar policy document can be construed as creating a contract, provided the handbook evidences a clear intent on the part of the institution to be bound contractually.

B. Principles of Due Process

Due process is a much overused and poorly understood doctrine; oftentimes, it is erroneously asserted when a personnel decision is made with which an employee disagrees. While the concept of due process is clearly inapplicable in a private institution setting, such institutions commonly promulgate policy handbooks containing the below-stated three elements of due process – notice, opportunity to be heard, and an impartial decision-maker. Upon hearing the assertion that due process rights have been violated, an academic administrator should undertake a three-part analysis:

1. *Property Rights:* Does the individual asserting due process enjoy a property or contractual right, such as tenure, or otherwise have the right to continue in his or her employment or education unless terminated or disciplined for good cause; or, alternatively,
2. *Liberty Interests:* Has the individual lost some “liberty” interest, such as his or her reputation or economic standing as a result of the actions of the institution; and, finally,
3. *What Process Is Due?:* If either question yields a “yes” answer, what process is due the individual under institutional policy. For practical purposes, in the academic employment or student discipline areas, “due process” refers to this latter concept, namely, the procedures to be followed when taking away someone’s property or contractual right in his or her job (or continued

education) or liberty interest (generally, in his or her good name or reputation).

While institutional legal counsel can assist the academic administrator to discern whether a property right or liberty interest is at stake, the administrator does well to focus on the third prong of the above-stated analysis—that is, what process is due an employee or student who enjoys such a property right or liberty interest.

4. *Due Process “in a nutshell”*: The *Fourteenth Amendment’s* Due Process requires public institutions (again, a private institution’s policy documents govern the process due) to provide an accused person the following three fundamental rights, which may be represented by the acronym, NOD:

- **NOTICE**: The professor whose tenured is being revoked and the untenured professor who is being terminated in the middle of his or her contract is entitled to notice of:
 - The behavior precipitating the adverse decision; and,
 - The rules or policies he or she has violated.
- **OPPORTUNITY TO RESPOND**: The accused individual must be given a meaningful and timely opportunity to challenge the institution’s action;
- **IMPARTIAL DECISION-MAKER**: The accused individual is entitled to an impartial decision or ruling on the validity of the institution’s action.

C. Making a Sustainable Decision to Terminate Employment

For most college and university administrators, termination is the least pleasant part of the job. In the case of a tenured professor (who, by law or policy, enjoys a property or contractual right in continued employment) or a professor being terminated before the expiration of his or her contract, the college or university must not only show good cause for the termination but also afford the professor the panoply of procedural rights mentioned above.

The difficulty in terminating is twofold. First, a termination, as with the ending of any human relationship, is inherently confrontational, especially when one party wishes to continue that relationship and the other does not. Second, the prospect of litigation by the employee (inevitably accompanied by public accusations, inevitable requests for documents and records, disruption of normal academic processes, and potential for both institutional and personal financial loss) is a

frightening thought for any college or university administrator. Thus, a college or university administrator contemplating an employee termination would do well to consider the following three-part, twelve-question analysis:

1. *Do a Self-Examination*

- What are my reasons for termination?
- What factor(s) precipitate my action?
- What rule or policy has the employee violated?
- What discipline, if any, have I previously administered?

If the supervisor cannot articulate the reasons for termination at the time he or she takes the action, attempting to discern the reasons after the fact will not only be difficult but may end up sounding contrived. This approach requires introspection and planning. How serious is the infraction? If the violation is relatively minor and the employee has no prior disciplinary problems, why is termination being considered? Is it in reaction to a spur of the moment emotion, such as anger? What outside pressures are being brought to bear? For example, if for ten years the employee has been taking long lunch hours and not been disciplined but happened to be late returning from lunch on a day the provost happened to drop by, termination seems inappropriate.

2. *Consider the Employee's Position and Rights*

- What kind or class of employee is it?
- What factors favor him/her (e.g., long service, speech activity)?
- What process, if any, is the employee due?
- What reaction(s) are likely from the employee or others?

The supervisor should consider the employee's point of view in making his or her termination decision because a reviewing authority, such as a federal or state civil rights agency, judge, or jury surely will. Many trial lawyers believe that a lawsuit is often won on its facts, and the supervisor plays a major role in establishing the facts in a particular case. The first factor in considering the employee's rights is to determine first what his or her job position is; if he or she is an employee "at will"; what legal authority exists to sustain discharge? Exercising that authority, however, may not be wise if he or she is a 25-year disabled, minority, female employee, who just wrote a very unpopular guest editorial in the local newspaper about legalizing marijuana. It is not suggested that any employee or class of employees should be immune from discipline, simply that a wise administrative decision is less likely if the employee's probable view of the case is not considered.

3. *Focus on a Positive Resolution*

- What alternatives to termination are there?
- What severance, if any, is reasonable?
- What are the upsides and downsides of a negotiated resolution?
- Whom must I consult or advise?

Negotiations should not focus on fault or statement of reasons for termination but on finding a “win-win” resolution that ends the employment relationship and leaves both parties as intact as possible and with some semblance of dignity. People settle employment disputes for many reasons—putting an end to an unpleasant relationship, repairing programmatic situations that have malfunctioned, bringing peace or stability to other employees, risk of losing a lawsuit (including the prospect of personal liability), desire to eliminate time wasted in dealing with a disruptive employee, and avoiding the consequences of negative or adverse publicity.

4. *A Note on the “At Will” Doctrine*

The “at will” or “at the pleasure” doctrine refers to the right of either the employer or the employee to end the working relationship at any time and without the obligation to state the reasons. Nevertheless, the law has carved out a number of exceptions to the employer's exercise of this awesome power, including the following:

- Discrimination (race, color, religion, national origin, sex, age, disability, and, in some cases, sexual preference or gender identity);
- First Amendment, activity (speech, association, religion);
- Filing a worker’s compensation claim;
- Whistle blowing activity;
- Employee refusal to perform an illegal act;
- Engaging in any activity protected by law (e.g., union organizing);
- Prohibition by federal or state law (e.g., voting, jury service, or testifying pursuant to a subpoena).

IV. The Concept of Diversity: *Fourteenth Amendment* Origins

A. Historical Underpinnings

The post Civil War amendments to the United States Constitution provided the historical underpinnings for the concept of equality for previously disenfranchised Americans. The *Thirteenth Amendment* outlaws slavery; the *Fourteenth Amendment* guarantees equal protection of the laws; and, the *Fifteenth Amendment* prohibits racially discriminatory denial of the right to vote. Congress gave force to these

amendments by passing the *Civil Rights Act of 1866*, which guarantees the right to make and enforce contracts, and the *Civil Rights Act of 1871* (also known as the *Ku Klux Klan Act*), which prohibits state government officials from using their authority to deprive any person of rights guaranteed by the federal constitution and laws.

