Legal Update for Community Colleges
June 2004

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Topics:

- Labor and Employment

Topics

Labor and Employment

"Reference Librarian Brings Discrimination Action Against University"

Cargill v. Harvard University (Mass. App. Ct., 804 N. E. 2d 377), March 8, 2004.

Former university lead reference librarian (employed by the university for 11 years) who was handicapped by rheumatoid arthritis brought discrimination action against the university regarding reasonable accommodation issue pertaining to her employment. There was no dispute regarding plaintiff's academic and professional qualifications (doctorate in botany and a master's degree in library science). However, the crux of the dispute focused around issues pertaining to the multiplex activities (e.g. cerebral and academic research, reference functions, paging/retrieval, shelving, lifting and carrying rather large books, and other manual labor) performed by the lead reference librarian, and whether Harvard had an obligation to make reasonable accommodations. An appeals court in Massachusetts held that genuine issue of material fact existed as to whether reasonable accommodation could have been tailored for the librarian without undue hardship to the university. Accordingly, the case was remanded to the lower court for further consideration.

"University Must Refer to Former Employee as Assistant Professor Not Instructor"

Texas A & M University-Kingsville v. Lawson (Tex, App. – Austin, 127 S. W. 3d 866), January 29, 2004.

Former employee's settlement agreement with state university, requiring university to refer to him as "assistant professor" when communicating with prospective employers, did not violate public policy and was not void because employee had been an "instructor" when his employment was terminated by the university. If he had not been

terminated, he would have been promoted to assistant professor upon completion of his doctorate.

Lawson was fired after a dispute with the university in September 1992 while employed as a clarinet instructor in the music department. Following his dismissal, he sued the university and reached a settlement which paid him $60,000, required the university to provide letters of recommendation that must "factually state both his accomplishments and positive aspects of his performance", and the manner in which the director of personnel must respond to employment inquiries.

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Topics:

- Athletics
- Civil Rights
- Disabled Students
- Health
- Student Discipline

Topics

Athletics

"Pretrial Mental Exam Required as a Condition to Title IX Case"

Simpson v. University of Colorado (D. Colo., 220 F.R.D. 354), February 10, 2004.

Good cause existed to permit pretrial mental examination of female student in her action against university alleging indifference to sexual harassment (alleged sexual assault) within athletic department in violation of Title IX. Student alleged specific psychiatric injury, i.e. post-traumatic stress disorder (PTSD) and intended to offer testimony to that effect. **Note:** Student contends that the university and athletic department had actual knowledge of, and remained deliberately indifferent to, repeated acts of sexual harassment by football players and football recruits.

Civil Rights

"Assistant Coach Not Invited to Participate in Summer Camp"

Horn v. University of Minnesota (C.A. 8 {Minn.}, 362 F. 3d 1042), April 6, 2004.

University head hockey coach's action of failing to invite assistant hockey coach to participate in summer hockey camp, and documenting assistant coach's alleged performance problems, did not amount to an adverse employment action for purposes of retaliation and discrimination claim under Title VII. The hockey camp **was independently run and unrelated** to the terms or conditions of employment; and documentation of performance problems did not adversely affect assistant coach's employment status with the university.

Disabled Student

"Medical Student's Failure to pass Licensing Exam did Not Violate ADA"

Powell v. National Bd. of Medical Examiners (C.A. 2 {Conn.}, 364 F. 3d 79), April 7, 2004.

Medical school made continuation of student's studies contingent on her passing (failed exam three times) licensing examination. Student claimed she suffered from dyslexia and attention deficit disorder (ADD); however, depression and anxiety could not be ruled out. School's actions were not made on a discriminatory basis. Thus, school did not violate American Disability Act (ADA) or Rehabilitation Act. **It was within the school's authority** to demand standards within its medical school, which was responsible for producing competent physicians. To allow the student to continue in the program without passing the exam **would have changed the nature and substance of the school's program.**

Health

"University Student Dies of Acute Anemia"

Goldberg v. Northeastern University (Mass. App. Ct., 805 N.E. 2d 517), March 25, 2004.

