Panel: Discrimination and Harassment Issues in Higher Education

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Discrimination and Harassment Issues in Higher Education

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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
Recent Developments in Campus Race Relations—Employment Impact

Campus protests across country, including:

- University of Missouri
- Yale
- Occidental College
- Princeton
- Ithaca College
- Brandeis
- Claremont McKenna College
- University of Cincinnati
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)
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