10 Most Important Higher Ed Labor and Employment Law Cases of 2013

Following are 10 higher ed labor and employment law cases that may have implications for your institution.

1) University CHRO's First Amendment Retaliation Claim Dismissed
A university chief human resources officer who was fired shortly after writing a newspaper editorial critical of comparisons between the gay rights movement and the civil rights movement has failed in a First Amendment retaliatory discharge claim.

The Sixth Circuit Court of Appeals recently affirmed the federal district court judge's grant of summary judgment in favor of the university, holding that the plaintiff did not engage in protected speech under the First Amendment and therefore could not sustain a retaliatory discharge claim (*Dixon v. University of Toledo* (6th Cir., No. 12-3218, 12/17/12)).

The plaintiff in this case had served in various HR positions with the university for approximately 10 years and otherwise had an unblemished record at the institution. There had been some history to gay rights issues on campus, including a prior official editorial by the university president describing the university's commitment to diversity and an editorial by the vice provost, who with her same-sex partner became the first couple to file for a domestic partnership in Toledo, Ohio. The vice provost was quoted in the local newspaper as saying that opposition to the domestic partnership registry stemmed from "religious beliefs" and that "bigotry in the name of religion is still bigotry."

Later, an editorial was published in the *Toledo Free Press* that was critical of the fact that the Medical College of Ohio (part of the University of Toledo) did not have employee domestic partner benefits despite the fact that University of Toledo did, and the author implicitly compared the gay rights movement to the civil rights movement. In response, the plaintiff in the *Dixon* case wrote her own editorial criticizing the comparison between the civil rights movement and the gay rights movement because of her belief that the "homosexual lifestyle" is a choice, whereas race is genetic and biological.

The Sixth Circuit Court of Appeals specifically found that the plaintiff held a policymaking position at the university and was discharged based on speech related to political or policy issues that directly contradicted several university policies. As such, the court concluded that the government's (in this case, the state university's) "interest in efficiency" outweighed the plaintiff's free speech rights and dismissed her retaliatory discharge claim. Under the Sixth Circuit rule, a public employee's speech will be unprotected by the First Amendment where the employee is a policymaker and speaks on a matter related to policy of the governmental entity.

The court also rejected the plaintiff's claim that she was similarly situated and treated differently than the university president and vice provost who also spoke publicly on this issue and were not discharged. The court recognized that the university president spoke consistently with university policy, not criticizing it. The court also concluded that the plaintiff did not present sufficient evidence that the vice provost was similarly situated to her.

2) Professor States a Breach of Fiduciary Duty Claim, Alleging Failure to Disclose a Separation Incentive Plan Under Consideration During Retirement Negotiations

A former George Washington University professor can proceed with his ERISA claim in federal court that the university breached its fiduciary duty to him in failing to disclose, when he was considering and negotiating over his decision to retire, that it was considering a voluntary separation incentive program (VSIP), which was in fact established shortly after he retired. In bringing his claim, the plaintiff alleged that he would have benefited from the program (*Soland v. George Washington University* (D.D.C., No. 1:10-cv-02034, 1/7/13)).

The plaintiff taught at George Washington University's Engineering School for more than 30 years. In January 2008 he told the head of his department that he planned to retire in the next two years and inquired about any VSIP packages that might be available to him. After some discussion and negotiation, the university offered him a separation package in April 2008 that set a date for his retirement provided that he would be granted administrative leave for 2009, and confirmed the amount of money he would receive. In 2009 while the plaintiff was on administrative leave, the university announced a VSIP for all full-time, regular, active faculty members in the plaintiff's department. When the plaintiff leaned of the VSIP, he inquired and applied but was told he was ineligible because he was not working full-time. He filed an internal appeal which was denied and then filed his federal lawsuit under ERISA.

The university defended, arguing that it could not be liable for failing to disclose something that at the time of his decision to retire "did not exist." The court rejected the university's argument, saying it mischaracterized the plaintiff's argument. The court concluded that the central inquiry is not whether the program existed when the plaintiff was in his 2008 negotiations over his retirement, but rather, whether the university was "seriously considering" the program when it was negotiating with him. The court concluded that the plaintiff has established sufficient facts to make that case and is entitled to a trial over his claim that the university breached its fiduciary obligation to him.

3) Illegal Immigration Status and Failure to Pay Federal Income Tax No Bar to Minimum Wage/FLSA Recovery

The United State Court of Appeals for the Eleventh Circuit recently affirmed a jury verdict of close to $50,000 in unpaid overtime wages of employees who were illegal immigrants and who had no right to work in the U.S. Both employees also failed to report earnings to the IRS and paid no income taxes (*Lominica v. Safe Hurricane Shutters Inc.* (11th Cir. No. 11-15743, 3/6/13)).