The concept of using federal executive authority to achieve racial equality first surfaced when President Franklin D. Roosevelt prohibited segregationist hiring practices by defense industry federal contractors (*Executive Order 8802 (1941)*). In 1953, when President Harry S. Truman's Committee on Government Contract Compliance prodded the Bureau of Employment Security "to act positively and affirmatively to implement the policy of nondiscrimination," the notion of taking affirmative measures to correct discriminatory practices entered the American lexicon.

President John F. Kennedy first employed the term "affirmative action" in creating the United State Equal Employment Opportunity Commission. Each federal contractor was required to pledge "to take affirmative action, to ensure that applicants . . . and . . . employees are treated during employment, without regard to their race, creed, color or national origin." *Executive Order 10925 (March, 1961)*. Three years later, Congress sanctioned this executive order and expanded it by adding a prohibition against sex discrimination. *Civil Rights Act of 1964 (Title VII)*.

In a 1965 commencement address at Howard University, President Lyndon B. Johnson argued that more than impartial treatment was required:

You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you're free to compete with all the others,' and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity.

True to his word, he signed *Executive Order 11246 (1965)*, requiring federal contractors to "take affirmative action to ensure that applicants are employed" and receive nondiscriminatory treatment after employment.

Finally, in 1971, President Richard M. Nixon's Department of Labor required all contractors to make "every good faith effort to make all aspects of the entire affirmative action program work." *DOL Revised Order No. 4*.

B. The Supreme Court and Higher Education Diversity Cases

As regards college and universities, in 1979 when the United States Supreme Court, in a plurality opinion, found that "race conscious" admissions policies were constitutional, provided race was only one of many factors considered. *Regents of*

the University of California v. Bakke, 438 U. S. 265 (1978).

In *Grutter v. Bollinger, 639 U.S. 306 (2003)*, the University of Michigan Law School considered race as one factor among many in the effort to attain what the school called a “critical mass” of diverse students. Plaintiff Caucasian students, who were denied admission, complained that the law school’s admissions practices were discriminatory and violated both the *Fourteenth Amendment’s* “Equal Protection” clause and *Title VII of the Civil Rights Act of 1964*. The University’s defense was that diversity served a compelling academic need and thus justified the school’s narrow use of race in both its law school and its undergraduate school.

Justice O’Connor (joined by Justices Stevens, Souter, Ginsburg, and Breyer) adopted Justice Powell’s view from *Regents of the University of California v. Bakke* that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” She stated that public and private universities across the nation have modeled their admissions programs on Justice Powell’s views, finding that race “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”

In an opinion that was as much a statement of educational philosophy as of law, the Court found that the educational benefits of diversity “are not theoretical but real” and include “cross-racial understanding” and the breaking down of racial stereotypes. It mentioned research showing that “student body diversity promotes learning outcomes . . . better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” It noted that major American businesses have suggested that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints,” and that military leaders have asserted that “a highly qualified, racially diverse officer corps” is essential to national security. Finally, the court reasoned that, “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

According to research studies (Gruin, 1999; Humphreys, 1998; Hurtado, 2003; Hurtado, 2005; Maruyama & Moreno, 2000; Smith, 1997), integration of diversity into the curriculum and into college and university life and culture in general has the following beneficial outcomes:

- Increased Student Learning Outcomes
 - Complex thinking skills;
 - Critical thinking skills;
 - Intellectual self-confidence;
 - Motivation to achieve; and
 - Institutional satisfaction and involvement.

- Increased Student Citizenship Outcomes
 - Ability and motivation to understand the perspectives of other people;
 - Social and cultural awareness;
 - Interaction with people different from self;
 - Leadership skills;
 - Motivation to be involved in the community;
 - Perception that difference is important to democracy; and
 - Willingness to engage in complex, diversity-related conversations.

Although these Supreme Court rulings promoting diversity in public institutions do not apply to private colleges and universities, the traditional values that are core to the mission of Loyola Marymount University and other similar mission institutions have provided guidance and leadership that public institutions would do well to emulate. Specifically, the third prong of this University’s mission is to advance the SERVICE OF FAITH, justice and inclusiveness, a value clearly consistent with the aspirations of both the Supreme Court and several presidents.

V. Student Privacy Issues

A. Federal Law: *Family Educational Rights and Privacy Act*

Congress enacted the *Family Educational Rights and Privacy Act of 1974* (“*Buckley Amendment*” or “*FERPA*”) with two overarching purposes in mind:

1. To guarantee students and parents access to the students' educational records; and,
2. To restrict access by others to such records. See *20 United States Code, Section 1232g(b)* and the enabling regulations promulgated by the United States Department of Education, *34 Code of Federal Regulations Part 99*.

B. Applicable Definitions

1. *Educational Records*: “Education records” include information related directly to a student or former student that is maintained by the institution. The following are not considered education records:
 - Records of instructional and certain other personnel that are in the sole possession of the maker;
 - Law enforcement records;

- Employment records;
- Counseling, medical, and psychiatric records; and,
- Records made or maintained in the normal course of the institution's business.

2. *Directory Information:* “Directory Information” means information contained in a student's education records that would not be considered an invasion of privacy or otherwise harmful to the student if it is released. It includes, but is not necessarily limited to: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized sports or other activities, weight and height (for members of athletic teams), dates of attendance, degrees and awards earned, and the most recent educational institution attended.

Upon enrollment and annually thereafter, the educational institution notifies students of the information it intends to publish as directory information and permits individual students to prohibit release of such information by notifying the registrar or other appropriate school official. The notification must inform students and parents their right to:

- Inspect and review the student's educational records;
- Seek amendment of inaccurate or misleading information;
- Consent to (or decline) disclosure of personally identifiable information that the school wishes to designate as directory information; and,
- Complain of *FERPA* violations to the U.S. Department of Education.

3. *Personally Identifiable Information:* The general rule on handling student records is both simple and complex--simple because the law clearly prohibits release of “personally identifiable information” on a student, complex because there are so many exceptions and nuances to the exceptions. Simply put, an educational institution may not release:

- A student or former student's name;
- His or her parent or family member's name;
- The student or family member's address;
- Any other personal identifier, such as a social security number;

- A list of personal characteristics that would make the student's identity easily traceable; and,
- Any other information that would make the student's identity easily traceable.

