2013 URMIA Journal Reprint

Policies, Timing, Documentation, and Consistency: Four Tools for Colleges and Universities to Manage Employee Relations and Mitigate Risks of Employment Discrimination Claims

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It does not do to leave a live dragon out of your calculations, if you live near him.

—J.R.R. Tolkien (1892–1973),
Author and University Professor

Policies, Timing, Documentation, and Consistency: Four Tools for Colleges and Universities to Manage Employee Relations and Mitigate Risks of Employment Discrimination Claims

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Abstract: Just like any other organization, institutions of higher education would likely prefer to avoid employment-related lawsuits. While completely avoiding litigation of any kind is impossible, there are steps that administrators and risk managers at colleges and universities can take to limit employment-related claims and lawsuits. By better managing employee relations, institutions of higher education can oversee their employees' work more effectively. Good employee management encompasses four distinct areas: policies, timing, documentation, and consistency. Keeping these four principles in mind will help college administrators mitigate the risk of lawsuits and minimize exposure when faced with employment discrimination lawsuits.

Introduction

Any college or university would be thrilled to get an answer to the question, "What can I do so that I don't get sued?" In the employment context, as in other areas of the law, there exists no certain action to avoid a lawsuit. The reality is that employment discrimination claims are on the rise, and at some point a college or university is likely to face such a suit. While understandably frustrating for employers, the American justice system is structured in a way which permits even baseless claims to proceed at least part way down the path of litigation. Further complicating matters in employment cases is the fact that lawsuits brought by employees often are driven by an employee's perception that he or she was rejected based on a personal, protected characteristic as opposed to a performance issue. One way to counteract these emotion-driven claims is for colleges and universities to find a way to bring objectivity into the workplace. To that end, there are some basic principles about managing employee relations that can help colleges and universities more effectively oversee the work of their employees and minimize the risk of liability in employment claims. Good employee management can be summed up in four words: policies, timing, documentation, and consistency. Each of these relates to the other, and it is sometimes difficult to separate them. Nevertheless, this article provides a brief review of each concept and how it should be applied in the workplace. Keeping these four principles in mind, a college or university just might better position itself to mitigate the risk of a lawsuit ever being filed or, at the very least, minimize its exposure when faced with an employment discrimination lawsuit.

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Lawsuits Arising from Employment

As a preliminary matter, it is important to understand the typical claims a college or university might face if it gets sued. Because they are employers, colleges and universities face the same claims that any other employer might face, including discrimination or retaliation claims. However, colleges and universities play a specialized role in our society, and, as such, they are uniquely exposed to lawsuits involving faculty issues. These claims will be briefly discussed below.

The Rising Impact of Retaliation Claims

The United States Equal Employment Opportunity Commission (EEOC) recently released data concerning workplace discrimination claims filed for fiscal year 2012.

According to the EEOC, it received 99,412 private sector workplace discrimination charges during fiscal year 2012, down slightly from 2011.[1] The agency obtained more than $365 million in monetary recoveries on behalf of discrimination claimants, the largest ever from private sector and state and local government employers.[2]

Race claims were the most frequent type of discrimination claim seen by the EEOC in 2012.[3] The next most frequent type of discrimination claim involved sex discrimination charges, which includes claims of sexual harassment and pregnancy discrimination.[4] Disability and national origin discrimination claims were the next most common claims.[5] With filings in considerably lower frequency were discrimination claims based on national origin, religion, and color.[6, 7, 8]

The EEOC for the first time this year released a new table identifying the type of adverse employment action which formed the basis for the discrimination claims filed in the agency.[9] In fiscal year 2012, discharge was the most frequently-cited discriminatory action, followed by changes in "terms and conditions" of employment, and then discipline.[10]

Perhaps most notable from the EEOC's data was that retaliation claims were the most frequently filed claims. In fiscal year 2012, there were 37,386 retaliation claims filed, 38.1 percent of all filed claims.[11] This is more than race and sex discrimination claims; it is more than twice the number of national origin, religion, and color discrimination claims combined. According to EEOC statistics, the number of retaliation claims filed with that agency has been on the rise for some time; indeed, it has almost doubled since 1997. As of 2012, retaliation claims now exceed all other unlawful discrimination claims.[12]

The rise in retaliation claims may be due in part to the United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Company v. White*.[13] Many interpret this decision as broadening the scope of retaliatory conduct by ruling that the anti-retaliation provisions of Title VII, unlike anti-discrimination provisions, extend beyond workplace or employment-related acts.[14] That is, there is no requirement that an adverse action materially affect the terms and conditions of employment to constitute actionable retaliation.[15] The Court also articulated what many argue is a lenient legal standard for proving retaliation: the employer must prove only that the employer's adverse action would discourage a reasonable worker from complaining.[16] Examples of such retaliation might include, for example, a change in job duties, a transfer to a different location, or even a negative review. While trivial annoyances created by an employer are not actionable, any treatment that is reasonably likely to deter protected activity could form the basis for a retaliation claim as the law currently stands.[17]

Retaliation claims also may be more popular than ever because they tend to be winning claims. It is not uncommon for employee-plaintiffs to lose a discrimination claim but succeed in a retaliation claim. As a practical matter, juries and judges seem more likely to find that an employer has retaliated against an employee for complaining or engaging in some other type of protected activity than they are to find, for example, that an employer has intentionally discriminated against an employee because she is female, African-American, or part of some other protected class.

