Jan Feb 2011 (#'s 612 & 613)

Legal Update for Community Colleges

January - February 2011

Johnny R. Purvis*

West's Education Law Reporter
November 12, 2009 – Vol. 248 No. 2 (Pages 527 – 1025)
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Topics:

- Labor and Employment
- Student Discipline

Topics

Labor and Employment:

"Failure of University to Restore Laboratory to Professor Did Not Constitute an Adverse Employment Action"

Chen v. Wayne State Univ. (Mich. App., 771 N. W. 2d 820), June 2, 2009.

Alleged failure of state university to restore tenured professor's access to a laboratory did **not** constitute a "materially adverse employment action," so as to maintain civil rights action against a university for natural origin, age discrimination, and retaliation for filing a claim with the Equal Employment Opportunity Commission (EEOC). When the professor had a lab, he did *not* use the lab to conduct research, obtain grants or supervise graduate students. Furthermore, professor rejected an offer of a new lab on the grounds that it was too small and the offer of a second lab on the grounds that it was ostensible radioactive.

"University Was Entitled To Terminate Its Contract with an Administrator"
Marks v. Smith (N. Y. A. D. 1 Dept., 885 N. Y. S. 2d 463), September 15, 2009.

Fordham University **was entitled** to terminate its contract with plaintiff, which appointed her to a tenure track associate professorship, subject to the provision that plaintiff first serve as an associate dean and be paid as an administrator and not as a faculty member until her full-time faculty status began. In response to the plaintiff's repudiation of the contract by refusing to accept any teaching assignment for the fall term, which refusal lacked any justification; plaintiff ***effectively abandoned*** her faculty appointment, thereby becoming the first party to breach her contract.

"Associate Professor Sufficiently Alleged Title VI Retaliation Claim"
Kimmel v. Gallaudet University (D. D. C., 639 F. Supp. 2d 34), August 4, 2009.

University professor's allegations that she was discriminated against by university for deaf persons, because of the nature and extent of her disability deafness, including the ways in which she chose to respond to her deafness that did not conform to what was preferred or accepted by university officials. Therefore, such discrimination **was sufficient for a disability discrimination claim** under Title VI of the District of Columbia Human Rights Act even though professor did not allege discrimination solely due to her deafness, but to her particular kind of deafness and approach to her disability.

Student Discipline:

"Fraternity Five-Year Loss of Recognition by University Upheld"
Alpha Kappa Lambda Fraternity v. Washington State University (Wash. App. Div. 3, 216 P. 3d 451), September 17, 2009.

Student conduct board's decision to sanction fraternity to a five-year period of loss of recognition from university was **not** arbitrary and capricious. Evidence demonstrated that illegal drug activity was actively condoned by many of the fraternity's officers and even those officers who may not have been involved in the drug activity failed to take reasonable precautions to stop it. Furthermore the general practices of the fraternity itself contributed significantly to the drug culture of the house.

Books of Possible Interest: Two recent books published by Purvis –

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2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

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March 2011 (#'s 614 & 615)

Legal Update for Community Colleges

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West's Education Law Reporter
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Topics:

- Admissions
- Civil Rights
- Labor and Employment

Topics

Admissions:

"State University's Consideration of Race as an Admissions Factor was Narrowly Tailored to Serve a Compelling Interest"
Fisher v. University of Texas at Austin (W. D. Tex., 645 F. Supp. 2d 587), August 17, 2009.

State university's consideration of race as one "factor" in its admissions process **was narrowly tailored to support university's compelling interest in achieving a critical mass of minority students**, as required to satisfy the equal protection clause of the Fourteen Amendment of the United States Constitution. Race was one of seven "special circumstances," which was in turn one of six factors that made up an applicant's personal achievement score. At no point in the process was race considered individually or given a numerical value. University did not accept any applicant based solely on race or ethnicity, university had given serious good faith consideration to race-neutral alternatives, including the state's admission of students under Texas Top Ten Percent Law. Furthermore, the university's admissions and enrollment policies were evaluated every five years to determine whether consideration of race remained necessary to achieve a diverse student body.

