

Chapter VIII

Personnel and Legal Issues

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Introduction

Institutions of higher education are not shielded from the requirements of employment laws because of their academic status, and the school or department that fails to understand and follow the law is asking to be sued. While colleges and universities have unique characteristics and concerns regarding employment issues, in many ways they are like every other large employer with respect to the state and federal laws governing employment. And this does not only mean a prohibition against discrimination. There are laws governing the way employees are hired, fired, and promoted, procedures for granting leaves of absence (not related to sabbatical), and laws concerning interaction with unions, retention of records, and a host of other considerations. When you add to the mix those laws and regulations that are specific to academia, things can get complicated.

Although a school's human resources (HR) department can assist individual departments with respect to nonacademic employment issues, academic administrators and others who may be deemed to serve in a supervisory capacity need to have an understanding of the laws as well. Department chairs are in the best position to nip problems in the bud and to make sure the rules are being followed and applied consistently and fairly.

General Discrimination Law

When one mentions employment law, most people think of a prohibition against discrimination at work. Various federal statutes impose upon employers the obligation to provide equal employment opportunity to employees without regard to age, sex, pregnancy, race, color, national origin, religion, disability, sexual orientation, or military status. These laws are not unique to academia, and generally no special rules distinguish schools, colleges, and universities from other types of employers. Employers today frequently face charges of violating one of the statutes prohibiting discrimination against individuals in one of these protected classes. These allegations of discrimination most often follow employment decisions that adversely affect an individual or group of individuals, such as the discharge or discipline of an employee, the denial of a promotion, or the rejection of an applicant.

Consequently, anytime an employer makes an adverse employment decision, the employer must carefully consider the governing laws before acting. Additionally, the employer should examine both its written and unwritten employment policies and ensure that these policies are being followed consistently. Where a decision appears to be inconsistent with policies and practices, the employer must be able to show a legitimate

reason for the inconsistency. Finally, it is imperative that the employer carefully document performance deficiencies or misconduct that support adverse employment decisions.

Several federal statutes govern employment discrimination. Among them are:

- Title VII of the Civil Rights Act of 1964, As Amended 1991: Prohibits employment decisions based on sex, race, color, religion, or national origin.
- Age Discrimination in Employment Act (ADEA) of 1967: Protects older workers (40 years of age and above) from discriminatory employment practices.
- Americans with Disabilities Act (ADA) of 1990: Prohibits discrimination against persons with disabilities.
- Pregnancy Discrimination Act (PDA): Prohibits discrimination due to pregnancy, childbirth, or related medical conditions.
- Equal Pay Act (EPA) of 1963: Requires an employer to pay male and female employees the same wages if they are doing work substantially similar in skill, effort, responsibility, and working conditions.
- Family and Medical Leave Act (FMLA): Provides covered employees with up to twelve weeks of unpaid leave in a twelve-month period for the birth or adoption of a child, to take care of their own serious health condition, or to take care of a family member with a serious health condition.

Allegations of sex discrimination and harassment continue to be a serious problem for academic institutions. Title VII and many state laws prohibit sex discrimination in employment decisions such as hiring, promotion, compensation, benefits, and termination. The EPA requires equal pay for equal work.

Employment decisions based on sex, or sexual stereotypes, are forbidden. The sole exception to this prohibition against intentional discrimination is where sex is a “bona fide occupational qualification” necessary to the operation of the business. This exception is extremely narrow and probably would not apply in an academic institution.

The availability of maternity leave and payment of benefits are two areas that continue to raise questions. An employer may not lawfully exclude pregnant employees from medical benefit programs, disability programs, health insurance, or sick leave plans. *The law requires that pregnancy be treated like any other temporary disability.*

One of the most frequently litigated—and publicized—aspects of Title VII’s prohibition against sex discrimination is sexual harassment. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. If a supervisor promises a promotion or other employment benefits to an employee who submits to his or her sexual advances (or threatens to demote or fire an employee who snubs such advances), sexual harassment has occurred. Another example is when sexual behavior or conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive environment. The best way to avoid and defend charges of sexual harassment is the institution developing a strong policy against harassment and distributing it to all faculty, staff, and administrators. Training and educating faculty, staff, and administrators on how to avoid charges of sexual harassment, teaching them how to report incidents of harassment, and explaining what types of behaviors are and are not acceptable in the workplace are critically important. All complaints of harassment must be thoroughly and sensitively investigated by individuals either within the university or, if necessary, from the outside. In addition, all policies against

sexual harassment must include a complaint procedure that allows an employee to bypass his or her own supervisor or department head and make a complaint directly to another neutral individual within the university who is not a party to the allegations. In the academic setting, care must also be taken to address the issue of sexual relationships between faculty and students, whether graduate or undergraduate. The best policy would be to prohibit such interaction.