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In one example in the college and university context, an associate professor at Tulane University lost his discrimination claims against the school, but his retaliation claim succeeded.[18] One important note is an employee who succeeds in a retaliation claim is entitled to the same significant statutory damages as a successful discrimination plaintiff, including emotional distress, reasonable costs, and attorneys' fees.[19]

That the current trend is for employees to pursue retaliation claims does not necessarily mean that colleges and universities cannot or should not discipline poor performing employees for fear of being sued. Colleges and universities are not precluded from taking adverse employment action against an employee merely because he or she made a complaint. If an employee legitimately is performing poorly and would objectively be subject to a negative review, discipline, or even termination, a college or university should not refrain from taking that action merely because the employee complained or engaged in protected activity. Indeed, applying the *Burlington North-*

ern standard, courts have denied faculty retaliation claims in the college and university context.[20] However, in light of the risk of discrimination and retaliation claims, colleges and universities need to employ effective strategies to try to mitigate the risk of retaliation and discrimination lawsuits and to strengthen the school's defenses if and when the lawsuit does happen.

That said, in its most recent session, the United States Supreme Court issued an opinion decided in the higher education context which indicates the Court's desire to moderate the recent prominence and success rate of retaliation claims. In *University of Texas Southwestern Medical Center v. Nassar*, Nassar was a physician of Middle Eastern descent who claimed that the university retaliated against him. In the case, after Nassar complained about religion and ethnicity discrimination and quit his faculty position, his supervisor contacted an affiliate hospital of the university to remind it that the hospital's offer to Nassar for a staff physician position was inconsistent with the affiliation agreement between the hospital and the university, which required the hospital to provide open positions to university faculty members (which Nassar no longer was). The hospital thereafter withdrew its job offer.[21] A jury had awarded Nassar over $3 million after trial.[22] However, the Supreme Court's decision vacated that jury award.[23] The Supreme Court ruled that a "but for" causation standard is proper for employment retaliation claims, i.e. a plaintiff must prove that the employer *would not have taken the action* in the absence of retaliation.[24] To put it another way, if the employer would have taken the same action in the absence of retaliation, then there exists no causation, and the plaintiff's retaliation claim fails.[25] Under the "but for" standard, if it could be shown that the affiliation agreement actually did preclude Nassar's hiring and the university would have sought to enforce that agreement in order to honor that agreement notwithstanding a retaliatory motive, it would not be liable for retaliation.[26]

The precise impact of the *University of Texas Southwestern Medical Center* case is unknown. Notably, the decision did not address that broadly defined conduct that may be retaliatory under *Burlington Northern*. Nevertheless, the Court's application of a stricter causation standard in retaliation cases will likely discourage plaintiffs from bringing retaliation claims, especially frivolous ones, by making it more difficult for them succeed in retaliation claim, notwithstanding the pro-employee ruling of *Burlington Northern*. Indeed, the Court reasoned in its decision that the more stringent "but for" causation would serve to discourage "frivolous claims which…siphon resources from efforts of employers, administrative agencies, and courts to combat workplace harassment."[27]

Tenure-Based and Other Faculty Focused Claims

In addition to employee retaliation and discrimination claims, colleges and universities also face specialized lawsuits by faculty members. Faculty lawsuits arise in a variety of contexts. Colleges and universities have been sued by faculty-employees for denying tuition to a professor who sought to take a course outside the permissible university system,[28] for refusing a request for graduate faculty status,[29] for allegedly preventing professors from fully participating in a faculty search,[30] for denying full professorship,[31] for denying sabbaticals, and many other situations. The most common faculty-related employment claim concerns the denial of tenure. The typical allegation is that tenure was denied on a discriminatory or retaliatory basis.

At the outset, it is important to acknowledge that tenure cases present a special challenge to courts. In deciding a tenure-based claim, the court must balance a college or university's right to academic freedom with the public policy against discrimination or retaliation. Courts routinely recognize that they cannot simply substitute their own views concerning faculty qualifications for those of the educational institutions.[32] At the same time, however, an employee's right not to be denied tenure for discriminatory reasons prevents completely insulating the tenure process from judicial review.[33] Accordingly, courts recognize that they are obligated to "take special care to preserve the university's autonomy in making lawful tenure decisions" and refrain from modifying those decisions, except in the case of discrimination, retaliation, or some other unlawful conduct.[34]

Because tenure-based claims, like other employment lawsuits, often settle confidentially before trial, it is sometimes difficult to ascertain how a jury might view them. One reported case, *Brown v. Trustees of Boston University*, provides a compelling example of what a jury could do when presented with an employment-related claim involving the denial of tenure.

Briefly, as background, the plaintiff, Julia Prewitt Brown, was an assistant English professor at Boston University.[35] Ms. Brown's tenure qualifications were evaluated in three areas: scholarship, teaching, and service to the university.[36] Many individuals and committees weighed in on whether Ms. Brown should receive tenure, and most recommended promotion and tenure.[37] One dean and the school's assistant provost expressed concerns about the quality of Ms. Brown's scholarship work and recommended denying Ms. Brown tenure.[38] Ultimately, the university president adopted the dean's and the provost's dissenting views, and at the president's recommendation, the board of trustees denied Ms. Brown tenure.[39]

Believing that she was denied tenure because of her sex, Ms. Brown sued the school for breach of contract on the theory that the denial violated the anti-discrimination clause of the faculty's collective bargaining agreement.[40] Ms. Brown also alleged a claim of sex discrimination under Title VII.[41] At trial, Ms. Brown presented evidence of male tenure candidates who had superior or equal qualification to Ms. Brown and were granted tenure.[42] Ms. Brown also presented evidence at trial that university administrators had made derogatory comments about women, such as, for example, stating, "I don't see what a good woman in your department is worrying about. The place is a damn matriarchy," even though women made up a minority of the members of the English department.[43]

The jury returned a verdict in favor of Ms. Brown and awarded her $200,000 in damages.[44] The court ordered the university to pay Ms. Brown an additional $15,000 in emotional distress damage and, perhaps most troubling for the school, the court *required* the university to grant Ms. Brown the position of associate professor with tenure.[45] The First Circuit affirmed the lower court's decision, upholding both the award of damages and the order requiring the university to grant Ms. Brown tenure.[46] Undoubtedly, a jury verdict today in favor of a faculty-plaintiff would result in an even larger damages award.