Expert testimony **was sufficient** to establish that university was negligent in setting up and operating a health care center with only registered nurse on weekends, who was to call off-site physician if nurse determined that a patient needed to see a doctor. Only expert testimony was from physician who stated that the setup of the health care center, particularly the weekend system whereby a registered nurse staffed infirmary and made initial assessment of each patient, **was consistent** with procedures ordinarily employed in university health care systems. **Note:** The case arose when a student died of acute anemia triggered by acute myelogenous leukemia. The nurse on duty misdiagnosed the young lady's condition as influenza without consulting a physician. Symptoms exhibited by the student included dry cough, nausea, dizziness, upper abdominal discomfort, lower back pain, and general malaise. Duty nurse recommended that the student drink fluids follow a bland diet, rest and take Tylenol.

Student Discipline

"Student Disciplined Without Procedural Due Process"

Gomes v. University of Maine System (D. Me., 304 F. Supp. 2d 117). February 23, 2004.

Former state university student sued university and officials claiming wrongful discipline for alleged sexual assault on fellow student. A United States District Court in Maine held that the students **were denied procedural due process** when they were not supplied with evidence against them and names of witnesses before the day of the disciplinary hearing. Additionally, students **were also denied procedural due processes when, at hearing, students and their attorney were** screened off from the rest of the courtroom.

Legal Update for Community Colleges
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Topics:

- Civil right
- Labor and Employment
- School Districts
- Torts

Topics

Civil Rights

"Student Arrested for Using Profanity and Yelling Loudly In Public Place"

Cady v. South Suburban College (N.D. Ill., 310 F. Supp. 2d 997) March 26, 2004.

College's student code of conduct did not impose an unconstitutional restraint on freedom of speech under the First Amendment of the United States Constitution, for purposes of a Section 1983 civil rights claim. Former student asserted that the code was vague in that it prohibited "activity which endangers personal mental or physical health of any person" and use of "abusive language toward members of the college community". **Any ordinary, reasonable person could have understood the code;** and it did not prohibit protected speech. School officials **had need to be able to impose discipline** for a wide variety of unanticipated conduct that may have disrupted the educational process and environment.

Labor and Employment

"College Computer Center Employee Fired for Doing Homework"

In re Alexander (N.Y.A.D. 3 Dept., 776 N. Y. S. 2d 142), May 6, 2004

Evidence presented to the Unemployment Insurance Appeal Board **was sufficient** to establish that claimant, a computer help-desk technician in a college computer center, had worked on her homework assignment during working hours. Thus, she lost her employment due to misconduct that **disqualified** her from receiving unemployment compensation benefits. Claimant testified that she did her homework on her break; however, a copy of claimant's homework paper was discovered in the printing tray of the office printer indicating the date and time that the document was printed, which was during her working hours.

School District

"Contractor Awarded More Than $3 Million Against Community College"

Alamo Community College Dist. V Browning Construction Co. (Tex. App. – San Antonio, 131 S.W. 3d 146), January 14, 2004.

Alamo College Community District (ACCD) and Browning Construction Company (Browning) entered into a contract whereby Browning agreed to serve as the general contractor for the construction of a new campus for ACCD. After disagreements over delay, Browning sued ACCD for breach of contract and won damages of over $3,000,000. The key issue in the suit was whether Browning could collect damages for delay when the contract had a no-damage-for-delay clause. A Texas court of appeals stated that **evidence established** that public community college district **failed** to comply with contract for construction of new campus by refusing to grant reasonable time extensions to general contractor. Critical expert testified that there were 101 days of delay in Phase A of construction and 296 days of delay in Phase B. These delays were beyond contractor's control and the ACCD **should therefore have granted contractor reasonable time extensions** as provided by the contract. Additionally, manager of the joint venture, which designed the project, **agreed** that the contract required the contractor be given reasonable time extensions; and he testified that district never considered these time extensions, despite numerous requests.

Torts

"Second Basement Hit in the Eye By Baseball Thrown By Catcher"

Geiersbach v. Frieje (Ind. App., 807 N.E. 2d 114), April 28, 2004.

University baseball coach did not act recklessly by choosing a drill during practice that could potentially put two balls into play; and thus, coaches were not liable for player's personal injuries sustained during such a practice. Player admitted that injury was accidental; drill was common in baseball practices; and being hit by a ball during a practice was an inherent danger in the game of baseball. **Note** The second baseman was participating in a baseball drill in the university's gymnasium when he was struck in his left eye by a baseball thrown by team's catcher.