The Eleventh Circuit ruled 2 to 1 that the FLSA judgment should stand and the individual defendants are personally liable as "employers" as the two were former shareholders of the now defunct employer. The defendants had argued that the plaintiffs, who were illegal immigrants and therefore not entitled to work in the U.S. as well as violators of the Internal Revenue Code for their failure to report their income and pay taxes, are barred from recovery, as a plaintiff who participates in wrongdoing cannot profit from that wrongdoing.

The court rejected the argument citing prior precedent that illegal immigrants can recover FLSA damages. The court went on to hold that wrongdoing was not part of any FLSA violation which would have precluded recovery.

4) Federal Appeals Court Reinstates Title VII Sex Discrimination Case Brought by Female Basketball Referee Alleging Exclusion From Officiating Boys' Games

The United States Court of Appeals for the Third Circuit recently overturned a federal trial court's dismissal of a Title VII sex discrimination claim brought by a female basketball referee who alleged that the school district and state interscholastic athletic association refused to allow her to referee boys' games (*Covington v. Int'l Assoc of Basketball Officials, Hamilton Township School District, and NJ State Interscholastic Athletic Association (NJSIAA)* (3rd Cir., No. 11-3096, 3/14/13)). The appeals court affirmed the dismissal of Title IX claims, as the plaintiff did not allege an official policy of discrimination.

The federal district trial court had dismissed the Title VII claim, holding that the plaintiff did not properly allege that the school district or the NJSIAA were her employers. The plaintiff had alleged that the school district had refused to assign her to officiate regular season boys' games and the NJSIAA had refused to assign her to boys' post-season playoff games. The appeals court held that the trial court had not correctly applied the Third Circuit's employer standards, which focuses on "the level of control a defendant exerts over a plaintiff, which entity pays the salaries, hires and fires, and has control over daily employment activities."

The appeals court concluded that the school district has "input into which officials are assigned each game, chooses the time, date and location of the games, and pays the officials for their work" and therefore may fairly be identified as the plaintiff's employer during regular season games, and the NJSIAA has the same role during the post season. As such, the appeals court ruled that the plaintiff's Title VII sex discrimination case against the school district and the state association should go forward.

5) Professor Loses "Regarded as Disabled" ADA Claim, as University's Request for Him to Undergo Exam Before Returning to Classroom Not Unlawful and Not Evidence That University Regarded Him as Disabled

A federal district court in Maryland recently granted summary judgment to the University of Maryland Eastern Shore and dismissed a former assistant professor's claim of discrimination in violation of the ADA, holding that university administrators did not "regard him as disabled" under the ADA and that they had ample, legitimate, nondiscriminatory reasons for his discharge. The court held that the university's request that he undergo a medical examination before returning to the classroom was not unlawful, served the university's stated business necessity — namely campus security — and was not evidence that the university regarded him as disabled. Moreover the court dismissed the plaintiff's claim that his termination was in retaliation for his EEOC complaint which was pending at the time of termination (*Coursey v. Univ. of Maryland Eastern Shore* (D Md., No. 11-1957, 4/30/13)).

The plaintiff was an assistant professor at the university, and in 2004 the HR department investigated reports from several students who claimed that the plaintiff had sexually harassed them. The investigation concluded that he had in fact harassed the students and retaliated against

them in violation of university policy. He was warned and the harassment ceased. However, in 2007, the plaintiff started ignoring his supervisor's directives and some students complained that they were scared of him and that he was "unstable." The university eventually suspended him and removed him from the classroom in February 2009. He appealed the decision, and a faculty grievance board recommended that he be reinstated. The university president responded that the board used the wrong university policy for its decision, and the dean of the School of Pharmacy advised against his return to the classroom, but called for him to get a medical examination prior to returning if he were to return to teaching.

The university followed up with four separate written requests that the plaintiff proceed to a medical examination before returning to the classroom, but the plaintiff refused and filed an EEOC complaint in response. The EEOC issued a letter of no findings and thereafter the assistant professor was issued a written letter of termination in May 2010, which listed the charges against him including abusive behavior, arbitrary and capricious grading methods, and insubordination. The plaintiff appealed the termination letter to the grievance board which, after a nine-day hearing in which it heard from 19 witnesses and reviewed 129 exhibits, rejected the plaintiff's claim. He appealed that to the state board of regents and was granted a hearing, but the regents board also affirmed the university's discharge.