The *Brown* case makes clear that a college or university will face significant scrutiny and cost if and when it gets sued for denying tenure to a faculty member. Being sued as a result of the denial of tenure also tends to disrupt operations to the extent faculty members and even high-level administrators are required to testify. Legal defense fees are also likely to be costly in tenure-based lawsuits even if the case is baseless and the college or university's tenure decision is upheld. For example, one institution was required to defend a national origin and religious discrimination case for denying tenure to a faculty member who was subject to repeated and increasingly serious students' complaints about the would-be professor's conduct.[47] In another case, a professor sued the institution for refusing to waive tuition for a course she wanted to take at a school that expressly was not included in the institution's written tuition waiver policy.[48] In both cases, the schools stood on firm ground in denying tenure, and it is difficult to imagine a court not upholding the institution's faculty decision. The institutions were, nevertheless, required to defend against these claims. As with other employment claims, colleges or universities can mitigate some of the risk of tenure-related claims by implementing thoughtful policies, utilizing progressive discipline, and remaining cognizant of the timing, documentation, and consistency to manage employees, including faculty members.

Adopting written employment policies is an important initial step to improving employee-employer relations, but it is important to remember that not just any written policy provides the same protection.

The Role of Progressive Discipline, Anti-Discrimination, and Other Written Policies

Adopting written employment policies is an important initial step to improving employee-employer relations. By establishing clear, objective standards for workplace conduct, written policies can begin to eliminate the tendency for supervisors to manage their employees based on personal feelings. Written employment policies also help to manage an employee's expectations about how the employer will treat the employee. While not fool-proof, having written policies that provide an objective basis for

the employer's decision may make an employee less likely to view an adverse employment action as based on personal dislike or on the basis of protected class status. As an added benefit, if a college or university does get sued, a fact finder is also likely to consider if the school has tried to eliminate disparate treatment in the workplace by adopting employment policies. But it is important to remember that not just any written policy provides the same protection. The following provides some guidance about the content of written employment policies that can assist in managing employee relations and can help to bolster a college or university's defense if and when a lawsuit arises.

Job Descriptions/Tenure Standards

Preparing written job descriptions and/or the standards for tenure is a critical step to minimizing a college or university's exposure in an employment or tenure-based suit. Having a written job description and written expectations for faculty creates an objective standard on which to judge an employee's performance that has nothing do to with any protected personal characteristic. A job description or tenure standard can be used as a checklist from which to evaluate whether an individual is adequately performing his or her job functions. Having a written job description also helps a college or university avoid hiring or tenure denial discrimination claims if it can point to a specific aspect of the position which it believed the applicant could not perform. The content of a written job description will also be critical to a disability claim because if an individual cannot perform the essential functions of the job, then the Americans with Disabilities Act does not apply, and there can be no disability discrimination.

A well drafted job description or tenure standard will be specific and detailed; it will contain educational, intellectual, and physical requirements of the position. It should also be drafted with a principal focus of determining whether an individual is able to perform the essential job functions verses the personal characteristics of the employee. Importantly, the written job description must truly reflect the requirements of the job, as opposed to identifying the aspirational duties of the position. When a job description fails to realistically describe the job, not only will it fail to provide support for employment decisions, it may actually hurt the credibility of the employer. When drafting a job description, consider what the employee(s) in the position will do on a daily, weekly, or monthly basis, and then describe in detail what physical, cognitive, and educational qualifications an individual must have to be able to perform those tasks.

It is vitally important that employees realize that its college or university employer is willing to act on any violations of its anti-discrimination policy.

Anti-Discrimination Policies

Anti-discrimination policies are also vital to avoiding employment-related lawsuits, including tenure-based claims, and defending them once they happen. At a minimum, an anti-discrimination policy should articulate that the college or university is an equal opportunity employer and explicitly prohibit discrimination in the workplace. An anti-discrimination policy should also list the specific personal characteristics that are protected by federal law and by state statutes, which are often more protective than federal law. A prohibition against harassment on the basis of personal characteristics, such as race, sex, or sexual orientation, should also be addressed in an anti-discrimination policy. An anti-discrimination policy should also list examples of the types of conduct which violate the policy, but the anti-discrimination policy should also specifically state that the list of examples is *non-exhaustive* – that is, it should be clear that the listed conduct does not identify every single type example of conduct that could violate the policy. An anti-discrimination policy should also address the college or university's commitment to make reasonable accommodations for qualified persons with disabilities. A college or university's anti-discrimination policy should include a statement that it also prohibits retaliation. It is also vitally important that employees realize that its college or university employer is willing to act on any violations of its anti-discrimination policy. To that end, it is advisable that the anti-discrimination policy state that any person found

to violate an anti-discrimination policy may face discipline, up to and including termination.

Open Door Policies

A college or university is also well advised to adopt an open door policy. An open door policy seeks to achieve a way for an employee to make complaints internally about issues in the workplace. Having an open door policy helps to promote a climate of candor and openness between employees and management because it signifies an employer's commitment to resolving employee complaints. In that way, open door policies go hand in hand with anti-discrimination policies. If an open door policy is drafted in a way that encourages reporting, it also creates opportunities for a college or university employer to resolve employee issues before they escalate to a formal, external complaint like a lawsuit.