Civil Rights:

"University's Regulation of Student Anti-abortion Organization's Protected Speech Did Not Violate the First Amendment"
Rock for Life—UMBC v. Hrabowski (D. Md., 643 F. Supp. 2d 729), July 8, 2009.

Student anti-abortion organization challenged the constitutionality of a state university's former policy on use of the school's facilities, as allegedly granting the university unbridled discretion to discriminate based on the content of speech and viewpoint of speakers in violation of the First Amendment and Equal Protection Clause. The United States District Court, D. Maryland, held that the case **was rendered moot** by university's voluntary revision of its policy to no longer allow university officials to relocate events at facilities for any reason. Since the university had *no* intention to reenact the former policy, but rather, made revised policy as public and a permanent as possible by formally changing the policy, alerting the district court as to the policy's revision, and updating the university's public wedsite to include the revised policy.

Labor and Employment:

"Lack of Collegiality Was Legitimate Ground for Termination"
Bernold v. Board of Governors of University of North Carolina (N. C. App., 683 S. E. 2d 428), October 6, 2009.

Lack of collegiality **was legitimate ground** on which professor could be terminated from his tenure teaching position at state university. The engineering college regulations stated that "each faculty member is expected to work in a collegial manner." Professor was aware that collegiality was a professional expectation for his position and that his collegiality was one possible focus of evaluation during his post-tenure reviews. Furthermore, the professor had received unsatisfactory post-tenure reviews in his last three consecutive years **which constituted sufficient evidence** of his professional incompetence **to justify** his termination.

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April 2011 (#'s 616 & 617)

Legal Update for Community Colleges

April 2011

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Topics:

- Civil Rights
- Labor and Employment
- Torts

Topics

Civil Rights:

"Christian Fraternity's Action Against the University of Florida Was Rendered Moot"
Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen (C. A. 11 [Fla.], 586 F. 3d 908), October 27, 2009.

Christian fraternity's appeal in action against state university to enjoin university from enforcing its requirement that fraternity's constitution include a statement that it would not discriminate on basis of religious belief or creed, and to enjoin university from denying fraternity the status of a registered student organization (RSO). The case **was rendered moot** when the university amended its student handbook policy to allow religious groups like the plaintiff to register as RSOs; thus, fraternity *obtained the relief that it sought.*

Labor and Employment:

"Former College Athletic Director Did Not Engage in Protected Activity under Title IX"
Atkinson v. Lafayette College (E. D. Pa., 653 F. Supp. 2d 581), September 9, 2009.

Former college athletic director brought action against college, alleging retaliation in violation of Title IX. The United States District Court, E. D. Pennsylvania, held that even assuming former college athletic director's efforts in pursuing Title IX compliance by athletic department were protected activities, she **failed to establish** that her efforts were cause of college's decision to terminate her employment, as required to establish a prima facie case of retaliation under Title IX. Plaintiff presented **no** evidence that college terminated her in retaliation for her outspoken involvement in seeking Title IX compliance or even considered her efforts in a negative manner; thus, there were **no** temporal proximity between her efforts and college's termination decision.

Torts:

"Student Injured His Hand in College's Fitness Center"
Beglin v. Hartwick College (N. Y. A. D. 3 Dept., 888 N. Y. S. 2d 320), November 12, 2009.

Material issues of fact **existed** as to whether college had notice of dangerous condition of weight machine in college's fitness center that allegedly caused student's injury. The material issues focused on such issues as whether accessory weight was being used at the time of the student's accident and whether such use was cause of the weight jam and as to whether student ignored warning label on weight machine when he placed his hand beneath weights that were on the machine; thus, **precluding summary judgment** for the college. **Note:** Plaintiff was working-out with a fellow student when he attempted to ascertain why the metal weight plates of a weight machine jammed. While examining the weight machine approximately 140 pounds of such weight plates suddenly dislodged and fell on his hand.