The obvious exceptions include the eight instances listed below (“Lesson” section under “Who has access?”) as well as “Directory Information” (see above) although, even in that situation, social security number, to the best of the author's information and belief, is universally excluded from the litany of items that institutions designate as directory information.

Operationally, the question of personally identifiable information arises, not with respect to the normal administrative processes of the institution, but rather involving a third party, such a faculty or staff member. For example, if an assistant football coach, concerned about a star athlete's eligibility for an upcoming rivalry game, asks a professor how the athletes in his or her class are faring this semester, the professor may not respond, especially if the only athlete in the class is the football player in question. Of course, if the student agrees in writing to release of the information, the professor may discuss his educational records with the coach.

Another, not uncommon, example involves a case in which a professor's classroom conduct or effectiveness as a teacher is called into question; and, in evaluating the professor, the dean's office wishes to rely upon student comments made on a faculty teaching evaluation form. In making his or her comments, a student is personally identified, for example, by a comment that he or she, as the only member of a particular ethnic group is in the class, was offended by a racist remark. The professor demands to see the specific student evaluation forms. It might reasonably be argued that in so identifying him or herself, the student waived any *FERPA* privacy rights or that the form is not an educational record but a business record of the institution and, therefore, not subject to *FERPA*. In any case, the best practice is to secure the student's permission before disclosing the personally identifiable comments for two reasons. First, to do so would certainly be within the spirit if not the letter of *FERPA*; second, from a practical vantage point, due process may entitle the professor to view the evidence to be used against him in a disciplinary or performance evaluation proceeding.

4. *Penalties for Violations of FERPA*: The Family Policy Compliance Office, U.S. Department of Education, has authority to receive and investigate complaints that an educational institution has violated *FERPA* and, after providing the institution opportunity to submit written or oral arguments in response, to determine whether or not the institution violated the Act.

Complaints must be brought within 180 days. The penalties for violation include:

- The withholding of further payments to the institution under any applicable program;
- The issuing of a complaint to compel compliance through a “cease and desist” order; or,
- Termination of eligibility to receive federal funding under any applicable program.

Finally, it should be noted that *FERPA* does not provide a student, parent or other individual the right to sue an institution of higher education, either for an injunction to compel compliance with the law or for money damages, court costs, attorney's fees or any other monetary relief. An aggrieved party's sole remedy is an administrative one through the U.S. Department of Education.

PRACTICAL GUIDELINES FOR CHAIRS

- **Who is protected?** **Current and former students.**
- **Are applicants for admission protected?** **Applicants have no right under *FERPA* to access their admission files (including letters of recommendation) because they have not been “in attendance”; however, state open records laws may grant access if the school is a public institution.**
- **Who has access?**
 - 1. The student.**
 - 2. Anyone with student's written permission.**
 - 3. Parent or guardian if student is dependent for federal income tax purposes.**
 - 4. Person who has secured a judicial order or lawfully-issued subpoena.**
 - 5. School officials with legitimate educational interests and schools officials where student seeks to enroll.**

- 6. For financial aid purposes to determine eligibility, amount, enforcement of aid conditions.
 - 7. In case of health or safety emergency posing significant risk to student or others.
 - 8. State and federal officials for research purposes.
- When must the school note, in student's file an action taken?
 - 1. Upon parent or guardian's request.
 - 2. When school official is denied access.
 - 3. When other parties make a request.
- When is student's permission to disclose records required?

For any disclosure not falling within the above-stated exceptions (items 1-8), including disclosure to a parent or guardian upon whom the student is *not* dependent for federal income tax purposes.
- How are disciplinary records handled?

The school may, but is not required to release Disciplinary records (name, violation, and sanction) to anyone if the act is a crime of violence or a non-forcible sex offense.
- How are law enforcement records handled?

Records held by campus enforcement unit *for law enforcement purposes* are not considered educational records, and disclosure is neither required nor prohibited. Such records are treated the same as municipal law enforcement records, and access to them is governed by state law. If records are held for other than law enforcement purposes, they are treated as educational records for purposes of access.
- To which of his/her records is a student not entitled?
 - 1. Confidential letters of recommendation.
 - 2. Parents' confidential financial information.
 - 3. Items not defined as educational records (although state open records laws may grant access).

C. *Patriot Act of 2001*

The *Patriot Act of 2001* has ten components or titles, including but not limited to: enhancing domestic security against terrorism, removing obstacles to investigating terrorism, increased information sharing, and improved intelligence. The Act defines domestic terrorism as involving criminal acts that are “dangerous to human life”; “occur primarily within the territorial jurisdiction of the United States”; and “appear to be intended (i) to intimidate or coerce a civilian population ; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping. . .” The Act impacts higher education by its amendment of the following statutes:

1. *Family Education Rights and Privacy Act. FERPA* was a congressional response to perceived Viet Nam and civil rights era abuses involving the sharing, with the government, of student records. The *Patriot Act* amends *FERPA* by providing for an “emergency disclosure” of student records. Thus, if a federal official, for example, the U.S. Attorney’s Office, secures a court order in furtherance of a terrorist investigation, the law now permits student educational records to be released without the student’s consent and without a showing of probable cause that the student committed a crime. However, the educational institution is not legally liable for disclosing the information; nor, is it required to make a record of the release.

2. *Foreign Intelligence Surveillance Act of 1978.* This statute exempts law enforcement authorities from following *Fourth Amendment* procedures (this amendment protects against unreasonable searches and seizures) if they believe that a “hostile foreign power” is promoting criminal activity. *FISA* authorized a seven-federal judge panel to meet in closed session to consider applications (which themselves were permanently sealed) for subpoenas and warrants. The *Patriot Act* amends *FISA* as follows:
 - The federal judicial panel is increased from seven to eleven members;
 - Electronic media and data are added to the statute’s reach;
 - In its investigation of “international terrorism or other clandestine intelligence activities,” a federal agency can seize certain business records;
 - The investigation may not include “a United States person solely on the basis of activities protected by the first amendment . . .”;
 - The record keeper is prohibited from disclosing the request to anyone except for “persons necessary to produce the tangible things” requested.