Thereafter, he sued in federal district court under the ADA and claimed retaliation in response to his EEOC complaint. The federal district court dismissed all of his claims as noted above and commented that he received the ultimate in due process, having gone through three hearings before two different university boards/panels.

6) Supervisor's Indecent Exposure Is Actionable Sexual Harassment Regardless of Employee's Lewd Provocation

A federal district court in California recently ruled that an EMT's sexual harassment charge that her supervisor exposed himself after she told him he "didn't have any balls" can proceed, notwithstanding that she was on final warning status as a result of prior lewd comments at work. In denying the employer's motion for summary judgment, the court ruled that a single incident can be sufficiently severe to constitute sexual harassment in the workplace which otherwise usually requires the actions to be pervasive (*Rangel v. American Medical Response West* (ED Cal., No 1:09-cv-01467, 4/25/13)).

The plaintiff worked as an emergency medical technician for the employer for approximately seven years before she was discharged after an incident involving an altercation with her supervisor who she alleged exposed himself to her. The plaintiff was on final warning status as a result of prior incidents of foul language in the workplace. She had been put on final warning status three months prior to the incident after a patient complained that she had cursed at him several times.

The plaintiff alleged that the incident started with her joking with her supervisor when she told him not to dirty the station because she had just finished cleaning it. She alleged that the supervisor responded by telling her that she could not tell people in the station what to do, just because "she wears the pants" at home. The incident continued and escalated when the supervisor pulled out a knife saying, "I can cut you right now." The plaintiff responded by telling

the supervisor that, "he didn't have any balls" because he had dropped out of the California Highway Patrol training in less than a week. The supervisor then proceeded to expose himself to her.

The employer fired the plaintiff, finding that she provoked the argument, that her conduct was inappropriate and unprofessional, and that she had received a final warning three months before for inappropriate comments at work. The employer asserted that it found the supervisor's conduct unacceptable also and intended to terminate him, but he resigned following the incident. The plaintiff sued the employer for sexual harassment and the supervisor for sexual battery.

The court ruled that the plaintiff's allegations of sexual harassment, which included the threat to cut her, amounted to a single incident that was sufficiently severe and pervasive to constitute sexual harassment. The court dismissed the sexual battery claim against the supervisor, holding that the supervisor did not make actual physical contact with the plaintiff, which was necessary in order to sustain a sexual battery claim.

7) Employee Suffering Post-Traumatic Stress Disorder After Finding Her Boss Dead States a Claim for FMLA Retaliation

An employee who suffered post-traumatic stress disorder (PTSD) as a result of discovering her boss's body at work has successfully stated a claim for retaliation after she was put on probation and not reappointed after requesting FMLA leave. A federal district court dismissed her employer's motion for summary judgment, stating that imposing probation would discourage a reasonable employee from seeking FMLA leave in the future (*Bravo v. Union County* (DNJ, No. 2:12-cv-02848, 5/23/13)).

The plaintiff claimed that the county board of elections retaliated against her for taking FMLA leave by putting her on probation and then refusing to reappoint her after she requested leave to care for her mother and to obtain treatment for PTSD, anxiety and depression after she discovered her boss deceased at work. The federal district court judge, in ruling for the plaintiff, stated that employers may not consider FMLA leave, paid or unpaid, as a basis on which to discipline their employees.

8) Community College Employee With "Passive Aggressive Disorder" Not Covered Under California Disabilities Act

A federal court in California recently ruled that "passive aggressive disorder" is not a qualified disability under the California state version of the Americans with Disabilities Act. This ruling is significant because the California antidiscrimination law is widely considered to be broader than the ADA with regard to qualifying disabilities. Nonetheless, the court ruled that "passive aggressive disorder" is outside the scope of the California Act's protections (*Gliha v. Butte-Glenn Community College* (ED Cal., No. 2:12-cv-02781, 6/14/13)).

The plaintiff had worked as the executive director of development for the community college district for seven years. The plaintiff alleged that a year prior to his termination, his supervisor began subjecting him to "hyperscrutiny." This allegedly began with a formal reprimand and the establishment of a performance review plan. The plaintiff claimed that he was accused of denigrating his department's efforts, "bullying" coworkers, being disloyal to his supervisor and

creating a hostile work environment. He was ordered by his supervisor to undergo treatment for "passive aggressive" behavior.

