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Panel Handout: Discrimination and Harassment Issues in Higher Education

Jason Walta
National Education Association

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

Panel: Discrimination and Harassment Issues in Higher Education

Harassment: Academic Freedom Issues and a Union’s Duty of Fair Representation

April 5, 2016

I. Harassment defined – Sources of harassment prohibitions/academic freedom & free speech issues

a. Statutory – Federal

i. Title VII/ADA/ADEA – Discrimination in employment


2. Harassment as a form of discrimination

   a. “Hostile environment” harassment:

      i. The standard for evaluating claims of hostile-environment harassment will depend on the
status of the harasser: “If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a supervisor, however, different rules apply. If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.” Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

ii. To be actionable, harassment must be so “severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.” Faragher v. City of Boca Raton, 524 U.S. 775 (1998). This requires an objectively hostile or abusive environment, as well as the victim's subjective perception that the environment is abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

b. “Tangible employment action/quid pro quo” harassment: if an employer makes an adverse employment decision about an individual based on the individual’s having rejected the sexual advances of a supervisor, or if an individual loses out on a possible promotion because a fellow employee who submitted to the sexual advances of a supervisor was promoted instead on that basis, the harassment is categorized as quid pro quo. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); 29 C.F.R. § 1604.11(a)(2).

ii. Title IX/Rehabilitation Act – Discrimination by recipients of federal funding. Courts generally apply the same standards as Title VII/ADA. See 34 C.F.R. § 106.51 (Title IX applies to sex discrimination in employment by covered recipients of federal funds); see also Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (applying Title VII legal analysis to claims under Title IX); Murray v. N.Y. Univ., 57 F.3d 243 (2d Cir. 1995) (same); Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001) (same).

iii. National Labor Relations Act -- The NLRB has found workplace bullying and harassment based on concerted activity or other union activity to be an unfair labor practice under the NLRA. See Northwest Graphics, Inc., 342 NLRB 1288 (2004); Garvey Marine, Inc., 328 NLRB 991 (1999).

b. Statutory – state and local. State and local laws may include additional classes of individuals protected against discrimination and harassment. See, e.g., N.Y. Exec. Law § 296 (prohibiting discrimination based on “age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status”).

c. Collective Bargaining Agreements

i. CBAs can provide broader coverage by including additional classes of individuals protected against discrimination (such as sexual orientation or marital status) or by having class-blind protection against harassment. See, e.g., CBA between GAO and GAO Employees Organization (provision addressing workplace bullying), available at
CBAs can have more expansive standards for the kinds of conduct that qualify as harassment. See, e.g., MOU between the University of Washington and UAW (agreement with unionized graduate student teaching assistants specifically recognizing a right to teach in an environment free of “microaggressions”), available at http://www.uaw4121.org/wp-content/uploads/2015/09/MOU-microaggressions.pdf.

CBAs can waive unit members’ rights to bring statutory discrimination claims in court. The Supreme Court has upheld clear waivers in a CBA requiring employment discrimination claims (like sexual harassment) to be made in arbitration. See 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009). Some argue that, because protections from harassment and employment discrimination are highly valued by a minority of members and valued substantially less by the majority, unions face temptation to bargain away such protections for things the majority values more highly. See Deborah A. Widiss, Divergent Interests: Union Representation of Individual Employment Discrimination Claims, 87 Ind. L.J. 421, 423 (2012).

d. University policies – Universities may implement their own harassment policies that go beyond the protections of federal, state, or local law.

i. Bargaining issues: an attempt by an employer to unilaterally impose an anti-harassment, anti-bullying, mutual respect, or some similar policy in a unionized workplace may be subject to challenge—particularly to the extent that it comes with disciplinary consequences, because discipline is a mandatory subject of bargaining. See, e.g., Southern Mail, Inc., 345 NLRB 644 (2005) (“Mandatory subjects of bargaining include the circumstances in which discipline will be imposed for violations of employer policies.”).