All faculty and staff should be educated that unlawful harassment includes more than sex. Harassment based on race, color, religion, or any other protected category is forbidden as well. Although the university may have its own policies against harassment in place for all faculty and staff, each department head should take responsibility to ensure that every member of the department is fully aware of the policy and follows it. All new members of the department, faculty, and staff should be given a copy of the institution's policy. An employer's defense may depend upon being able to show that it had a policy against harassment in place and the employee failed to take advantage of it. When necessary, department chairs must be willing to involve individuals from outside the department in the investigation and resolution of all complaints.

With age discrimination, the law protects only individuals who are age 40 and older. An employer may legally favor older workers over younger ones, even if the younger workers are also over the age of 40. One scenario that can inadvertently cause problems with age discrimination is the desire to bring "new blood" into the department. Although it is important to have faculty and staff who are up to date with research and other trends, be careful not to assume that candidates with the most recent and relevant experience and knowledge will also be those who are younger. With respect to age discrimination, keep the following points in mind:

- It is illegal to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment *because of* the individual's age.
- It is illegal to limit, segregate, or classify employees so as to adversely affect them because of age.
- It is illegal to reduce wage rates in order to comply with the ADEA.
- It is illegal to discriminate or retaliate against any person who has exercised rights under the ADEA.
- It is illegal to print or publish notices or advertisements for employment indicating any preference, limitation, specification, or discrimination based on age.

Perhaps the most complex of the discrimination laws concerns employees with disabilities. The ADA prohibits discrimination against persons with disabilities in the areas of employment, government programs and services, public accommodation, and telecommunication. This prohibition applies to job application procedures, hiring, promotion, compensation, training, and all other terms, conditions, and privileges of employment. These provisions impose complex responsibilities and liability for conduct both before and during the employment of individuals who are protected by the ADA.

Because the ADA only protects a "qualified individual with a disability," in order to claim coverage under the ADA, an individual must prove he or she has a "disability," which is defined as:

- a physical or mental impairment that substantially limits one or more of the major life activities of such an individual (examples include an individual who is blind or deaf, has AIDS, uses a wheelchair); or
- a record of such an impairment (examples include an individual who has had cancer but who no longer does or someone who was misclassified as having a learning disorder); or
- being regarded as having such an impairment (examples include an individual with high blood pressure who is regarded as being unable to work in a high stress job, even though that is not the case, or an individual with a disfigurement who is not hired as a receptionist); or
- having a relationship or association with someone who has a known disability (for example, an individual who has a child with epilepsy). The ADA does not, however, require an individual in this category to be reasonably accommodated.

The ADA imposes a number of restrictions on employers in the hiring process. Generally, an employer may ask about an applicant's ability to perform both essential and marginal job functions, but employers may not refuse to hire an applicant with a disability who cannot perform a marginal function. The employer may *not* ask either on an application form or in an interview whether an applicant has a disability that prohibits him from performing the job. The employer also may not inquire about health-related issues or about hospitalization or worker's compensation history.

The ADA imposes a duty of "reasonable accommodation" to permit a disabled employee to perform the essential functions of his or her job. In the academic setting, this might include such things as assigning a wheelchair-bound professor to a classroom located close to his or her office or providing an extra teaching assistant. Even though decisions about reasonable accommodation may need to come from the university administration, the department chair should be involved in all discussions because he or she is in the best position to help craft a reasonable, workable accommodation.

Questions of how to provide leaves of absence for medical or other reasons can also be difficult. The university should have a uniform FMLA policy, and it is important that all leave requests be made in writing. Department chairs should be careful not to make "side agreements" regarding leave on a case-by-case basis. Such agreements may not only violate the FMLA but can also open the school up to a lawsuit by another employee whose request was treated differently.