3. *Electronic Communications Privacy Act of 1986.* With exceptions, the purpose of this act is to protect privacy of communications in the electronic environment. The principal exceptions include consent of at least one party to a communication (e.g., the recipient of an e-mail message may disclose its contents without the sender's consent); operators in the course of business (for example, an operator who overhears a conversation); and law enforcement people acting under color of law (e.g., pursuant to subpoena). The Act applies to "providers of internet services to the public," which may or may not include colleges and universities. The *Patriot Act* amends *ECPA* as follows:

- It expands the authority of federal law enforcement officials to secure search warrants for electronic evidence (for example, a federal subpoena, wherever obtained, is valid nationwide);
- It requires a provider of computing or electronic services to disclose customer communications or records to the government pursuant subpoena, judicial order, or simply a letter from the Attorney General;
- It requires a provider of computing or electronic services to disclose telephone connection and subscriber data; a showing of probable cause that a crime has been committed is not required;
- It requires a provider of computing or electronic services to disclose stored voice mail communications without necessity of a wiretap authorization;
- It provides that anyone who accesses a protected computer without authorizations has no reasonable expectation of privacy.

4. *Additional Effects:* In addition, the *Act* has the following effects:

- It gives law enforcement officials broad access to a variety of records(library use, sale, financial, and medical record) without having to show probable cause (*Sections 215, 505*);
- Under threat of jail, holders of such records are prohibited from disclosing that they have produced them (*Sections 215, 505*);
- It permits the gathering of information from student political meetings and religious ceremonies without probable cause via video surveillance and otherwise (*Sections 203, 901*).

PRACTICAL GUIDELINES FOR CHAIRS

- Create or follow a “chain of command” for processing of electronic information.
- Authorize or permit a custodian of records to deal with requests by persons representing themselves as law enforcement officials for the contents of any electronic data base.
- If you have reason to believe that any electronic system has been compromised, report the same immediately through the chain of command.
- Create or follow policies that reasonably advise students and other users of college and university electronic networks that they have no reasonable expectation of privacy as to data they create, retrieve, or otherwise maintain on those networks.
- Recognize that student rights of privacy are fairly absolute because of *FERPA*, the primary purpose of which is to protect privacy. In brief, if it is a student record, presume that it may not be disclosed without the student's written permission.
- Recognize that no comparable federal law protects faculty or employee personnel records and that, in a public institution setting, the primary purpose of state open records laws is to provide public access to government records.

VI. *The Americans with Disabilities Act*

The *Americans with Disabilities Act* (“*ADA*”) is intended to provide qualified students with disabilities equal access to all services available to the general student population. The disabled must be afforded the opportunity to participate in or benefit from a “good, service, facility, privilege, advantage or accommodation” that is “equal” to that afforded others. “Separate but equal” is *verboten*. The *ADA* is considered an anti-discrimination, civil rights statute.

- What is a Disability?

The *ADA* defines a disability as:

1. A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
2. A record of such impairment; or,
3. Being regarded by others as having an impairment.

- **What is a Physical or a Mental Impairment?**

The law recognizes two categories of disability:

1. **Physical Impairment, including sensory impairments (such as vision or hearing impairments) and physical impairments (such as orthopedic and neuromotor impairment); and,**
2. **Mental impairment, including cognitive (e.g., mental retardation and learning disabilities) and mental or emotional disabilities.**

- **What are “Major Life Activities”?**

Section 504 of the Rehabilitation Act of 1973 defines “major life activities” as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working..”

- **What Obligations Does a Disabled Student Have?**

1. **Such a student must request an accommodation in the first instance, not presume that the institution knows of his or her disability or of his or her need for an accommodation.**
2. **The student must demonstrate to the institution that he or she suffers from a physical or mental impairment of a major life function.**
3. **If the institution proffers an accommodation that the student considers insufficient, he or she must demonstrate why the proffered accommodation is insufficient.**

- **How Does an Instructor Deal with a Request for Accommodation?**

This would depend upon the policies of the the institution. If the institution has an office of disabled student services, such office should be involved from the outset by an instructor who is made aware by a student of a request for an accommodation so that the instructor, the institution and the student can work

together as a team to effect a reasonable accommodation. If the student shares his or her need for an accommodation with one instructor but not another, neither the institution nor the other instructor should be held responsible for failing to provide a reasonable accommodation.

- **May the University Require Advance Notice of a Request for Interpreters? How Much Advance Notice Can Be Required?**

It is not unreasonable to require students to provide advance notice of their need for interpreters, especially where locating qualified interpreters may be difficult. How much notice can be required would depend upon the circumstances of each case. Also, the institution may impose reasonable requirements for use of interpreters, such as advance notice of intent to cancel use. For example, a student who is provided an interpreter for class use and consistently misses class without timely notifying the institution, thereby causing needless expenditure, can probably be denied that particular accommodation in the future.

- **Are “Disorders” as Opposed to “Disabilities” Covered by ADA?**

Generally, students with emotional disabilities are covered by the *ADA* if they are otherwise qualified to attend the institution. Psychiatric problems, including the inability to handle stressful situations, schizophrenia, manic depressive syndrome, depressive neurosis, and serious emotional disturbance have been identified by the Bureau of National Affairs as substantially limiting a major life activity. If the emotional or psychiatric disorder meets the test for disability articulated by *ADA*, it would be covered.

- **Once Disabled, Always Disabled?**

A student with a history of a disability but who is not currently disabled may not be discriminated against under the *ADA*. For example, a student with a heart condition, who has been released by his or her cardiologist, may not be prohibited from trying out for the women’s volleyball team. However, it would be wise to verify her medical release and secure

a release of claims from her. The student has the obligation to notify the institution of her disability. A student who fails to so notify the institution likely will be unable to hold the institution responsible, either for failing to make the accommodation or for personal injury (or death) occasioned by failure to make the accommodation.

- **What is Not Covered by ADA?**

ADA explicitly excludes the following:

1. Transvestism, transexualism, homosexuality and bisexuality;
2. Compulsive, kleptomania, and pyromania.
3. Psychoactive substance use disorders resulting from current illegal use of drugs; and,
4. Sexual behavior disorders, such as pedophilia and exhibitionism.

- **Does the ADA Protect Drug Abusers?**

Yes, if the person is a recovering drug addict. Persons who are addicted to drugs but are no longer using drugs and who are under treatment or have been successfully rehabilitated may not be discriminated against because of their prior drug use. However, current illegal users of drugs are not considered individuals with disabilities entitled to the protections of the *ADA*.

