Journal of Collective Bargaining in the Academy

Volume 0 National Center Proceedings 2016 Article 65

September 2016

Panel: Discrimination and Harassment Issues in Higher Education

Jill Rosenberg
Orrick, Herrington & Sutcliffe LLP

Follow this and additional works at: https://thekeep.eiu.edu/jcba
Part of the Collective Bargaining Commons, and the Higher Education Commons

Recommended Citation
DOI: https://doi.org/10.58188/1941-8043.1623
Available at: https://thekeep.eiu.edu/jcba/vol0/iss11/65

This Proceedings Material is brought to you for free and open access by the Journals at The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.
Discrimination and Harassment Issues in Higher Education

Jill L. Rosenberg, Orrick, Herrington & Sutcliffe LLP (jrose@orrick.com)

NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS—43RD ANNUAL CONFERENCE

Discrimination and Harassment Issues in Higher Education

Jill L. Rosenberg, Orrick, Herrington & Sutcliffe LLP (jrose@orrick.com)
Recent events highlight tension between need to take appropriate action where sexual misconduct found and rights of tenured faculty

Sources of faculty tenure rights

- Academic freedom—First Amendment
- AAUP standards—termination for cause
- Due process—public sector faculty
- Internal policies and procedures—CBAs, faculty statutes, individual employment agreements
Removal of Tenured Faculty for Sexual Misconduct—AAUP Principles

• Termination for “cause”
  » Definition of cause in context of tenure revocation
• To be considered by faculty committee and institution’s governing boards with deference to faculty committee
  » What deference is afforded to EEO office/Title IX investigation findings
• Notice of charges in writing and opportunity to be heard and confront witnesses
  » Confidentiality concerns of charging party and witnesses
• Right to an advisor/counsel; record of proceedings
• Burden of proof—clear and convincing evidence
  » Compare to Title IX standard—preponderance of the evidence
Removal of Tenured Faculty for Sexual Misconduct

Public Sector Due Process Standards:

• Tenure=property right; substantive due process—just cause
• Procedural due process includes (1) reasonable notice of reason and grounds for proposed action, (2) hearing before an impartial decision maker, and (3) reasonable opportunity to prepare and present defense.
• State law protections for tenured faculty—e.g., NJ and CA
Legal Challenges to Tenure Revocation Decisions

• Application of institution’s handbook, manual, bylaws and regulations to individual faculty member

• Institution’s failure to adhere to AAUP standards
  » Interplay with Title IX/EEO hearing procedures

• Institution’s failure to follow CBA or other institutional procedures

• Institution’s ad hoc procedures were unfair or arbitrary
Legal Challenges to Tenure Revocation Decisions

• Challenge to cause finding
  » Scope of judicial review-plenary or limited
  » Consensual v. non-consensual conduct
  » Progressive discipline
  » Reliance on prior conduct at institution where no complaint
  » Reliance on prior conduct at another employer
  » Disparate treatment
Campus protests across country, including:

- University of Missouri
- Yale
- Occidental College
- Princeton
- Ithaca College
- Brandeis
- Claremont McKenna College
- University of Cincinnati
Recent Developments in Campus Race Relations---Employment Impact

Student demands for employment action, including:

- Removal of officials and faculty (CMC, Yale, Ithaca)
- Hiring of Chief Diversity Officer (Mizzou, Ithaca)
- Mandatory cultural sensitivity and diversity training
- Commitments to increase faculty diversity (Mizzou, Yale, Brown, Brandeis)
Recent Developments in Campus Race Relations—Employment Impact

Laws that may apply to employment diversity programs

- Federal, state and local employment discrimination laws (e.g., Title VII of the Civil Rights Act of 1964)
- U.S. Constitution (Equal Protection Clause) for public institutions
- Title VI of Civil Rights Act of 1964 (for recipients of federal funding)
- Section 1981 of the Civil Rights Act of 1866 (governing use of race in making and enforcement of private contracts)
- Executive Order 11246 (for federal contractors)
Recent Developments in Campus Race Relations—Employment Impact

Some Race Neutral Ways to Achieve Greater Diversity

• Financial incentives to recruit and hire diverse candidates
• Active outreach and recruitment where there are diverse candidates
• Targeted advertising/publicity to reach diverse candidates
• Build the pipeline through student and fellowship programs
• Require diverse slates of candidates
• Use recruiters and existing staff to identify candidates
• Target of opportunity hiring programs
• Encouraging under-represented groups to apply