ii. Other NLRA issues: Some policies or applications of policies may be invalid because they risk interfering with employees’ rights under the NLRA to engage in concerted activities for mutual aid and protection. Anti-bullying policies that proscribe any negative comments about other employees, for example, may be read as an impermissible prohibition on employees making complaints about their supervisors.
e. Academic Freedom and First Amendment concerns

i. First Amendment – Public university faculty generally have a First Amendment right to speak on academic matters and issues of public concern without fear of retaliation by the employer. *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011). *But see Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003) (professor’s sexually-charged comments were a matter of private concern and not protected by the First Amendment). Accordingly, several cases have struck down overbroad harassment policies that restricted protected academic speech. *See, e.g., Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (in a case brought by a biopsychology graduate student who was concerned that research theories he wished to explore could be labeled "racist" or "sexist" under the university’s harassment policy, the court struck down the policy was unconstitutionally vague and overbroad); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down the University of Wisconsin’s harassment code as unconstitutionally overbroad because it included prohibitions on “discriminatory comments, epithets or other expressive behavior directed at an individual... [that] intentionally...[d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual... and [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity”); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (holding that that a professor, who had been suspended under the university's sexual harassment policy, was constitutionally protected in drawing an analogy during class between sex and writing, as the comments were part of his academic freedom to teach about writing). At least one court has said that “we doubt that a college professor’s expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment.” *Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010).

ii. Academic freedom – Faculty should be entitled to full freedom in research and in the publication of the results, freedom in the

iii. Several recent examples highlight the tension between harassment codes and academic freedom:

1. After writing an article critical of “sexual paranoia” on college campuses, Northwestern University Professor Laura Kipnis was herself the target of a Title IX complaint alleging that her article amounted to harassment and retaliation against students who report sexual misconduct. The complaint was investigated and ultimately dismissed. See Laura Kipnis, My Title IX Inquisition (May 29, 2015), available at http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf.

2. Patricia Adler, a tenured sociology professor at the University of Colorado, was told that she could not deliver a lecture on prostitution because of complaints that the content of the lecture could make some listeners uncomfortable. Adler accepted a buyout and left the university. See Scott Jaschik, Too Risky for Boulder? (Dec. 16, 2013), available at https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution.

3. Professor John McAdams at Marquette University was disciplined for writing on his blog about a graduate teaching assistant after she wouldn’t allow a conservative undergraduate to voice opposition to gay marriage in an ethics class discussion. McAdams blog post was highly critical of the graduate student and identified her by name; readers of the blog then apparently targeted the graduate student with
threatening emails. The University suspended McAdams for one year and conditioned his reinstatement on making an apology to the graduate student. McAdams has declared that he will not apologize. See Karen Herzog, Suspended Marquette professor McAdams says he won't apologize (Mar. 28, 2016), available at http://www.jsonline.com/news/education/suspended-marquette-professor-mcadams-says-he-wont-apologize-b99695888z1-373773981.html

II. Union liability for harassment

a. Union can be liable for its own discrimination (e.g., in carrying out its duties as exclusive representative or in administering apprenticeship program). See, e.g., EEOC v. Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976); United States v. Electrical Workers, 428 F.2d 144 (6th Cir. 1970); Hameed v. Bridge Workers, 637 F.2d 506 (8th Cir. 1980); Eldredge v. Carpenters, 833 F.2d 1334 (9th Cir. 1987); Maalik v. Int'l Union of Elevator Constructors, Local 2, 437 F.3d 650, 652 (7th Cir. 2006). Additionally, unions may be liable even for well-intentioned but legally-incorrect steps taken to shield (for example) women from an environment of harassment; a union that refused to refer women to a particular job because of the hostile work environment at the job site gave rise to a claim for the women. See Egger v. Local 276, Plumbers and Pipefitters Union, 644 F. Supp. 795 (D. Mass. 1986). At least one court has held that Title VII creates liability for union that opposes discipline of a harasser regardless of the underlying merits of the accusation. See EEOC v. General Motors Corp., 11 F. Supp. 2d 1077 (E.D. Mo. 1998).

b. Liability for union inaction in the face of employer discrimination or harassment is unsettled.

i. Supreme Court: Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (holding that a union’s refusal to grieve complaints by black members about racial discrimination violates Title VII).