A college or university's open door policy should impress upon employees that it takes seriously any complaint, and it should also state that the school will investigate all complaints of discrimination, harassment, retaliation, or unfair/disparate treatment on the basis of one's personal characteristics. An open door policy should specify the process by which a complaint should be made. Colleges and universities should be cautious, however, about formalizing the process too much. If there are too many steps an employee must take to make a complaint, or if the process is too rigid, for example, by requiring completion of specific/multiple forms, the purpose of the open door policy might well be eliminated.

Open door policies also often explain that in the first instance, an employee should discuss any issues in the workplace with his or her supervisor before formally filing an internal complaint. While such a statement makes sense, it is critical that the open door policy also identify an alternative person to whom the employee may complain, just in case the alleged wrongdoer happens to be the complaining employee's supervisor. An open door policy also should identify the name and contact information of a point person(s) who holds a more senior position at the college or university to whom complaints should be made if the employee does not feel comfortable raising an issue with the direct manager. An open door policy should also identify an address and phone number for the state administrative agency responsible for investigating complaints of discrimination and retaliation.

A college or university should consider leaving out of its open door policy an absolute promise to keep complaints confidential. Absolute confidentiality often prevents a college or university from doing a full investigation of a complaint. It is quite difficult, if not impossible, to perform interviews to determine the validity of the complaint if the college or university cannot discuss the identity of the complaining employee or provide some background information about the complaint because of a promise of complete confidentiality. Instead, the school is well advised to state in its open door policy that it will make *reasonable efforts* to maintain confidentiality and balance the privacy rights of the complaining employee with its obligation to investigate the complaint.

It is also important that an open door policy reiterate the college and university's commitment against retaliation. An open door policy should explicitly state that a person who launches a workplace complaint will not be retaliated against, i.e. the college or university will not take an adverse employment action against an employee because the employee utilized the open door policy. Colleges and universities should also consider including a statement that anyone who participates in the investigation will not be retaliated against. It should also be made clear that the college or university strictly prohibits the alleged wrongdoer, or any other employee for that matter, from taking any adverse employment action against the complaining employee. To that end, an open door policy should state that any employee who retaliates against complaining or participating employees may be subject to discipline, up to and including termination.

To ensure that the complaining employee feels comfortable in the workplace even during the investigation, a college or university might also consider addressing in the open door policy the possibility for intermediate action to be taken against an alleged wrongdoer during a pending investigation. For example, many open door policies allow ways for the complaining employee to avoid contact with the alleged wrongdoer during an investigation. This type of proactive provision provides considerable cover for an employer against retaliation claims. The college and university employer must be certain, however, that in taking intermediate steps to separate the accused and the accuser, the terms and conditions of the complaining employee's employment are not altered in any way. If those mid-in-

vestigation steps change the complaining employee's job in any way, it could be retaliatory. When in doubt, always air on the side of inconveniencing the alleged wrongdoer.

Progressive Discipline

Adopting a progressive discipline policy is another effective way for colleges and universities to manage the risk of a discrimination/retaliation suit. Progressive discipline is an approach to employee and faculty management which seeks to achieve proportionality in the response to undesirable employee behavior in the workplace. Essentially, an employer responds to poor performance or misconduct by utilizing a broad range of consequences commensurate with the offense. A progressive discipline process might utilize informal counseling, official verbal warnings, written warnings, performance improvement plans, and suspensions, with or without pay, demotions, or even discharge, depending on the number or type of offense. Importantly, progressive discipline would not preclude an employer from terminating an employee for the first offense. Rather, a progressive discipline policy seeks to identify increasingly more serious disciplinary action for similarly more serious performance issues. Progressive discipline should also take into account the employee's performance history to identify the appropriate consequences for a discrete act. Progressive discipline would apply, for example, a harsher penalty to a person who steals from the employer than it would for an employee who simply was not performing well at his or her job. Likewise, under a progressive disciplinary approach, an employee who had performed poorly for months, including under a written performance improvement plan, might well face more serious employment consequences than a person who, for the first time, fell below the satisfactory level in a regular review. In short, a progressive approach to discipline attempts to achieve a policy where the "punishment fits the crime."

The Second Circuit has held that a retaliation plaintiff cannot establish retaliation if the adverse employment action that forms the basis for the claim was taken by the employer as part of a progressive disciplinary process that began before the plaintiff complained.

Not only does the implementation of progressive discipline help an employer mitigate the risk of employment discrimination or tenure denial claims, these types of policies have the added advantage of providing an ongoing means to manage employee conduct. Using a progressive disciplinary approach can often help to correct a performance issue before it escalates too far. Having a progressive discipline process also allows an employer to identify clear and known sanctions for a range of employee conduct it deems undesirable. A progressive discipline policy also provides an employer objective guidance on which to fall back for employee discipline, to the extent there might exist some personal bias against an employee. Lastly, an employer who follows a progressive discipline policy is much more likely to be able to point to a legitimate, non-discriminatory reason for its disciplinary action and/or its denial of tenure than one who does not, which in turn bolsters the institution's defense to any lawsuit that may result therefrom. Indeed, in some cases, the utilization of progressive discipline may form the basis for an absolute defense to a retaliation claim, whether brought by an employee who faces termination or a faculty member who is denied tenure.