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May - June 2011 (618 & 619)

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Topics:

- Labor and Employment
- Security
- Student Discipline

Topics

Labor and Employment:

"University Employee Did Not Establish a Causal Relationship between Her Protected Activity and Non-Renewal"
Schechter v. Georgia State University (C. A. 11 [Ga.], 341 Fed. App. 560), August 12, 2009.

Former state university employee did **not** establish a causal relationship between her protected activity and the non-renewal of her contract. Therefore, the plaintiff **failed** to establish a prima facie case of retaliation under Title VII, where university had renewed her contract with "serious reservations" before her gender discrimination complaint. There was a five-month gap between her complaint and her negative evaluation on which her non-renewal was based. **Note:** The plaintiff alleged gender discrimination, disparate treatment, and a hostile work environment, which lead to her filing a grievance complaint.

Security:

"University Entitled to Charitable Immunity in Death of Student Who Fell To His Death"
Orzech v. Fairleigh Dickinson University (N. J. Super. A. D., 985 A. 2d 189), December 29, 2009.

Student's conduct in violating university's alcohol policy by holding a party in his dormitory in which alcohol was served to minors did **not** alter student's status as a beneficiary of the university, and thus the university **was entitled** to charitable immunity in family's wrongful death claim against the university after the student fell out of a dormitory window while intoxicated and died. **Note:** Plaintiff's son (Keith Orzech – 21 years old) completed the 2004-2005 school term at Fairleigh Dickinson University and was enrolled for the upcoming 2005-2006 school term. During the summer of 2005, although not taking classes, he remained on campus as a RA in a residence hall. On June 30, 2005, Orzech purchased alcohol and had a party in his dorm suite, along with somewhere between 10 – 12 invited guests. Plaintiff's son became extremely intoxicated and was put to bed between 2:00 a.m. and 2:30 a.m. The county prosecutor's office determined that sometimes between 4:20 a.m. and 9:00 a.m. Orzech must have gotten up, leaned out his window, and accidently fell to his death. It was also determined that the student's blood alcohol content at the time of his death was 0.166%.

Student Discipline:

"Student Legally Expelled for Plagiarism"
Dequito v. New School for General Studies (N. Y. A. D. 1 Dept., 890 N. Y. S. 2d 56), December 17, 2009.

University **substantially complied** with its published guidelines in expelling student for plagiarism and plaintiff **received adequate notice** of ad hoc committee's hearing and **a meaningful opportunity** to be heard. Furthermore, there was **no** indication that the university's guidelines prohibited the professor who reported student's plagiarism from serving on the ad hoc committee. **Note:** The plaintiff was repeatedly advised to remove plagiarized portions from her various drafts of her master's thesis.

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July 2011 (620 & 621)

Legal Update for Community Colleges

July 2011

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Topics:

- Civil Rights
- Labor and Employment
- Torts

Topics

Civil Rights:

"College's Reason for Not Hiring Professor to Teach Summer School Was Not Pretext to Retaliation" Due to EEOC Charge"
Tori v. Marist College (C. A. 2 [N. Y.], 344 Fed. App. 697), September 2, 2009.

College's reason for not hiring adjunct professor to teach a five-week summer class in summer, namely that it was not the college's practice to bring back faculty members who had not been granted tenure and whose contacts had expired, was **not** pretext for retaliation for having filed a charge with the EEOC, under Title VII. The college had in fact, emailed the plaintiff to inquire about his availability to teach a class during July and August of that same year.

Labor and Employment:

"University Employee Not Subjected to Severe or Pervasive Harassment"
Hill v. Emory University (C. A. 11 [Ga.], 346 Fed. App. 390), August 25, 2009.