ii. Some circuits hold that mere acquiescence is enough. In these circuits, unions that do not act to stop sexual harassment may be in violation of the law. That said, many still require both knowledge of the underlying discrimination and an active decision not to bring a grievance (whether to protect other members, or otherwise). See, e.g., Woods v. Graphic Communications, 925 F.2d 1195 (9th Cir. 1991);
Howard v. Int'l Molders Union, 779 F.2d 1546 (11th Cir. 1986). See also York v. AT&T, 95 F.3d 948 (10th Cir.1996) (adopting so-called acquiescence theory but noting “mere inaction does not constitute acquiescence” and requiring “(1) knowledge that prohibited discrimination may have occurred and (2) a decision not to assert the discrimination claim”); Gray v. Greyhound Lines, 545 F.2d 169 (D.C. Cir. 1976) (“it is clear that in some circumstances a union may be held responsible for an employer’s discriminatory practices if it has not taken affirmative action against those practices”).

iii. Other circuits hold that mere acquiescence is not enough. In these circuits, the courts require a plaintiff to show some greater level of culpability by the union, such as facilitating harassment in some fashion. EEOC v. Pipefitters Ass’n Local Union 597, 334 F.3d 656 (7th Cir. 2003); Thorn v. Amalgamated Transit Union, 305 F.3d 826 (8th Cir. 2002); Martin v. Local 1513, 859 F.2d 581 (8th Cir. 1988); Anjelino v. N.Y. Times Co., 200 F.3d 73, 95 (3d Cir. 1999). See also Ellison v. Plumbers & Steam Fitters Union Local 375, 118 P.3d 1070 (Alaska 2005).

c. This area of law is also complicated because so many cases addressing union liability involve mixed cases of acquiescence to an environment of harassment, and harassment by union shop stewards. See, e.g., Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983).

III. DFR claims against a union arising out of allegations of harassment between co-workers

a. Duty of Fair Representation Defined: The DFR “requires a union to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement.” Teamsters Local No. 391 v. Terry, 494 U.S. 558 (1990); see also Vaca v. Sipes, 386 U.S. 171 (1967). The DFR, however, does not prevent a union from “taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another ... [because] conflict between employees represented by the same union is a recurring fact.” Humphrey v. Moore, 375 U.S. 335 (1964).
b. The DFR can be particularly complicated in cases where both the alleged harasser and victim are bargaining unit members. “A union owes a duty of fair representation to both a victim of alleged harassment and to the worker accused of harassment, if they are members of the collective bargaining unit.” See Mary K. O’Melveny, *Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harrasment Complaints My Represented Employees*, 15 Lab. Law. 321(2000); see also Jenson v. Eveleth Taconite Co., 824 F.Supp. 847 (D. Minn. 1993).

c. Potential DFR claims by the victim of harassment

i. Generally the employee complaining of harassment must have filed a grievance or made a formal complaint in order to trigger a DFR claim. See e.g., *Badlam v. Reynolds Metals Co.*, 46 F.Supp.2d 187 (N.D.N.Y. 1999)(dismissing claim against union because it found that union had not acquiesced, based in part on union’s stated willingness to help plaintiff employee file a grievance that employee ultimately never filed); see also *Catley v. Graphic Communications International Union Local 277-M*, 982 F. Supp. 1332 (E.D. Wis. 1997) (employee must ask union to file grievance before union acquires a duty).

ii. Although a union’s failure to act generally does not breach the union’s DFR, see, e.g., *Grant v. Burlington Indus.*, 832 F.2d 76, 79 (7th Cir. 1987), an employee who had been harassed could win a DFR claim against a union by showing that a) the employer violated the CBA, b) the union failed to act to hold the employer to account, c) the union’s disinclination to act was based on an improper gender-motivated bias. See *Hines v. Anchor Motor Freight*, Inc., 424 U.S. 554, 561 (1976).

iii. Favoring another employee over the victim may violate the DFR if that decision is not based on having investigated the relative merits of competing claims. See e.g., *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1237 (8th Cir. 1980) (cert. denied).

iv. At least one court has endorsed the idea that an elected union representative of a largely male constituency has an inherent incentive to be biased in this context, while finding that a failure to represent a union member in her attempt to bring charges of sexual harassment against three other union members violated Title VII. See *EEOC v. Regency Architectural Metals Corp.*, 896 F. Supp. 260 (D. Conn. 1995).
d. Potential DFR claims by perpetrator of harassment

i. The subject of a harassment complaint, if disciplined, may file a DFR complaint against a union that declines to represent him. However, in this context, a union making a good faith investigation before declining to grieve the member’s transfer—even though the union’s own investigation concluded that the harassment claims lacked legal merit—may protect the union from liability. See Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853 (7th Cir. 1997). (The court did, however, note both that the transferred employee’s conduct had been inappropriate, and that the CBA included a unilateral right for the employer to transfer an employee for any reason.)