Finally, understand that it is unlawful not only to discriminate on the basis of a protected category but also to take any adverse action against a complaining employee in retaliation for the complaint. This also includes retaliating against employees who helped the complaining employee with his or her complaint by acting as a witness, giving testimony, or otherwise showing support.

Affirmative Action

Affirmative action has always been an important subject in academia, particularly with respect to student admissions. But faculty diversity and the search process also raises affirmative action issues. Today, affirmative action in the hiring process has moved beyond simple questions of race or gender and may include such traits as socioeconomic background, religion, and/or sexual orientation. In all hiring situations, candidates should be

considered based on individual merit, with affirmative action traits added only as a “plus” factor, not the deciding factor.

Even with a carefully thought-out affirmative action plan, a school remains open to claims of discrimination (or reverse discrimination) in hiring. Departments should work closely with the chief academic officer, HR department, and legal counsel. Search committees in particular need to be trained about how to conduct effective and lawful faculty searches. Education should include guidelines for questioning, examples of unlawful questions and areas of inquiry, an explanation of the school’s diversity policy, and the ability for committee members to ask questions and obtain guidance throughout the search process. This information should be provided to members of the search committee when the first meeting is convened. A member of the committee or the chair should be assigned the task of retaining resumes, applications, and search committee materials. Consult with the chief academic officer or HR office regarding institutional policy on record retention for searches.

For schools that are government contractors, the Office of Federal Contract Compliance Programs in the Department of Labor has implemented regulations requiring affirmative action programs and the reporting of affirmative action data. This covers any institution that is a party to a contract (or subcontract) with the federal government for services or supplies of at least \$50,000, and that has at least 50 employees. These institutions must have developed and have available at each workplace a written affirmative action compliance program (“AAP”) within 120 days from the commencement of the contract. A report of the results of the AAP must be compiled annually and the AAP updated and summarized at that time. The institution’s HR department should oversee the creation and filing of an AAP, when necessary.

Whether or not your school or department participates in a formal affirmative action plan with respect to hiring, there are still laws regarding record-keeping that must be followed. Any employer subject to Title VII of the Civil Rights Act, including an institution with fifteen or more employees, must maintain the information that would be required to complete an EEO-6 form, even if the employer is not required to file one. An EEO-6 form was also known as the Higher Education Staff Information Report and, until 1993, was to be filed biennially. Since 1993, the Department of Education’s National Center for Education Statistics (NCES) assumed the responsibility of compiling all information previously submitted on the EEO-6 onto a new reporting form—the Integrated Postsecondary Education Data System Survey (IPEDS). The IPEDS thus replaced the EEO-6 report formerly required by EEOC. Institutions must now submit the IPEDS to the NCES on a biennial basis. Department chairs should work with their institution’s HR department to provide accurate information about faculty and staff so that the IPEDS can be completed in a timely manner. The filing of reports is the responsibility of the institution and not individual colleges, schools, or departments.

Retention

Pursuant to federal law, all records used to complete the EEO-6 or the IPEDS must be retained for a period of *three years* “at the central administrative office of [the institution], at the central administrative office of a separate campus or branch, or at an individual school which is the subject of the records and information, where more convenient.” All department chairs should consult with their institution’s HR department or chief academic officer regarding the retention and destruction of employment-related documents. Some,

such as those regarding hiring, firing, promotion, and other employment decisions, should be maintained for at least one year. Others may need to be kept longer, depending on whether the school is a federal contractor. Of course, all records relating to pending charges of discrimination and actions by the EEOC or the attorney general, or which are the subject of a lawsuit, should be retained until the final resolution of the action. However, such documents should not be produced or released to anyone without the prior authorization of the school's attorney.

The EEOC has also prescribed record-keeping requirements on tests and other selection procedures that are used by employers as a basis for making employment decisions (e.g., hiring, promotion, demotion, retention). Each employer must maintain "records or other information" that disclose the "impact"—including any "adverse impact"—that tests and other selection procedures have on employment opportunities of persons by race, sex, or ethnic group. Where there are large numbers of applicants, and selection procedures are used frequently, the information may be retained on a "sample" basis (provided the sample is adequate in size and is appropriate given the applicant population).