"Student Slips On Icy Sidewalk While On Field Trip"

Webb v University of Utah (Utah App., 88 P 3d 364), March 11, 2004.

Student brought negligence action against state university after he slipped and fell on an icy sidewalk while on a university sponsored, and course required, field trip. The Court of Appeals of Utah reversed and remanded the third District Court's decision, which was in favor of the university, back to the lower court for reconsideration. Utah's court of appeals held that the student did not have to show the existence of special relationship between himself and university in order to maintain negligence action against the university. Student did not allege that university breached duty to protect him from icy conditions, but student **alleged that university breached duty not to act negligently** in providing instruction. Plaintiff was a student in an earth science class, and was required to attend an off campus field trip to examine fault lines in an area of Salt Lake City. While walking on a sidewalk covered with snow and ice, one of the plaintiff's fellow students lost her footing and grabbed the plaintiff for support and caused him to fall, sustaining injuries.

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Topics:

- Labor and Employment
- Civil Rights
- Religion
- Torts

Topics

Labor and Employment

"Dining Service Employee's Retaliation Claim Precluded Summary Judgment for University"

Rexach v. University of Connecticut, Dept. of Dining Services (D. Conn., 313 F. Supp. 2d 100), March 31, 2004.

Genuine issue of material fact as to whether reasons given for termination of employee, a Puerto Rican male of Latino ancestry, by university **were pretext for retaliation** after employee complained continually to management that his supervisor made racially derogatory statements to him and other Latinos. Despite university's claim that termination was based on employee's poor work history, possible criminal activity within the dining facility, and unpaid wages advances ($2,475.00), the court **precluded summary judgment** for university under Title VII (Civil Rights Act of 1964).

Civil Rights

"Free Speech Rights of Students and Faculty Violated Over University's Mascot"

Crue v. Aiken (C. A. 7 {Ill.}, 370 F. 3d 668), June 1, 2004.

Case centers on free speech rights of state university students and faculty, who wished to contact prospective student athletes to make them aware that university and its athletic program utilized a mascot ("Chief Illiniwek") that they believed was degrading to Native Americans. The university's chancellor had issued a directive that banned all speech directed toward prospective student athletes without preclearance from the Director of Athletics or his designee. Although university had an interest in preventing sanction by athletic association, that interest **was outweighted by free speech interests** of members of a major public university community in questioning what they saw as blatant racial stereotyping.

Religion

"Evangelist Denied to Speak on University Campus"

Bourgault v. Yudof (N. D. Tex., 316 F. Supp. 2d 411), May 4, 2004.

Non-member of state university community, denied permission to speak on campus in alleged violation of his free speech rights (viewpoint discrimination), was not likely to prevail for purposed of obtaining a preliminary injunction. University required that all off-campus speakers must be sponsored by at least one student organization. Accordingly, the university allowed students to form organizations regardless of their viewpoints.

Torts

"University Not Liable for Deliveryman's Injuries"

Laecca v. New York University (N. Y. A. D. 1 Dept., 777 N. Y. S. 2d 433), May 20, 2004.

Plaintiff deliveryman was injured when a door, leaning against a wall pending installation, fell on him. The court held that owner and contractor were not vicariously liable for negligent acts of subsubcontractor where none of their employees supervised, assisted, or otherwise participated in the installation of the door.

Legal Update for Community Colleges October 2004

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Athletics

"Alleged Discrimination Against Member of Women's Basketball Team Did Not Violate Title IX"

Howell v. North Cent. College (N.D. Ill., 320 F. Supp. 2d 717), June 2, 2004.

During a team luncheon the plaintiff voiced her opposition to homosexuality. Both head coach and assistant coach told her not to express her opinion on the subject. Thereafter, her coaches repeatedly talked to her about lesbian activity in an effort to "indoctrinate" her. She resisted their "lesbian indoctrination" and her playing time was refused in favor of an inferior player. Soon thereafter, she was told by the head coach not to wear ribbons in her hair because it was "too feminine". Thus, plaintiff chose to leave the team as a result of indoctrination efforts, dress code requirements, and unbalanced personal criticism. A United States district court in Illinois held that plaintiff's alleged harassment and discrimination by her basketball coaches because of her opposition to homosexuality did not violate Title IX's prohibition against discrimination based on sex.