ii. Some member harassers have classified their claims against a union as defamation—that is, unsurprisingly, union representatives or investigators siding with the harassed employee during a grievance proceeding may say something that paints the harasser in an unflattering light. These theories have largely failed because grievance proceedings are protected by qualified privilege, and proving actual malice or reckless disregard for truth requires a tremendous showing by a plaintiff. See New York Times v. Sullivan, 376 U.S. 254 (1964). Note also that some employers are protected on the basis of having a “legitimate business interest” in informing, for example, another office about the backstory of a transferred employee. See Garziano v. E.I. Du Pont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987).

e. Employer challenge to arbitration awards

i. Vacating an award after arbitration on public policy grounds should only happen in exceptional circumstances. To do so, a court must find a well-defined public policy, and that the arbitrator’s award itself violated that policy. See Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000).

ii. Even though there is a defined public policy against harassment, there is not a defined policy about specific disciplinary steps—and as such, courts have difficulty justifying overturning an arbitrator’s decision about discipline. See Stephen Plass, Reconciling the Public Policy Exception to Enforcing Contracts with Title VII’s Public Policy on Disciplining Harassers, 19 St. Thomas L. Rev. 407 (2007); see also Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590 (6th Cir. 2004)
(upholding arbitrator's award reducing discipline for employee's racially derogatory comments); Weber Aircraft Inc. v. Gen. Warehousemen Union Local 767, 253 F.3d 821 (5th Cir. 2001) (same with regard to award reinstating employee who sexually harassed co-worker); Westvaco Corp. v. United Paperworkers Int'l Union, 171 F.3d 971 (4th Cir. 1999) (same); Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers, 959 F.2d 685 (7th Cir. 1992) (same).

iii. However, there are plenty of examples to the contrary. See, e.g., Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840 (2d Cir. 1990) (vacating arbitration award that reinstated employee who had repeatedly harassed co-workers); Stroehmann Bakeries, Inc. v. Teamsters Local 776, 969 F.2d 1436 (3d Cir. 1992) (vacating arbitration award that reinstated employee accused of sexual harassment without determining whether harassment actually occurred); State v. AFSCME, Council 4, Local 391, 69 A.3d 927 (Conn. 2013) (vacating arbitration award that reduced harasser's punishment from termination to a one-year suspension because “the public policy against sexual harassment in the workplace required the [employee's] dismissal”); Philadelphia Hous. Auth. v. AFSCME Council 33, Local 934, 52 A.3d 1117 (Pa. 2012) (vacating arbitration award that awarded reinstatement and backpay to employee who engaged in “lewd, lascivious and extraordinarily perverse” harassment of a co-worker).

f. Basic approaches for a union's handling of grievances alleging harassment by a co-worker:

i. Pursue separate grievances for each member: If the union simply decides to have separate representation for employees with competing interests, it may be insulated from suits alleging breach of DFR even absent having declined to make any investigation whatsoever. See Hellums v. Quaker Oats, Co., 760 F.2d 202 (8th Cir. 1985); see also Nolan v. Epifanio, No. 96 CIV. 2562 (JSR), 1998 WL 665131 (S.D.N.Y. Sept. 28, 1998) (union providing employee with counsel to pursue an internal complaint satisfied union's responsibilities to individual under DFR).

ii. Investigate the underlying circumstances and make a credibility determination, and pursue the grievance/represent the interests of the credible employee. See Hellums v. Quaker Oats, Co., 760 F.2d 202
iii. Represent both: There is no conflict of interest in this context; the Supreme Court has recognized that barring the union from operating when two union employees have a conflict would "weaken the collective bargaining and grievance process." *Humphrey v. Moore*, 375 U.S. 335 (1964). In at least one case, a court has found that a union representing both a member and a different member of whom the first had claimed harassment did not violate the DFR. *See Marshall v. Ormet Corp.*, 736 F.Supp. 1462 (S.D. Ohio 1990).