For example, the Second Circuit has held that a retaliation plaintiff cannot establish retaliation if the adverse employment action that forms the basis for the claim was taken by the employer as part of a progressive disciplinary process that began before the plaintiff complained.[49] In the *Slattery* case, the court noted that when "gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."[50] As a result, the court entered judgment to the employer because the decision to put the plaintiff on probation and subsequently terminate his employment could not be retaliation for his filing a charge of discrimination, when it was made as part of a progressive discipline initiated against the plaintiff months before he filed a charge

of discrimination because of his ongoing performance issues.[51]

When preparing a progressive discipline policy, consider incorporating the concept that the "punishment fit the crime." It should establish equitable treatment and set clear expectations for employees about their conduct and the sanctions therefore. Progressive disciplinary policies should also permit the consideration of multiple offenses. They should provide guidelines that are easy for all supervisors to follow. They should provide a systematic approach to performance issues and should establish consistent consequences that are applicable to all employee levels at the college or university.

A progressive discipline policy should also somehow implement a means to consider extenuating circumstances that might justify enhancing or lessening the formal disciplinary action. A good progressive discipline policy will connect consequences with particular behavior, rather than be based on personal attacks. Furthermore, it should go without saying that progressive discipline should in no way, whether in principle or in practice, be linked to a protected class of employees.

A college or university employer should also consider creating performance review records that are consistent with its progressive discipline policy. For example, an employer should consider creating performance evaluations for employees and faculty members alike and link the discipline to those evaluations. Some employers assign a color or number system to reflect the progressive approach to discipline. For example, a green or low number assigned to an offense might subject the employee to merely a verbal warning that is documented in the system, while a red or high numbered offense might suggest termination is the appropriate disciplinary action. But this type of designation is not necessary. The important principle is that the policy associate more serious consequences to more serious offenses.

The progressive discipline policy, or any written employee policy for that matter, should contain a disclaimer that does not transform the at-will employment relationship and that it does not constitute a contract between employee and employer. The progressive discipline policy should also clearly state that it merely serves as guidance about the consequences associated with employee performance issues and in no way shall limit the employer's right to take any action it deems fit to address a disciplinary issue in the workplace.

The closer the proximity in time between the employment decision and the protected activity, the more likely a fact finder will associate the decision with the protected activity.

Publication of Policies

All written policies should be widely distributed to faculty and staff, applicants for admission or employment, and other relevant parties. Colleges and universities should also prominently post their written policies on all websites and in areas around campus that employees frequent, such as employee lounges, department offices, and/or in any human resources department. Colleges and universities should also consider requiring employees to sign an acknowledgment form indicating that they have read and understand these important policies. This provides some "proof" that the employee was aware of the school's policies if and when a lawsuit arises.

The Guiding Principles for Employee and Faculty Management and Mitigating the Risk of Employment Lawsuits

While there is no certain way for a college or university to ensure that it will not get sued by one of its employees or faculty members, a college or university that adopts objective, reason-based written policies has taken significant steps toward managing the risk of an employment lawsuit. In addition to adopting well reasoned policies, there exist some guiding principles for managing employees that also help to mitigate the risk of getting sued. If utilized, these principles can help to mitigate the risk of lawsuits and minimize a college or university's exposure when the inevitable employment discrimination lawsuit is filed. A college or university that fairly and effectively implements its written policies and makes timely, consistent employment

decisions that it documents has substantial achievement towards mitigating the risk of employment lawsuits.

Timing

Timing is probably the most critical tool to managing the risk of an employment-related lawsuit, including a tenure denial claim. Nearly every fact finder will eventually focus on the timing of an employment or tenure decision and connect it to a prior event. For example, the relative timing of an adverse employment action (including tenure denial) to an employee's engagement in a protected activity is probably the single most significant factor in evaluating a retaliation claim. The closer the proximity in time between the employment decision and the protected activity, the more likely a fact finder will associate the decision with the protected activity.[52] That accordingly argues for proactive management and "striking while the iron is hot."

To that end, college and university employers should conduct performance reviews on a regular basis. If there exists a discipline problem, or if an employee is failing in some way to meet the school's performance standards, do not delay disciplining the employee. Employers also should not avoid disciplining the employees when discipline is warranted. While it may be counterintuitive, employers actually mitigate the risk of getting sued in the future by confronting performance issues and responding to an employee's failures immediately.

While a conversation about the ways in which an employee has failed to meet expectations may well be uncomfortable, it is almost guaranteed that the performance issues of an employee are NOT going to get better with time, especially if there is no employer intervention. Moreover, creating an open dialogue with an employee about his or her perceived deficiencies may actually improve the employee's performance. In turn, an employer might be able to avoid a demotion, termination, or other adverse employment action altogether. Providing contemporaneous feedback is likely to make the employee aware of an issue that he or she was oblivious to beforehand. Communicating about an employee's performance may even permit the employee and employer to identify solutions to the performance issues.

The tone of contemporaneous feedback given to employees is important, too. When discussing performance issues, employers should avoid statements of conflict and hope. Employers should never make performance reviews personal. Employers also should avoid saying things like, "don't worry about it," and "things will get better." These types of statements only permit denial about legitimate issues going on in the workplace. Colleges and universities should also coach their employees on an ongoing basis but especially on performance issues that supervisors identify as requiring improvement. Giving regular feedback, both positive and negative, is also helpful. Employers are also well advised to train managers on how to perform reviews, issue discipline, coach, and give feedback. Employers should document any feedback, coaching, and discipline as the employer gives it.

Real life cases give the best examples. In one case, a manager decided to discharge an administrative employee for performance reasons, which he had not previously documented. The manager waited to deliver the news because he did not want to deal with the emotions normally associated with job loss, including anger, blame, fear, and the isolation that comes with it. Finally, he summoned the courage to sit with her and, as he did so, the employee said she also had something to raise with him during the meeting. He literally offered, "Ladies first," and she proceeded to tell him about a disability that she had that needed accommodation. He listened and when she finished he informed her that she was discharged. How's that for timing? The employee ended up suing.