"University of Cincinnati's Starting Quarterback Convicted of Assault during an Intramural Basketball Game"

State v. Guidugli (Ohio App. 1 Dist., 811 N.E. 2d 567), June 4, 2004.

Evidence **was sufficient** to support defendant's conviction of misdemeanor assault for his role in fight that broke out during college intramural basketball game. Intramural supervisor and scorekeeper at the game testified that they saw defendant punch victim in the face with such force that one could reasonably infer intent to inflict physical injury. Investigating officer testified that when he spoke to the victim after the fight, he was holding a wet towel to his face. **Note:** The Municipal Court, Hamilton County, had imposed a 180-day jail sentence. It was suspended in favor of one year's probation, with conditions that Guidugli undergo 60 days of home incarceration using an electronic monitoring unit and participate in any treatment and counseling (including anger management) recommended by the probation department.

Labor and Employment

"Custodian Terminated for Discussing Salaries"
Koehn v. Indian Hills Community College (C.A. 8 {Iowa}, 371 F. 3d 394) , June 9, 2004.

Terminated at-will custodian at an Iowa community college had not engaged in an activity protected by clearly defined public policy of promoting free dissemination of information regarding government spending and promoting citizen knowledge and discussion of public expenditures. Community official who terminated custodian told him that "he was an antagonist", and that his services were no longer needed after bringing a published salary list in a newspaper to work which resulted in his supervisor becoming upset after seeing in a highlighted list that his salary was less than other staff members. The custodian **was speaking solely as an employee,** not as a concerned taxpayer or citizen.

"University Presented Legitimate Reasons for Not Hiring Applicant"

Annett v. University of Kansas (C.A. 10 {Kan.} 371 F 3d 1233), June 15, 2004.

Employee held an adjunct lecturer position for a one-year appointment and applied for an assistant director job at the University's Equal Opportunity Office (EOO), a position which included facilitating the recruitment and hiring of faculty and unclassified staff. The search committee for the position decided not to interview the plaintiff for the position, and sent her a letter stating that another person had been hired for the position. The United States Court of Appeals, Tenth Circuit, held that university officials **stated legitimate and nondiscriminatory** reason for failing to hire plaintiff for the EOO position, and stated that her prior experience was limited and she had no administrative experience. All persons chosen to be interviewed had some administrative experience in recruitment; and the person chosen for the position had 14 years of relevant experience in recruitment.

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November – December 2004

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Athletics

"Football Player Not Entitled to Injunction Against NCAA Rules"
Bloom v. National Collegiate Athletic Ass'n (Colo. App., 93 P. 3d 621), May 6, 2004

Football player at the University of Colorado (CU) **failed** to demonstrate that there was a reasonable possibility of success on the merits of his challenge to the NCAA bylaws which restricted him from engaging in paid entertainment and commercial endorsement work in connection with his professional skiing career (He was the World Cup champion in freestyle moguls and had agreed to endorse commercially certain ski equipment, and to model clothing). NCAA bylaws expressed clear and unambiguous intent to prohibit student-athletes from engaging in endorsements and paid media appearances. The NCAA bylaws were neither arbitrary nor capricious as applied to the athlete; thus, he was not entitled to preliminary injunctive relief.

Civil Rights

"Assistant Vice President Termination Upheld"

Timm v. Wright State University (C.A. 6 (Ohio), 375 F. 3d 418), July 7, 2004.

Assistant Vice President was not terminated in a violation of the First Amendment because she had spoken out eight months earlier about expenses related to the death of the university's president; but rather because of incidents of insubordination and an unhealthy environment she created at the office. **Note:** Timm accused her immediate supervisor of improperly allocating university money to cover expenses related to the president's funeral and the family's move. However, her employment was terminated due to the following incidents: (1) inviting candidates for a university auditor's position to party when she was told not to invite them; (2) disclosing her immediate supervisor's choice pertaining to the most qualified candidate for university's auditor when she was told not to tell that preference; (3) entering into a contract with a graduate student to complete a university computer project when she was told not to contract with the student; and (4) implementing a charge-card system unilaterally across the university when she was told to implement it in a piecemeal fashion.