- **Does the ADA Protect Alcoholics?**

Yes. An alcohol abuser, even one who is currently abusing alcohol, is not necessarily denied the *ADA's* protections provided he or she is qualified to perform the essential functions of a job. Moreover, the *ADA* explicitly permits an employer to:

1. Prohibit the use of alcohol in the workplace;
2. Require employees to not be under the influence in the workplace; and,

3. Hold alcoholic employees to the same job standards as other employees.

- **Are There Exemptions to the ADA?**

Yes. The institution may refuse to provide an accommodation:

1. If the institution can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facility, privilege, advantage or accommodation being offered; or,

2. If providing the auxiliary aids and services would be an undue burden or hardship – that is an, action requiring significant difficulty or expense when considered in light of the following factors:

a. the nature and cost of the accommodation;

b. the overall financial resources and workforce, of the institution; and,

c. the type of operations of the institution, including the composition and functions of its workforce and administrative and physical relationships.

- **What Kinds of Pre-Admission Inquiries Are Acceptable?**

As with pre-employment inquiries, the *ADA* prohibits inquiries into the existence or nature of a disability. Such inquiries must be limited to the applicant’s qualifications for admission. Inquiry can probably be made of all students as to whether they can perform the requirements of the particular academic program. The focus of the inquiry must be bona fide and not geared to determining who is or is not disabled.

VII. Sexual Misconduct and Harassment

A. Sexual Misconduct - Campus Accountability and Safety Act (Title IX)

The topic of sexual misconduct on college campuses has generated extensive media coverage with both the legislative and the executive branches of the government calling attention to this very serious topic. The Violence Against Women Reauthorization Act (“VAWA”), imposes new obligations on colleges and universities under its Campus Sexual Violence Act (“SaVE Act”) provision, Section 304. Under VAWA, colleges and universities are required to:

- Report domestic violence, dating violence, and stalking, beyond crime categories the Clery Act already mandates;
 - Adopt certain student discipline procedures, such as for notifying purported victims of their rights; and
 - Adopt certain institutional policies to address and prevent campus sexual violence, such as to train in particular respects pertinent institutional personnel.
1. A top priority of every college and university should be the prevention of all forms of sexual misconduct.
 2. Recent legislative and federal regulatory actions require institutions of higher learning to implement certain procedures for
 - reporting;
 - investigating; and,
 - adjudicating,all types of sexual misconduct matters whether occurring on or off campus.
 3. These legislative changes also require campuses to provide educational prevention and awareness programs addressing matters such as
 - rape;
 - domestic violence;
 - dating violence;
 - sexual assault; and,
 - stalking.

4. The law expects that educational and awareness programs be extensive and on-going.
5. To ensure compliance with the legislative changes, institutions of higher learning must refer to
 - federal law;
 - state law; and,
 - federal regulatory actions.
6. Sexual Misconduct is a broad term encompassing a range of non-consensual sexual activity or unwelcome behavior of a sexual nature. The term includes but is not limited to sexual assault, sexual exploitation, sexual intimidation, sexual harassment, domestic violence, dating violence, and stalking. Sexual misconduct can be committed by men or women, strangers or acquaintances, and can occur between or among people of the same or opposite sex.
7. Applicability of Policy. A sexual misconduct policy should apply to all students, faculty, staff, and third parties within the institution's control. The policy should prohibit sexual misconduct committed by or against a student, faculty, staff, or third parties, and apply to sexual misconduct:
 - on the institution's premises;
 - at institution-affiliated educational, athletic, or extracurricular programs or activities;
 - that has an adverse impact on the education or employment of a member of the institution community; or
 - that otherwise threatens the health and/or safety of a member of the institution community.
8. Responsible Employee refers to a campus employee who has the authority to redress sexual misconduct; who has the duty to report incidents of sexual misconduct to the Title IX Coordinator or other appropriate designee, or whom a student could reasonably believe has this authority or duty. Responsible employees shall include all administrators, faculty, staff or student workers.
9. Applicability to Department Chairs. While day-to-day management and enforcement of a college or university sexual misconduct policy principally reposes in the student affairs side of the institution, department chairs should

be aware of the above referenced laws and vigilant about recognizing and acting upon sexual misconduct when it occurs in the academic area.

B. Sexual Harassment - A Form of Sex Discrimination

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's color, religion, sex, or national origin. The United States Supreme Court has held that sexual harassment is a form of sex discrimination. The Equal Employment Opportunity Commission (EEOC), the primary federal agency for enforcing *Title VII*, has issued regulations prohibiting sexual harassment. Sexual harassment is defined as unwelcome sexual advances, request for sexual favors, and other verbal, visual or physical conduct of a sexual nature when:

1. Submission to such conduct is made, explicitly or implicitly, a term or condition of an individual's employment;
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions; or,
3. Submission to or rejection of such conduct by an individual has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Conduct of a sexual nature must "unwelcome" in order for sexual harassment to occur. According to the United State Department of Education's Office of Civil Rights, conduct is unwelcome if the victim does not request or invite the conduct and views it as offensive or undesirable. The fact that the victim does not immediately speak out or complain does not mean the conduct was consented to or welcome.

C. *Quid Pro Quo* Harassment

Sexual harassment can take two forms—*quid pro quo* harassment and hostile work environment. *Quid pro quo* harassment, literally meaning "this for that" ("tit for tat"), occurs in the form of an offer or some kind of exchange. Its form can be negative (for example, when a student is threatened with a failing grade unless he or she submits to the harassment) or "positive" (for example, when a student is promised that he or she will pass a doctoral comprehensive examination in exchange for submitting to the harassment).

D. Hostile Environment Harassment

This form of sexual harassment occurs when the employer creates or allows the creation of a work environment that is so hostile, intimidating, or offensive that it unreasonably interferes with the teacher's ability to perform the job.

EEOC regulations hold the employer responsible, not only for its own acts of sexual harassment, but also for the acts of its agents and supervisory employees. However, in a public school setting, the United States Supreme Court has ruled that the employer will not be responsible for teacher harassment of a student (in a Title IX gender equity case) unless a school official with authority to address the harassment and institute corrective measures has actual knowledge of the harassment and fails adequately to respond.

Not all sexual conduct creates a sexually hostile environment. Although even one incident of *quid pro quo* harassment is unlawful, hostile environment harassment is created by a series of incidents. In determining what is a hostile environment, a reviewing authority may consider the following:

1. The nature of the conduct, how often it occurred, and how long it continued;
2. Where the harassment occurred;
3. Whether the alleged harasser was in a position of power over the victim;
4. The ages of the alleged harasser and victim (especially where the victim is a student);
5. Whether the conduct reasonably affected the victim's work environment (education or educational environment); and
6. Other incidents of harassment.