Obviously, there were a number of things he could have done to prevent the lawsuit that followed. First, the manager should have noted the employee's performance issues as they arose and not hold back his comments and concerns until he could not take it anymore. Second, he should have documented his coaching on those performance concerns as he gave it so that a record of those issues would have existed. Third, he should have started the final conversation with his own agenda as it was he who called the meeting and as the message he needed to deliver should have controlled the communication.

The main point is to avoid surprising the employee with a negative performance review or an adverse employment action like a termination. Rightfully so, an employee who hears for the first time that he or she is being terminated for employment issues about which he or she never knew is much more likely to perceive that the adverse employment action is unfair and perhaps even unlawful. Try

to avoid this perception by managing a regular dialogue concerning employee performance and raising any performance issues immediately.

Documentation

In addition to raising disciplinary issues in a timely fashion, employers who document those issues are much better able to manage their employees and, in turn, the risk of employment discrimination lawsuits.

Legal counsel is often mocked about its seemingly constant insistence that performance issues need to be documented. The fact of the matter is that the state and federal administrative agencies tasked with vetting discrimination claims look for documents to substantiate an employer's legitimate, non-discriminatory reasons, like an employee's substandard performance, for taking adverse action against an employee. Simply put, documentation provides the record of events that could eventually be the subject of lawsuits.

The process of documentation can also provide a vehicle for clear communication with employees, which may improve management and avoid lawsuits from the beginning. Nevertheless, because it is viewed as too formal, or even too inconvenient, employers often fail entirely to document employee performance issues. There have been countless times when employers faced with allegations of discrimination relay compelling stories of the ongoing performance issues of the complaining employee or the misconduct in which the employee engaged in throughout the employment. Yet when they are asked if they documented those issues, the answer is commonly "no." While the failure to document the performance issue does not in reality make the story any less compelling, the fact is that when the personnel file fails to substantiate an employer's story, or worse yet it conflicts with the employer's story, it raises serious credibility issues and may well affect the result of a discrimination case. For these reasons, management should get itself in the habit of documenting its dealings with employees.

It is important that whatever documentation does exist is accurate, complete, and thoughtful. To that end, college and university employers are well advised to avoid making hasty notations in the file or rushing through a form evaluation.

Employers should create standard performance evaluations and make all reviews in writing. Employers should discuss the written employment evaluations with the employees and require the employees to sign the reviews in writing. Similarly, any disciplinary action an employer tries to take should be in writing, and employees should sign their disciplinary notices. Employers are also well advised to include space on their evaluation and disciplinary notice forms for the employee to indicate his or her disagreement with the evaluations and/or disciplinary notices. To the extent the employee fails to take the opportunity to document his/her side of the story, there exists evidence that they had no disagreement at the time and only bolsters the legitimacy of the employer's action. Moreover, in some states, like Massachusetts, employees have to be notified of any documentation placed in a personnel file which might be viewed as negative, and he or she must be given the opportunity to respond. While the importance of documenting formal reviews and/or discipline seems more obvious, supervisors should even document their coaching comments. Employers should also provide regular training sessions to the managers and anyone responsible for reviewing employees about how to prepare and keep clear documentation of reviews, discipline, and feedback.

Obviously, not every communication with employees needs to be in writing. Indeed, the reality of operating a college or university would prevent documenting every comment or statement made to an employee about his/her work, but an annual review, a second and third warning, or other significant feedback should be in writing and, if possible, signed by the employee. This not only records the communication and preserves history, it also forces clear communication between management and employees. In light of the critical role documentation plays in managing the risk of discrimination lawsuits and minimizing the exposure if a lawsuit is filed, failing or delaying documentation of reviews, discipline, or other feedback because you "don't have the time" is simply not a good excuse.

It is also important that whatever documentation does exist is accurate, complete, and thoughtful. To that end, college and university employers are well advised to avoid making hasty notations in the file or rushing through a form evaluation as yet mere formalistic paperwork required under corporate rules. Even if it is just in a handwritten note, placing a thoughtful, well drafted note in the file about a coaching opportunity with an employee is helpful in recording the story of the employee's performance if there exists a lawsuit in the future. For this reason, using emails to communicate disciplinary decisions or performance evaluations, either among supervisors or with employees, is probably not a good idea. The drafters tone is often lost, and sometimes the drafters meaning can be misinterpreted when the message is delivered by email. At the end of the day, the goal is not to "make book" on employees but to manage them productively. Well timed documentation assists in that goal.

And, just as important, don't wait. The fact finder does not know that you intended to draft that write up before the filing of a charge of discrimination or complaint in court. If it does not exist at the time of filing, a belated entry will only be viewed as manipulative at best and fraudulent at worst. See ***Timing***, above.

Consistency

Adopting well drafted policies and documenting regular performance reviews are most certainly vital tools to manage the risk of employment discrimination claims. Equally important is the principle that the employer must apply its standards and policies consistently. The kindergarten support for this concept is typically phrased as "what is good for the goose is good for the gander." Indeed, the primary issue in the *Brown* case was that the plaintiff believed that the university had not consistently evaluated the tenure qualifications of male and female faculty members.[53]

As lawyers who often are called on to defend discrimination claims, in almost every case, we see written requests from administrative agencies or opposing counsel for the employer to provide a list of all employees other than the complainant who "have committed the same offense" with a follow up request for the documentation showing how the company responded to such offenses. The reality is that the fact finder in any employment discrimination or tenure denial case will examine the institution's history of dealing with similar offenses or tenure evaluations and compare the history to the case before it to determine if the school acted consistently with past practice. Any deviation from past practice, especially if the complainant is treated more harshly than other faculty members who were granted tenure or other employees who have committed similar offenses, will likely be interpreted as evidence of discrimination or other wrongful conduct by the employer. Perhaps the best way to ensure consistent evaluation and discipline is for the individuals charged with managing employees to take emotion out of employee review. Reason and standard performance guidelines, and not feelings about any individual employee, should drive how an employee does on an evaluation and what actions employers take to remedy a disciplinary issue.