Employee of defendant was **not** subjected to severe and pervasive harassment as required to establish a Title VII hostile work environment claim. The plaintiff alleged charges similar to the following: his work group was referred to a counseling session, he was demoted, his requests for supporting office staff were denied, one of his hiring decision was denied, his request to attend a conference was denied, he was never assigned any office space, defendant failed to reabsorb him after his job was terminated or provide him with a list of available job openings. The United States Court of Appeals, Eleventh Circuit, held that plaintiff was **not** subjected to severe and pervasive harassment as so required to establish a Title VII hostile work environment claim.

Torts:

"Swim Team Member Sues University for Negligent Hiring and Supervision of Her Coach"
Segal v. St. John's University (N. Y. A. D. 2 Dept., 893 N. Y. S. 2d 221), January 12, 2010.

Allegedly negligent actions of a university swim team coach were within the course and scope of his employment; thus, **defeating** negligent hiring and supervision claims asserted against the university by a swim team member claiming her back injury was caused by certain training methods employed by the coach.

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August 2011 (622 & 623)

Legal Update for Community Colleges

August 2011

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Topics:

- Civil Rights

Topics

Civil Rights:

"Professor's Refusal to Allow Student to Give a Speech on Abortion Did Not Violate Student's Free Speech"
O'Neal v. Falcon (W. D. Tex., 668 F. Supp. 2d 979), October 27, 2009.

Community college professor's concern over the potentially disruptive nature of the subject of abortion ***constituted a legitimate pedagogical reason*** for the professor to prohibit a student from choosing the topic of abortion for a persuasive speech in his speech communication class. Thus, the professor's prohibition did **not** violate the student's First Amendment right to free speech. In addition, the professor ***had a legitimate concern*** that permitting a speech on abortion would improperly shift the focus of the lesson to the topic of abortion rather than to speech communication skills.

"College Did Not Violate Title IX in Responding to Female Student's Complaints of Harassment by Male Professor"
Johnson v. North Idaho College (C. A. 9 [Idaho], 350 Fed. App. 110), October 13, 2009.

No reasonable juror could have concluded that college had notice of professor's allegedly discriminatory conduct against female student prior to the date that the student's counselor informed the college's affirmative action officer charged with receiving reports of sexual harassment. Furthermore, the college did **not** manifest deliberate indifference to professor's behavior once it was on notice of it, and thus the college did **not** violate Title IX. The college promptly investigated the student's allegations and forced the professor to resign his position in short order.

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September 2011 (624, 625, & 626)

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Topics:

- Abuse and Harassment
- Labor and Employment
- Torts

Topics

Abuse and Harassment:

"Professor Denied Request for Better Office Space"
Lockridge v. The University of Maine System (C. A. 1 [Me.], 597 F. 3d 464), March 10, 2010.

Female professor filed in state court a suit against a state university, claiming gender discrimination, retaliation, and hostile work environment in violation of Title VII. The United States Court of Appeals, First Circuit, held that defendant's denial of plaintiff's request for better office space did **not** constitute "materially adverse" employment action. The denial of her request for better office space would not dissuade a reasonable employee from making or supporting a charge of discrimination, as so required for the plaintiff's Title VII retaliation claim. Furthermore, the denial of office space left her in *no worse position* than that held by similarly situated faculty members.

Labor and Employment:

"Professor Failed to Establish a Case of Gender Discrimination"
Mastrolillo v. Connecticut (C. A. 2 [Conn.], 352 Fed. App. 472), November 5, 2009.

Former assistant professor of community college **failed** to demonstrate that the college's non-renewal of her teaching contract gave rise to an inference of discrimination, as required to establish a case of gender discrimination against the college under Title VII. The plaintiff submitted **no** evidence that she was treated differently than men or that men were given preferential treatment. **Note:** Plaintiff did not establish that she performed her job satisfactorily, given the negative performance evaluations and her admitted lack of interest in teaching certain advanced level courses.