A faculty member (especially a tenured faculty member), who is accused of any infraction of institution policy, including sexual harassment, may be entitled to procedural rights prior to being found culpable. Commonly, these rights include notice of the charges and opportunity to tell one's side of the story before an impartial decision-maker. Failure to accord the accused such "due process" may subject the institution and its administrators to civil liability.

Case References

Menitor Saving Bank vs. Vinson, 477 U.S. 57, 64-65 (1986).

Dismissed from her position, an employee sued the banks' vice president, charging that she was constantly subjected to sexual harassment by the vice president during her four years of employment. She argued that such harassment created a "hostile work environment," which amounted to sex discrimination under *Title VII of the Civil Rights Act of 1964*. Accepting the employee's argument, the United State Supreme Court found that Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment."

Harris vs. Forklift Systems, Inc., 114 S. Ct 367 (1993).

An employee sued her former employer, claiming the conduct of its president constituted an "abusive work environment." The Supreme Court examined the circumstances of the alleged harassment and found that the employee suffered sexual harassment even though the comments made were not "so severe as to . . . seriously affect her well being" or cause her to "suffer[r] injury."

Burlington Industries vs. Ellerth, 524 U.S. 742 (1998).

Employee quit her job as a salesperson after 15 months, allegedly because she had been subjected to sexual harassment by one of her supervisors. She refused all of his advances; informed no one of her complaints, "suffered no tangible retaliation," and, in fact, was promoted once. She charged Burlington with sexual harassment and constructive discharge. The Supreme Court held that an employer may be held liable, vicariously, to a victimized employee for an actionable hostile environment created by one of its supervisors with authority over the victim. However, the employer may escape liability by proving: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the victim employee unreasonably failed to take advantage of preventive or corrective opportunities offered by the employer to avoid harm.

Gebser vs. Lago Vista Independent School District, 118 S. Ct 1989 (1998).

A high school student and one of her teachers had a secret sexual affair until they were caught having sex, after which the teacher was both arrested and fired. At the time, the school district had no sexual harassment policy and no official procedure for reporting such harassment, as required by federal law. The Supreme Court held that, in order to recover damages for sexual harassment, an aggrieved party must show that : (a) a school administrator with authority to institute corrective measures knew of the forbidden conduct; and, (b) the educational establishment failed to respond in a proper manner.

PRACTICAL GUIDELINES FOR CHAIRS

The prudent department chair:

- **Takes reasonable care to prevent and correct promptly and sexually harassing behavior. Such care includes, but is not necessarily limited to:**
- **Reading and understanding the institution’s policy on sexual harassment;**
- **Publicly communicating its importance to all members of the department;**
- **Affirming his or her intent to uphold both the letter and spirit of the policy.**
- **Takes seriously, responds promptly to, and treats discreetly all charges of sexual harassment brought to his or her attention.**
- **Resists the urge to prejudge and listens to the accused’s side of the story before making his or her decision.**
- **Leads by example by not repeating or encouraging sexist or off-color stories, jokes or remarks, however innocently intentioned or humorous they might be.**

VIII. A Primer on the First Amendment

The First Amendment—“Congress shall make no law. . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The AAUP’s 1940 Statement of Principles—“The teacher is entitled to full freedom in research and publication of the results . . . to freedom in the classroom in discussing [the subject, and when speaking or writing as a citizen, to freedom] from institutional censorship or discipline.”

A. “A Tale of Two Cities”: Matters of Public versus Personal Concern

Since both the federal and state constitutions circumscribe only the actions of the government, private colleges and universities are generally not impacted by the First Amendment—that is, employees at private colleges and universities do not enjoy freedom of speech protections (except insofar as the institutions may confer such rights by policy or contract).

As regards regulation or restriction of speech the United States Supreme Court has been much more solicitous and respectful of government agencies, including public colleges

and universities, when they are acting as employers instead of as “sovereigns.” Two cases exemplify the distinction. In the first case, an assistant district attorney in New Orleans was advised by her supervisor that she was being transferred from one division of the office to another. After stating her unwillingness to change assignments, she went home that evening and prepared a questionnaire, which she distributed to colleagues the next morning. The questionnaire inquired as to several matters, including the competency of the supervisors in the office, their thoughts on low morale, and whether they thought the district attorney should be using his staff on his re-election efforts. Predictably, the district attorney called her into his office and inquired one last time whether or not she would accept the reassignment. When she refused, he terminated her employment. In a classic balancing of the government’s versus the individual’s interests, the Supreme Court upheld the termination, reasoning that the employee’s alleged free speech pertained only to terms and conditions of employment and not to matters of public concern or debate. Justice Sandra Day O’Connor pronounced that the government as an employer has greater latitude to regulate speech than the government as sovereign when the speech does not relate to matters of public concern or debate but only to internal terms and conditions of employment. *Connick vs. Myers*, 461 U.S. 139 (1983).

The “bookend” case enunciating this distinction was decided four years later in a matter originating in the Harris County (Houston), Texas constable’s office. Upon hearing of the assassination attempt on the president of the United States in 1981, a data-entry employee in the county constable’s office expressed the sentiment that “if they go for him again, I hope they get him.” She was called into the constable’s office and promptly fired. In another split decision, the Supreme Court invalidated her firing, balancing the government’s interests against the employee’s. the Court reasoned that the employee was not a commissioned law enforcement officer; that she did not have the right to wear a badge or carry a gun; that the speech took place in a back room of the constable’s office; and that the employee was speaking on matters of public concern, not merely on matters involving terms and conditions of her relationship with her employer. Unpersuaded and in dissent, Justice Antonin Scalia scathingly remarked that she wants to “ride with the cops and cheer for the robbers.” Notwithstanding, the Court found that in this case, the employee’s right to freedom of speech outweighed the constable’s interest in suppressing speech with which he disagreed.

The initial inquiry in any case involving the First Amendment rights of employees in the workplace is whether the speech relates to a matter of public concern or simply pertains to the terms and conditions of employment. If the latter, a public college or university is treated as any private employer and, therefore, has greater authority to discipline or dismiss the employee without triggering the protections of the First Amendment. If the speech falls into the former category, the employee’s First Amendment rights are impacted, and the public college or university’s rights are circumscribed. In such case, the courts will balance the employee’s right to speak against the government’s interest in suppressing the speech. Moreover, the government demonstrated three things in order to prevail: 1) that its interest is compelling; b) that its restriction on the speech is narrowly tailored to advance the interest; and, c) that there is no less intrusive means of accomplishing the interest. If one of these elements is missing, the government loses.