The plaintiff claimed that he was wrongly accused of bullying and acting unprofessionally, and he never underwent counseling or treatment for passive aggressive disorder. The court found that while the plaintiff was asked to undergo counseling for the passive aggressive disorder, he was never diagnosed with such a condition. The court concluded that the California disabilities act (FEHA) prohibits employment discrimination based on an employee's having "any mental or psychological disorder or condition, such as intellectual disability, emotional or mental illness, learning disabilities" and the like. Under the California statute, if a mental disability causes a "limitation" on any major life activity, it is protected by the law and as such, a plaintiff cannot be discriminated against because of the mental disability. This standard is broader than the federal ADA standard which requires disabilities, including mental disabilities, to cause a "substantial limitation" on a major life activity.

The court concluded that inability to get along with one's supervisor does not give rise to a disability claim under either the ADA or the FEHA. The court went on to conclude that the plaintiff failed to provide any reason to include passive aggressive disorder, standing alone, within the meaning of a disability as explained in the California FEHA.

9) Federal Appeals Court Allows Employee's Title VII Religious Discrimination Claim Based on a "Blend of Christianity and Local Nigerian Customs"

The United States Court of Appeals for the Seventh Circuit recently reversed a federal trial court's dismissal of a failure to accommodate religious beliefs claim where an employee's request to take three weeks of unpaid leave to attend his father's funeral in Nigeria was denied. The plaintiff wanted to participate in several local funeral rite customs and claimed a "risk of spiritual repercussions" if he failed to attend the funeral. The appeals court held that the employee was entitled to a jury trial over the employer's failure to provide the leave and his eventual termination for taking unauthorized leave (*Adeyeye v. Heartland Sweeteners LLC* (7th Cir., No. 12-3820, 7/31/13)).

The appeals court, in reversing the trial court's dismissal of the lawsuit on the employer's motion for summary judgment, held that the plaintiff's written request for leave sufficiently raised the religious nature of the request which the court recognized as a blend of Christianity and local Nigerian customs. The court held that a "reasonable jury could certainly find that the plaintiff's letter's multiple references to spiritual activities and the potential consequences in the afterlife" provided the employer with sufficient notice of the religious request. The plaintiff wrote that he was required to be at the funeral, which would last more than three weeks, as he was the first child and only son.

The appeals court held that while the plaintiff's religious beliefs are not as common as others in practice in the United States, "the protections of Title VII are not limited to familiar religions." The court also rejected the employer's defense questioning the plaintiff's religious beliefs, claiming that he wanted to attend the funeral as a result of his duties as a son as opposed to religion. The court held that would create a slippery slope and that it would not question the religious beliefs of the individual once raised. The

court also noted the plaintiff's sincerity as it related to his religious beliefs, as he put his job at risk and put his car up as collateral for a loan on the travel costs to attend. Finally, the court rejected the employer's claim of undue hardship, holding that unpaid leave is generally a reasonable and acceptable form of accommodation for religious faith and practice. Further, the court noted that the employer maintained a significant number of temporary employees and maintained a roster of on-call employees so that the request of unpaid leave should not be an undue hardship.

10) Employee Fired for Misconduct at EEOC Mediation Proceedings Loses Retaliation Claim

The United States Court of Appeals for the Seventh Circuit recently dismissed on summary judgment a former employee's retaliation claim after he was discharged for misconduct during an EEOC supervised mediation session (*Benes v. A.B. Data, Ltd* (7th Cir., No. 13-1166, 7/26/13)).

The plaintiff had filed suit against his former employer after he was discharged for misconduct with occurred at an EEOC supervised mediation of his sex discrimination charge. The plaintiff had worked for the company for four months when he filed a charge of sex discrimination. The EEOC called the parties together for separate-room mediation, wherein the parties are kept in separate rooms in a bid to limit emotional outbursts and other distracting activities, and the mediator is shuttled from room to room to attempt to mediate the dispute.

In this case, while the parties were participating in the separate-room mediation, the company made a settlement offer which was communicated by the mediator to the plaintiff. Upon hearing the offer, the plaintiff entered the room occupied by the employer, telling the employer, "you can take your proposal and shove it," used an expletive, and told the employer that it could fire him and he would still pursue his charge. The court concluded that the employer accepted the employee's counterproposal by firing him.

The judge observed that the employer could have fired the employee who barged into a superior's office in violation of instructions, and it should be no different with someone who did the same thing at mediation. The court concluded that the plaintiff sabotaged the mediation and therefore should be sanctioned for that conduct. The court pointed to case law which supports a court sanctioning a party for misconduct during litigation and concluded it should be no different during mediation. Finally, the court recognized that the purposes of Title VII are met here. The court observed that Title VII covers investigation and litigation in the same breath and does not create a privilege to misbehave in court, nor does it create a privilege to misbehave during mediation.