Torts:

"Investigation of Inappropriate Touching of Student Did Not Amount to Deliberate Indifference"

J. B. v. Lawson State Community College (Ala., 29 So. 3d 164), June 26, 2009.

The conduct by college officials and the immediate supervisor of a basketball coach, who raped the plaintiff, in failing to intervene in the plaintiff's long-standing relationship with the coach prior to the rape did **not amount to deliberate indifference** for purposes of imposing liability under Title IX. The plaintiff never complained to the coach's immediate supervisor or any other school official regarding the coach's conduct toward her. **Note:** The plaintiff was coach for three years in high school by the offending coach, visited in his home, traveled with him and his family, and traveled with the coach and his family to watch his daughter play basketball for a local university.

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November/December 2011

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The **Legal Update for Community Colleges** is a monthly update of selected significant court cases pertaining to post-secondary institutions. It is written by Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at **501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Free Speech
- Labor and Employment
- Torts

Topics

Free Speech:

"Prohibiting Students from Wearing Empty Holsters in Classrooms and Corridors Violated Students' First Amendment Rights"
Smith v. Tarrant County College Dist. (N. D. Tex., 694 F. Supp. 2d 610), March 15, 201.

Community college's policy prohibiting students from protesting ("empty-holster protests") the status of the law and school policy on "concealed firearms" by wearing empty holsters in classrooms and hallways **was unconstitutional** as applied to students in violation of free speech provision of the First Amendment of the United States Constitution. The justification for the rule that a disruption to classroom activities might be caused by either students' immediate reaction to the empty holsters or to the police response to reports of firearms on campus caused by the empty holsters, could **not** be supported by mere undifferentiated apprehension of a disturbance.

Labor and Employment:

"Professor's Racially-Charged Website and E-Mails Were Pure Speech and Not Unlawful Harassment"
Rodriguez v. Maricopa County Community College Dist. (C. A. 9 [Ariz], 605 F. 3d 703), May 20, 2010.

Community college professor's racially-charged website and e-mails sent over a distribution list maintained by his community college district, which questioned why the district was endorsing a Hispanic celebration asked readers to "celebrate the superiority of Western Civilization", along with declaring that "the only immigration reform imperative is the preservation of the White majority." The United States Court of Appeals, Ninth Circuit, declared that the professor's remarks **constituted pure speech and was not unlawful harassment**; thus, the district's refusal to discipline or dismiss the professor under the district's anti-harassment policy did **not** violate Hispanic employees' equal protection right to be free from unlawful workplace harassment.

Torts:

"University could be Liable for Danger Posed by Portable Ramp to its Commissary"
Page v. State (N. Y. A. D. 3 Dept., 902 N. Y. S. 2d 199), April 29, 2010.

Genuine issue of material fact **existed** as to whether portable ramp placed over stairs for deliveries to the state university's commissary violated regulations governing the means of egress; thus, **precluding summary judgment** for the university in commissary worker's action against state and university. The plaintiff was seeking damages for personal injuries she sustained when she tripped on the ramp and fell while exiting the commissary. **Note:** As documented by a security video recording, plaintiff exited the building onto a loading dock, crossed the dock at an angle to her right and, as she stepped onto the left side of a 30-inch by 10-foot portable ramp leading to the pavement below, her left foot caught on a three-inch curb on the side of the ramp. With her hands full, she lost her balance, stumbled down the ramp and fell at its bottom. The ramp, which had been in use for approximately 10 years, was intended to cover the underlying stairs when used for deliveries or raised and secured on its side by an attachment to a hook installed in the wall of the building.

Books of Possible Interest: Two recent books published by Purvis –

1. Leadership: Lessons From the Coyote, www.authorhouse.com
2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

Note: Johnny R. Purvis is currently a professor in the Department of Leadership Studies at the University of Central Arkansas. He retired (30.5 years) as a professor, Director of the Education Service Center, Executive Director of the Southern Education Consortium, and Director of the Mississippi Safe School Center at the University of Southern Mississippi. Additionally, he serves as a law enforcement officer in both Arkansas and Mississippi. He can be reached at the following **phone numbers**: 501-450-5258 (office) and 601-310-4559 (cell)