That said, "a foolish consistency is the hobgoblin of little minds," according to Ralph Waldo Emerson.[54] In other words, an employer should not replace sound judgment with robotic reaction, but "due" attention to consistency will assist sound judgment rather than hinder it. The trick will be to maintain not only a culture of fairness but also an institutional memory of prior actions to help decision makers going forward.

Employers might want to develop a flexible but predictable progressive discipline policy or tenure standard, as more fully discussed above. An institution of higher education should document discipline and other feedback in a readily accessible manner. Prepare and implement an open door policy to ensure the exchange of communication between employees and management so that management can receive an early warning in the event of an unduly harsh or inconsistent manager. Prepare and update a policy handbook that makes clear how employees can complain about discrimination, harassment, and retaliation. Employers should also train managers on the progressive discipline policy, the open door policy, the anti-discrimination policy, and generally on providing well timed, good, and consistent feedback in a manner that improves productivity of workers. See ***Timing*** and ***Documentation*** above.

Checklist for Managing the Risks of Employment Claims

Timing

- Perform regular reviews.
- Respond immediately to a discipline problem.
- Coach on performance issues.
- Give regular feedback, both positive and negative.
- Be sure to document your feedback, coaching, and discipline as you give it.
- Train managers on how to perform reviews, issue discipline, coach, and give feedback.
- Do not fail to document your assessments and communications.
- Avoid conflict and hope statements, like "things will get better."
- Do not wait to address a performance issue – it WILL NOT get better.

Documentation

- Put reviews in writing.
- Put discipline in writing.
- Put coaching in writing.
- Place the writings in the personnel file.
- Be formal and specific – avoid vagueness.
- Think about the content of the evaluation/disciplinary notice/coaching before putting it in writing.
- Be complete and thoughtful in the writing.
- Discuss performance evaluations and disciplinary notices with the employee.
- Have employees and faculty members sign their discipline notices, evaluations, and coaching comments.
- Permit employees/faculty members space/time to comment/give their side of the story on the review/disciplinary notice.
- Train managers on how to prepare and keep clear and consistent documentation of reviews, discipline, and feedback.
- Avoid delaying documentation of reviews, discipline, or other feedback because you "don't have the time."
- Avoiding "sugar coating" in reviews.
- Avoid the use of emails to communicate about discipline.

Consistency

- Prepare flexible but predictable progressive discipline.
- Document discipline and other feedback in a readily accessible manner.
- Establish an open door policy.
- Follow the policy.
- Make the "punishment fit the crime."
- Consider the effect of multiple offenses.
- Have a policy handbook with anti-discrimination, harassment, and retaliation policies.
- Develop and implement a fair and consistent standard/guidelines for granting tenure.
- Train managers on the policies.
- Train managers about being objective when reviewing/disciplining employee.
- Do not deviate from the policy without good reason.
- Do not make decisions based on emotion.
- Do not link the disciplinary/failing review to protected activities or personal characteristics.
- Avoid playing favorites.

Conclusion

Like any other employer, colleges and universities must adjust to the idea that this is a litigious society. Moreover, whether we like it or not, even baseless claims of discrimination or retaliation may go forward in court. The reality is that once a college or university gets sued, it often must incur significant costs, both in terms of time and money, to eventually prove that it did not discriminate against one of its employees. While well drafted policies, thorough and regular training, and consistent implementation cannot prevent the filing of a lawsuit, these actions certainly can go a long way toward mitigating the risk of an employment lawsuit. A college or university that makes timely, consistent employment decisions and then documents those decisions has taken significant and critical steps toward managing the risk of an employment lawsuit. A college or university can further mitigate the risk of lawsuits by adopting written employment policies. Importantly, even when these guiding principles do not prevent an employment-related lawsuit, they still most certainly help to decrease a finding of liability and minimize the exposure for damages that might be awarded to

an employee who sues his or her college and university employer. In conclusion, policies, timing, documentation, and consistency constitute critical concepts for a college or university to manage its business, employees, and the risks of employment discrimination and retaliation lawsuits.

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Christopher V. Vrountas is the president of Vrountas, Ayer & Chandler, P.C. Mr. Vrountas has been in law practice for over 20 years and has substantial experience in employment matters, including employment discrimination and wage claims. He has appeared before various state civil rights commissions, as well as the Equal Employment Opportunity Commission (EEOC), the US Department of Labor, and the departments of labor of several states across the country. He has tried employment matters on behalf of businesses in both state and federal courts in a number of jurisdictions.

Allison C. Ayer is the vice president of Vrountas, Ayer & Chandler, P.C. Her practice concentrates on counseling employers, including colleges and universities, on preparing and complying with internal policies and applicable law and also defending educational institutions in state and federal court. Ms. Ayer has significant experience defending discrimination harassment claims at both administrative agencies and in court. Ms. Ayer also assists her employment clients with developing and implementing policies and procedures to help prevent litigation. She has reviewed and drafted employee handbooks and performed sensitivity and other legal training to employers in the region. Ms. Ayer has successfully defended colleges and universities in cases involving claims of negligent hiring and retention, invasion of privacy, false arrest, federal civil rights violations, sexual abuse, disability discrimination, and personal injury matters.

Endnotes

1 US Equal Employment Opportunities Commission (EEOC), "EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012," January 28, 2013, http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm.