The chalk line between matters of public concern and matters that pertain solely to personal matters, i.e., terms and conditions of employment, sometimes looks like the batter's box in the bottom of the ninth. In *Rankin* (the Harris County constable's case), the Supreme Court noted that three factors—form, content, and context (the “FCC” factors) determine whether speech relates to matters of public concern and is, therefore, protected. For instance, had the data-entry employee above been a law enforcement officer and uttered the speech while on duty and within earshot of the public, her dismissal likely would have been upheld. The constable's interest in having his badged, weapon-toting officers not publicly sanction commission of a criminal act arguably would outweigh the officer's right to express her opinion in the workplace. While the content and form of the speech would have been the same in our example and in the actual case, the context would have been the same in our example and in the actual case, the context would have been public; also, the speaker would have been someone who, by virtue of her commission by the state to carry a badge and gun, represent the face of law and order in the community. In such a case, the employer's interest in maintaining that public persona likely would have outweighed the speaker's right to express her opinion. Conversely, in the assistant district attorney's case (*Connick*), if, on her own time and as a citizen, she had written an opinion letter to the editor of the local newspaper questioning why the district attorney used his legal staff in his political campaigns while they were on government time, and further questioned whether his major contributors were people his office was charged with prosecuting, the content, form, and context of her speech might have rendered the issue one of public concern. In such a situation, the reviewing court might well have held that her right as a citizen to write a letter to the editor about perceived corruption in public office outweighed the district attorney's interest in suppressing the speech.

Matters of public concern transcend the narrow confines of the work setting and must involve issues about which some public (the college or university community, the city or town, the state, the nation, or the world) is interested. Whether or not the United States should have invaded Iraq, school prayer, passage of a new state law prohibiting affirmative action, local passage of a new property tax, or whether the football coach should be fired all transcend the internal workings of the physics, or sociology, or history departments. A professor speaking out on such issues in a proper forum generally may not be punished for expressing his or her views. On the other hand, a professor who constantly complains about teaching assignments, disrupts faculty meetings, curses at secretaries and colleagues, and discusses extraneous matters in class without covering the required subject matter may be disciplined or, in appropriate cases, dismissed. His or her speech does not in any way relate to matters of public concern, but rather pertains to the internal functioning of the department. Nor, does such behavior fall even within the nebulous parameters of academic freedom.

Third and Seventh Circuit Courts of Appeal cases further exemplify. A tenured professor refused to change a student grade from an “F” to an “I” as directed by a public university president. The professor criticized the president in writing to the trustees and was discharged two years later. In ruling for the university, the court opined that the speech did not involve matters of public concern but stated that the result might have been different had

the professor spoken against grade inflation, “a specific subject about which there is demonstrated [public] interest.” *Brown vs. Armenti*, 247 F. 3d 69, 79 (3rd Cir. 2001). Similarly, a non-tenured University of Illinois assistant professor was fired for making lascivious comments at a professional conference in Toronto. While dining with colleagues and graduate students at a restaurant, he commented on a public television documentary on the mating habits of primates, making repeated, sexually-suggestive comparisons between primate and human behavior. Observing that the speech expressed mere personal interests rather than matters of public concern, the court of appeal reasoned that the speech was not constitutionally protected. Finally, seemingly just to punctuate its finding, the court opined that, even if the speech was protected under the *First Amendment*, the university’s interest in restricting it outweighed the speaker’s right to utter it. *Trejo vs. Shoben*, 319 F. 3d 878 (7th Cir. 2003).

In summary, aside from issues of immunity, the first inquiry of a reviewing court will be whether the speech relates to matters of public concern or merely to internal terms and conditions of employment. If the latter, the institution wins and the case is over. If the former, the court will next balance the content of the employee’s speech and interests against the importance of the institution’s reasons for suppressing or punishing the speech. This analysis may include the forum or location in which the speech was uttered (be it classroom or faculty meeting, free speech area on campus or local editorial page) as well as the content of the speech (was it violent, obscene, defamatory, or commercial in nature).

B. The *First Amendment* Fulcrum: Balancing the Public and Personal Interests

An English professor was prone to repeated use of profanity and sexual terms (“fuck” and “pussy”) in class, language that was not academically germane to his subject matter. An offended student complained of sexual harassment, and the professor circulated her complaint, with her name redacted, as well as his sarcastic and scornful “apologia.” He was dismissed and subsequently sued, the federal court of appeals making two essential rulings: 1) that the profanity was not protected speech; and, more importantly, 2) that although his “apology” was protected speech, the college’s interest in maintaining the confidentiality of student complaints, disciplining professors for retaliation, and creating a non-disruptive atmosphere on campus outweighed the professor’s speech rights. The United States Supreme Court declined to hear the case, letting the appeals court decision stand. *Bonnell vs. Lorenzo*, 241 F. 3d 800 (6th Cir.), *certiorari denied* 122 S.Ct. 347 (2001). Here, the professor’s interest was that of any citizen to express his views; however, the college demonstrated much more compelling interests. For one, under the federal *Family Educational Rights and Privacy Act*, wrongful disclosure of identifiable student records could have subjected the college to loss of federal funds, including student financial assistance. Secondly, the professor’s response to the student was retaliatory for her filing of the sexual harassment complaint, and, if allowed, could deter other students from availing themselves of a policy enacted for their protection. Finally, the professor escalated the student’s complaint to the administration into a public dispute by circulating her complaint and his response to it, causing division and disruption among students and faculty, an atmosphere the college

reasonably viewed as inimical to the well being of the campus. When balanced against the professor's right of expression, the court concluded that these governmental interests justified his termination.

The same court reached a different result in another case involving a professor's foul language in the classroom. In this latter case, a language instructor, who suggested that words, such as "nigger," "bitch," "faggot," and "girl," can marginalize minorities (his syllabus promised not to use racist or sexist language in class). Although he apologized to the one objecting student, she and a local civil rights leader pressed the issue with the college, resulting in the instructor's not being rehired. The court concluded that the speech was protected as it pertained to matters of public concern, and the United States Supreme Court declined to hear the case, letting the decision stand. *Hardy vs. Jefferson Community College*, 260 F. 3d 671 (6th Cir. 2001), *certionari denied sub nomine Besser vs. Hardy*, 122 S.Ct. 1436 (2002).