Retention of Faculty

The overall environment at an institution or in a department can go a long way toward keeping faculty content and satisfied, and individual departments can help by implementing the following practices and procedures.

Mentoring

Making a new appointment feel welcome and part of the department sets the right tone for his or her relationship at the school. Partnering a new faculty member (no matter how experienced) with a current one who shares similar interests or background can help integrate the new professor into the department smoothly. Such a mentoring process can be formal or informal, and can be limited to such things as social interaction or more broad, including professional development, integration into the entire university community, and information about teaching, tenure, and research.

Informed Faculty

Make sure to keep all members of your unit aware of department- and university-wide policies and procedures, particularly when changes are made. All faculty should understand the promotion and tenure process at the school and receive regular performance reviews. Regular department-wide meetings will help keep everyone up to date, which is particularly important in the academic setting, where individual faculty members and administrators may not have other opportunities to see each other or interact on a regular basis. Be sure that new faculty and staff have received written information on the institution's policies and procedures.

Complaint Procedures

Another factor that is important for retaining faculty and staff members is to have procedures in place for questions, complaints, and suggestions. Members of the institution are less likely to be dissatisfied if they have a place to air grievances and have them addressed by the administration. At the department level, this could include an informal ombudsman

position, a suggestion box, periodic meetings to discuss issues or concerns, or other types of programs. As explained above, it is very important for complaints of discrimination or harassment to be taken seriously and to be investigated, either at the department level or by the administration, when necessary. But attention to more minor gripes can go a long way toward avoiding more serious problems.

Collective Bargaining

Collective bargaining in higher education refers to a process by which the faculty (or a group of staff) band together, usually with the help and representation of a labor union, to negotiate as equals with the school's administration about issues relating to working conditions, teaching, and other topics of concern. The results of the negotiations are memorialized in a collective bargaining agreement, which is a contract between the faculty members and the administration that is renegotiated every few years according to the terms in the agreement.

Many college and university faculties are represented by unions, and even if individual department chairs or other departmental administrators do not have direct input into the bargaining process, they need to be aware of the agreement and its terms, in order to avoid violations. For example, beware of making promises to or personalized agreements with individual faculty members about such things as teaching schedule, wages, vacation, hiring and tenure decisions, or even classroom or office location. Some of these issues may be determined at the department level, but they may also be set forth in the collective bargaining agreement.

The music executive may also need to reference the collective bargaining agreement regarding such items as offer letters, job descriptions, or notices of reappointment or non-reappointment, particularly if the agreement contains a grievance procedure. Who needs to sign such documents? The department chair only? The dean or provost? Does language in such letters and notices need to be standardized throughout the university? These are the types of considerations that department chairs must consider with respect to the collective bargaining process.

When to Seek Help Outside the Department

Even though individual academic departments often enjoy a high degree of autonomy, the information in this chapter should underscore the message that, particularly in the employment context, some issues cannot be resolved only at the department level. Department chairs need to know when an employment issue is so serious or important that they must go beyond the department level to discuss problems or obtain guidance. This may involve working with the university administration alone or also seeking assistance from in-house or outside counsel. Although there is no hard-and-fast rule, matters involving complaints of discrimination or harassment of any type need the attention of the university, even if it is merely to provide regular status reports on the course of an investigation or to confirm the school's policies. The involvement of university officials is particularly important when the allegations are against the department chair or members of his or her administration.

Issues that involve allegations of criminal misconduct, fraud, or threats of violence also need to go beyond the department, as does any matter concerning the collective bargaining agreement. Minor issues, such as questions of department policy, can stay within the

department. If the executive is unsure whether to seek outside assistance, it is safest to err on the side of going to the university's administration and/or talking to the university's attorneys.

Correctly dealing with employment issues in the academic setting (or in any workplace, for that matter) requires knowledge, common sense, and fair and consistent practices. Sometimes an employment law may not seem rational, or may appear overly complex, and department chairs need to be as much aware of what they do not know as what they do know when dealing with faculty and staff. Some particularly tricky issues include those concerning employees with disabilities, questions of leave, and labor issues. Most importantly, proper training of everyone in the department can help avoid employment problems before they even have the chance to occur, and a well-understood and simple complaint procedure can help keep small concerns from becoming serious problems.