2 Ibid.

3 Ibid. There were 33,512 race claims filed, which was 33.7 percent of the total number of EEOC claims.

4 Ibid. There were 30,356 sex discrimination claims filed in 2012, which was 30.5 percent of all claims.

5 US Equal Employment Opportunities Commission (EEOC), "Charge Statistics: FY 1997 Through FY 2012," http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. There were a total of 26,379 disability claims (26.5 percent) and 22,857 national origin claims filed (23 percent).

6 Ibid. National origin claims totaled 10,883, or 10.9 percent of total claims. There were 3,811 claims of religious discrimination, or 3.8 percent of total claims. Finally, charges of discrimination based on color amounted to 2,662 claims in 2012, which equaled 2.7 percent of claims filed in 2012.

7 EEOC, "EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012." In addition to these employee-driven administrative charges, in fiscal year 2012 the EEOC filed 122 lawsuits, including 86 individual suits, 26 multiple-victim suits, and 10 systemic suits. The legal department at the EEOC resolved 254 lawsuits, recovering more than $44.2 million in monetary relief. The EEOC completed 240 systemic investigations in fiscal year 2012 and secured $36.2 million dollars in benefits for more than 23,446 people through its administrative enforcement activities - mediation, settlements, conciliations, and withdrawals.

8 The full panoply of EEOC, as well as historical data concerning discrimination charges, lawsuits, and monetary benefits obtained, can be found at the EEOC's website: http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

9 Ibid.

10 Ibid.
US Equal Employment Opportunities Commission (EEOC), "Statutes by Issue: FY 2010 - FY 2012," http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm.

11 Ibid.

12 Ibid.

13 *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 43 (2006).

14 Ibid., 59-66.

15 Ibid.

16 Ibid., 67-68.

17 Ibid., 59-68.

18 *Rubinstein v. Administrators of the Tulane Educational Fund, et al.*, 218 F.3d 392 (5th Cir. 2000).

19 *See* 42 U.S.C. §2000e-5(g).

20 *Somoza v. University of Denver*, 513 F.3d 1206 (10th Cir. 2008).

21 *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op. at 2-4 (U.S. June 24, 2013).

22 Ibid., 4, 23.

23 Ibid.

24 Ibid., 5-23.

[25] Ibid., 6-8. This "but for" causation standard is more stringent than the "mixed motive" standard applicable in status-based discrimination (i.e. claims that allege discrimination based on a personal characteristic such as race, color, national origin, or sex), where a plaintiff must prove that the discrimination was merely a *motivating factor* or a *substantial factor* in the employment decision.

[26] Ibid., 19.

[27] Ibid., 18. The Court's decision in *Vance v. Ball State University*, No. 11-556, slip op. (U.S. June 24, 2013), that the alleged wrongdoer must be able to take tangible employment actions against the alleged victim, like hiring and firing, to be considered a "supervisor" who can create liability for the employer under in a Federal discrimination claim similarly makes it more difficult for an employee to prove a discrimination case against an employer.

[28] *Meiners v. University of Kansas*, 359 F.3d 1222 (10th Cir. 2004).

[29] *Rubinstein v. Administrators of the Tulane Education Fund*.

[30] *Somoza v. University of Denver*.

[31] *Meyers v. Northern Kentucky University*, Civil Action No. 2011-113(WOB-JGW), 2013 WL 954230 (E.D.Kentucky Mar. 11, 2013).

[32] *Brown v. Trustees of Boston University*, 891 F.2d 337, 346 (1st Cir. 1990).

[33] Ibid.

[34] Ibid.

[35] Ibid., 340.

[36] Ibid.

[37] Ibid., 341-44.

[38] Ibid., 341-43.

[39] Ibid., 344.

[40] Ibid.

[41] Ibid.

[42] Ibid., 347.

[43] Ibid., 349-50.

[44] Ibid., 340.

[45] Ibid.

[46] Ibid., 361.

[47] *Keri v. Board of Trustees of Purdue University*, 458 F.3d 620 (7th Cir. 2006).

[48] *Meyers v. Northern Kentucky University*.

[49] *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 94-95 (2d Cir. 2001).

[50] Ibid., 94.

[51] Ibid., 94-95.

[52] Indeed, federal courts have noted that the close temporal proximity, i.e. a short duration in time, between protected activity and the adverse employment action can constitute evidence of retaliation. See *Meiners v. University of Kansas*, 359 F.3d 1222 (10th Cir. 2004) (while temporal proximity may be evidence of retaliation, elapsed time of two to three months between time of protected activity and tenure denial failed to support a claim of retaliation); *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001); *DeCaire v. Mukasey*, 530 F.3d 1, 19 (1st Cir. 2008) (evidence of temporal proximity may be sufficient to make out a prima facie case of retaliation for exercise of rights protected under Title VII); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001); *Asmo v. Keane*, 471 F.3d 588, 593 (6th Cir. 2006); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361,1364 (11th Cir. 2007); *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832-33 (8th Cir. 2002).

[53] *Brown v. Trustees of Boston University,* 340-46.

[54] Ralph Waldo Emerson, "Self-Reliance," *Essays: First Series*, 1841.

For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.

—Nelson Mandela (1918–),

South African President (1994-1999) and Anti-Apartheid Revolutionary

The *URMIA Journal* is published annually by the University Risk Management and Insurance Association (URMIA), PO Box 1027, Bloomington, IN 47402-1027. URMIA is an incorporated non-profit professional organization.

The 2013 *URMIA Journal* was edited and designed by Christie Wahlert, URMIA, Bloomington, Indiana; and the *URMIA Journal* was printed at Indiana University Printing Services, Bloomington, Indiana.

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