Why the different result? For one, in *Hardy*, the language appeared not to be merely gratuitous but germane to the subject matter of the class; also, the professor apologized and let the matter drop, rather than pursuing his tirade against the student, making the issue a *cause célèbre* on campus. Remembering the FCC factors—form, content, and context—although the form of the speech the same (oral), the content was arguably less sexual (compare "fuck" and "pussy" with "nigger," "bitch," "faggot," and "girl"); and the context was didactic, that is, to teach, in a language class, how certain words can negatively impact society's perception of certain subgroups within it. The college was unable to articulate reasons compelling enough to justify its decision not to rehire the instructor. Thus, a language instructor's right to use offensive language in a proper academic context outweighs a public institution's interest in repressing it.

PRACTICAL GUIDELINES FOR CHAIRS

The first inquiry in an employee *First Amendment* free speech case is whether or not the speech pertains merely to terms and conditions of employment, in which case the speech is entitled to no constitutional protection. If, on the other hand, the speech pertains to matters of public concern, it may be protected (see the analytical construct below).

College and university administrators wishing to restrict or punish employee speech should first answer the following five general questions (sub-questions intended for guidance):

- **Does the speech relate solely to terms and conditions of employment?**
 - **Is the employee just griping about the job?**
 - **Is it a personal complaint or are others interested in the outcome?**
- **Does the speech relate to matters of public concern?**

- Does the complaint have policy implications beyond the department?
- Are people beyond the department interested in the topic?
- Does the topic transcend day-to-day operations of the department?

- What about the FCC factors (Form, Content, Context)?
 - What form does the speech take?
 - What is the content of the speech?
 - What is the context of the speech?

- What are the institution's reasons for restricting or punishing the speech?
 - Are those reasons compelling?
 - Do I oppose the speech because I disagree with its content?
 - Are my reasons based in written policy?
 - Are they more important than the employee's right to speak?

- Would the speech be protected if uttered by a non-public employee?
 - Would a non-public employee be personally interested in the topic?
- Would this topic be most appropriate in the campus free speech area?

Hypothetical I

The Case of Niba and Sal

Your department was instrumental in inviting a German economist, who is an expert on the rebuilding of her country's infrastructure after World War II, to speak as part of your college lecture series. The lecture included discourse on race relations and a comparison of the German and American experiences. At a reception following the lecture, Niba Lunger, a new tenure track faculty member, commented in a circle of colleagues and students, that, "we would all be better off if we would just put the holocaust behind us." Niba, a German national, lost her father as a result of the Nuremburg trials. Sal Amander, who is Jewish and a tenured full professor in the department, overheard the remark; followed her out to the parking lot after the reception, shouting, "We must never forget." He has made it known throughout the department that, "that woman" would never be tenured at this university as long as he was here and that, "we would all be better off if we put that Nazi behind us." Niba, who is up for tenure next month, has formally asked that Sal not be allowed to vote on her tenure. Outraged by this putative infringement of his academic freedom, Sal has announced his intention to participate fully. Niba, in turn, has informed you that she would sue if Sal did not recuse himself and her tenure application was denied.

Hypothetical I

The Case of Niba and Sal:

Niba's Position

- Articulate the rights you believe have been infringed. Have they actually been infringed, or do you merely fear they will be?
- How will suing impact your academic career? Your life?
- Could Sal be justified in his outrage about your statements?
- Does Sal have rights? If so, what are they, and do they outweigh your rights? State your best arguments.
- Has Sal shown that he will not judge your tenure application on its merits? Support your position with facts.
- What do you want your department chair to do for you?
- What factors must the chair consider, and how do they affect the resolution you hope for?
- What compromise, if any, can you offer that will not seriously affect the resolution you seek, i.e., do you have a “fall back” position?

Hypothetical I

The Case of Niba and Sal:

Sal's Position

- Articulate the rights you believe have been infringed. Have they actually been infringed, or do you merely fear they will be?
- What are the consequences, if any, upon your academic career and/or your life if you assert and avail yourself of your rights?
- Could Niba be justified in her concern that you will not judge her on her merits? If so, how and to whom should you allay such concern?
- Does Niba have rights? If so, what are they, and do they outweigh your rights? State your best arguments.
- The department chair informs you that Niba has threatened to sue if you participate in her tenure review and she is denied. What do you want your department chair to do?
- What factors must the chair consider, and how do they affect the resolution you hope for?
- What compromise, if any, can you offer that will not seriously affect the resolution you seek, i.e., do you have a “fall back” position?

Hypothetical I

The Case of Niba and Sal:

The Chair's Position

- Articulate the rights of each party. Do the rights of one clearly outweigh the rights of the other, or are the equities fairly equal?
- What does each want? Can you give it to him or her? Is each party entrenched, or is there room for compromise?
- After assessing Sal's public position, what, if anything, can you say to him or do for him to encourage or nudge him to compromise?
- What, if anything, would persuade Niba that resolving her grievances informally and internally is in her best interest? What does she have to lose from not resolving matters?
- Are third parties impacted? Who are they, and what are their interests? How will your decision affect those interests?
- What third parties, if any, should be informed as to the dispute? Can any of them be solicited to help?
- What factors must you consider in making your decision? What resolution is in the best interests of the department and of the university?

Hypothetical II

The Case of the Overexposed Photographer

Easel McDiesel is a professor of photojournalism and a well-renowned photographer, whose work Department Chair Della Ware has always admired. Finding herself alone in his office one day and curious about his upcoming book, funded by a University Arts Foundation grant, she “surfs” through his computer. To her shock, she finds materials on a work in progress entitled, “Child Nudity and Sexuality.” She hastily exits the computer and, as she continues to wait for the professor, notices that his middle desk drawer is partially open, exposing a key. Reluctantly taking the key, she finds that it fits one of the file cabinets, the bottom drawer of which contains some jogging shoes, other personal items, and a large manila envelope. She opens the envelope and is further shocked to find pictures of the professor and young females, some of whom she recognizes as graduate students. She replaces the envelope and key, leaves immediately, and says nothing to anyone. Three months later, a twice-divorced female graduate student with a poor reputation for character walks into Della’s office and accuses the professor of sexual harassment.

Hypothetical II

The Case of the Overexposed Photographer:

Questions for Discussion

- What self assessment should Chair Della Ware make after the graduate student leaves her office?
- Is what she knows about Easel relevant to the graduate student's complaint?
- What are Easel McDiesel's rights as to the university? Have they been infringed?
- Has Chair Della Ware acted appropriately as to Easel? Explain.
- What are his rights with regard to the graduate student's complaint?
- Aside from the graduate student's complaint, does the university have any basis for disciplining Easel?
- May the university revoke Easel's University Arts Foundation grant?
- The university owns Easel's office computer. Who owns the work product that is on it?