"University's Orientation Which Included Study of Islam Faith Did Not Violate Free Exercise Clause"

Yacovelli v Moeser (M.D.N.C., 324 F. Supp. 2d 760), July 7, 2004.

Students brought Free Exercise claim against University of North Carolina at Chapel Hill, challenging the University's freshmen orientation program involving a study of a book about the Islamic faith. The court held that the program did not violate the Free Exercise Clause of the First Amendment because the university permitted an exception for students who objected to reading the book on religious grounds. In fact, the objecting students were free to explain their reason for not reading the book, including expressing their own religious views. No grade was given on the assignment, and students were not punished in any manner for not reading the assigned book on Islamic faith.

Disabled Students

"Student With Depression Not Discriminated Against by University Due to His Disability"

"Hash v. University of Kentucky (Ky. App., 138 S. W. 3d 123), June 11, 2004)

Law school applicant who had previously withdrawn from university law school because of disability, was not "otherwise qualified" for readmission for purposes of Civil Rights Action against the university. The university was concerned for the safety of already admitted students and had not received enough information regarding applicant's condition in time to consider properly his application. Additionally, university officials relied on their academic standards and professional judgment to determine that applicant was not qualified for law school. **Note:** These two letters form the applicant are interesting reading:

"I realize that all this bouncing from one doctor to another may not sound like the greatest means for making the glorious recovery that the Admissions Committee might want to hear, but one thing I've learned from other patients, health professionals and my readings is that often it takes a number of missteps before finding just the right physician and treatment plan… So you see, I can't make the Admission Committee any guarantees about my health and I seriously doubt that a doctor or Maytag repair man could either."

"So here I am today, presenting you with one of the more offbeat appeals you'll ever seen so please don't confuse it's {sic} tone or look for lack of seriousness, because in the immortal words of Willy Wonka: "A little { } now and then, is relished by the wisest man."…I have faith in UK Law and I think it's time to see if UK Law has faith in its ability to help an individual student overcome any obstacle that may arise, rather than letting a former student twist in the wind until it is "safe" for him to be readmitted."

Labor and Employment

"Denial of Promotion Not Discriminatory"
Alexander v. Chattahoochee Valley Community College (M.D. Ala., 325 F. Supp. 2d 1274), July 9, 2004

Black female clerk in admissions office of community college sued college and president claiming wrongful denial of promotion, and failure to provide equal pay. A United States District Court, M.D. Alabama, Northern Division, held that community college did not violate Title VII or Equal Protection Clause by appointing white female interim admissions director instead of black female admissions office clerk, following the departure of prior interim director to assume a position at another college. College had racially neutral reasons (e.g. clerk lacked experience in recruiting students and her writing sample contained errors) for appointment; position was on an interim basis; and clerk did not show reason for not hiring her to be pretextual (cover-up).

Student Discipline

"University Failed to Follow Own Rules When Disciplining Student"
Ebert v. Yeshiva University (N.Y. Supp. 780 N.Y.S. 2d 283) July 8, 2004.

Ebert was a full-time student at YU, with less than two semesters remaining to graduate. On November 21 or 22, 2003, two students went to his dorm room and demanded that he apologize to a young woman to whom he had made insulting remarks. He called the woman and left a message of apology on her answering machine. As the other students were leaving his room, a fight broke out between them. Additionally, this was not the first time in which Ebert was involved in a fight during his university stay. The Supreme Court, New York County, held that the university **failed** to follow its own rules when it took disciplinary action against student following fighting incident. University rules governing student discipline required it to inform students of specific charges and to provide them with reasonable notice of disciplinary interview so they could formulate an oral and written defense. In this instance, the student was called to a disciplinary meeting only two days after the alleged incident. At the meeting, he was given a copy of the rules, informed of the specific charge, and told that the meeting was his only chance to speak on his behalf. **Note:** The two university officials conducting the hearing gave Ebert two options, he could either voluntary withdraw or be expelled. He chose voluntary withdrawal.