The Law of Higher Education, 4th Edition

and

The Law of Higher Education Fourth Edition: Student Version

New Developments, Clarifications, and Errata

The following new postings are now available by clicking the links. The first section number refers to *LHE 4th* and the second number (when there is one) refers to *LHE: Student Version* (i.e., *SV*). Internal page references in the postings are set up in the same way: The first page number refers to *LHE 4th*, and the second number (when there is one) refers to *SV*. The new postings of bibliography appear after the last substantive posting for each chapter and are labeled "Selected Bibliography."

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- **LHE 4th, p. 88 (under Sec. 1.6.)/ SV p. 680: New Development** (posted 8/27/2007)
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- ***New Development*** (posted 8/10/2007)

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- ***New Development*** (posted 9/20/2006)

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- ***New Development*** (posted 8/10/2007)

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- ***New Development*** (posted 8/24/2006)

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- ***New Development*** (posted 8/24/2006)
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- ***New Development*** (posted 10/23/2007)

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- ***New Development*** (posted 8/24/2006)

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- ***New Development*** (posted 8/10/2007)

Selected Bibliography – *Chapter 7*

- **LHE 4th, p. 718 (under Sec. 7.1.)/ SV Chap. 6, p. 683: New Development** (posted 10/23/2007)

LHE 4th Sec. 8.1.3./ SV Sec. 7.1.3. The contractual rights of students

- ***New Development*** (posted 8/10/2007)

LHE 4th Sec. 8.1.5./ SV Sec. 7.1.5. Students' legal relationships with other students

- ***Clarification*** – **Page 747** (posted 8/24/2006)
- ***Erratum*** – **Page 752** (posted 8/24/2006)

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- ***New Development*** (posted 8/10/2007)
- ***Correction*** **– Page 783** (posted 8/27/2007)

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- ***Erratum*** **– Page 813** (posted 9/20/2006)

LHE 4th Sec. 8.6.3./ SV Sec. 7.6.3. Federal statutes and campus security

- ***New Development*** (posted 8/10/2007)

LHE 4th Sec. 8.7.2. Health services/ SV Sec. 7.7.1. Overview (of support services)

- ***New Development*** (posted 10/23/2007)

Selected Bibliography – *Chapter 8*

- **LHE 4th, p. 902 (under Sec. 8.1.)/ SV Chap. 7, p. 684: New Development** (posted 10/23/2007)

LHE 4th Sec. 9.4.2./ SV Sec. 8.4.2. Public institutions: disciplinary sanctions

- ***New Development*** (posted 3/9/2007)

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- ***Erratum*** **– Page 951** (posted 10/23/2007)

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- ***New Development*** (posted 10/23/2007)

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- ***Erratum*** **– Page 1004** (posted 8/27/2007)

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- ***Erratum* – Page 1014** (posted 8/27/2007)

LHE 4th Sec. 9.5.6./ SV Sec. 8.5.5. Posters and Leaflets

- ***Clarification* – Page 1015 (LHE 4th)/Page 491 (SV)** (posted 8/27/2007)
- ***New Development*** (posted 8/27/2007)

LHE 4th Sec. 10.1.4./ SV Sec. 9.1.4. Principle of nondiscrimination

- ***New Development* – Page 1069** (posted 8/24/2006)

LHE 4th Sec. 10.4.6./ SV Sec. 9.4.6. Sex discrimination [in athletics]

- ***New Development*** (posted 9/20/2006)

LHE 4th Sec. 11.6.3./ SV Sec. 10.1.2. Trespass statutes and ordinances, and related campus regulations

- ***New Development*** (posted 10/23/2007)

LHE 4th Sec. 12.5. Other state regulatory laws affecting postsecondary education programs

- ***New Development*** (posted 8/10/2007)

LHE 4th Sec. 13.2.7. Trademark laws

- ***New Development*** (posted 9/20/2006)

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- ***New Development*** (posted 8/10/2007)
- ***New Development*** (posted 3/9/2007)

LHE 4th Sec. 13.4.4. "Cross-cutting" aid conditions

New Development (posted 8/10/2007)

LHE 4th Sec. 15.4.7. Conflicts of interest

- ***New Development*** (posted 10/23/2007)

Selected Bibliography – *Chapter 15*

- **LHE 4th, p. 1662 (under Sec. 15.2.): New Development** (posted 10/23/2007)

LHE 4th Sec. 1.3./ SV Sec. 1.3. The governance of higher education
<u>New Development</u>

In recent years, momentum has been building for modifications in state governance structures that would facilitate collaboration between higher education and K-12 education on issues of mutual concern, such as improving high school students' preparation for college. New types of entities, developed for this purpose, are generally grouped under the title "K-16 initiatives" or "P-16 initiatives." These initiatives may be attached to the state governor's executive offices or to the statewide public university system, or may be set up as a separate state-level commission or council. See, e.g., Peter Schmidt, "A Tough Task for the States: Efforts to Get Schools and Colleges to Cooperate Yield Both Fixes and Frustration," *Chronicle of Higher Education,* p. B6 (March 10, 2006). Collaboration between higher education and K-12 education, and modification of state governance structures to accommodate such collaboration, become increasingly important as the interdependencies and mutuality of interests between K-12 and higher education become increasingly clear. See generally William Kaplin, *Equity, Accountability, and Governance: Three Pressing Mutual Concerns of Higher Education and Elementary/Secondary Education*, IHELG Monograph 06-11 (Institute for Higher Education Law and Governance, Univ. of Houston, 2007).

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LHE 4th Sec. 1.4.4. The role of caselaw
<u>Clarification</u> – p. 40

In the National Reporter System, there now is also a P.3d for the *Pacific Reporter* and an S.W.3d for the *South Western Reporter*.

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LHE 4th Sec. 1.5.2. State action doctrine

<u>Erratum</u> – p. 44

The set off quote at the top of the page is from the *Rendell-Baker* case, not the *Blum* case. The citation is correct as is.

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LHE 4th Sec. 1.6.3. Governmental support for religious institutions

<u>New Development</u> – p. 66

In March 2007, the California Supreme Court issued its decision in the appeal of *California Statewide Communities Development Authority v. All Persons Interested in the matter of Validity of Purchase Agreement*, 152 P.3d 1070 (Cal. 2007). In a 4 to 3 decision, the majority determined that the Development Authority's issuance of tax-exempt revenue bonds for the construction projects of religious institutions does not violate either the First Amendment establishment clause or the similar provision of California's Constitution – "if certain conditions are satisfied." The conditions that the court set out (see 152 P.3d at 1079-1081) are similar to those from the *Virginia Building Authority* and *Steele* cases (LHE 4th p. 66).

These two earlier cases also provided the reasoning by which the California Supreme Court resolved the First Amendment challenge to the issuance of the bonds. The challenge based on the state constitution, however, required partially different reasoning that took account of the applicable text (Cal. Const. art. XVI, sec. 5). The issue, according to the court, was "whether the Authority's proposed indirect assistance to the three schools, through its issuance of revenue bonds, would be 'aid of any . . . sectarian purpose' or 'help to support any school . . . controlled by any . . . sectarian denomination,' as prohibited by section 5 of article XVI of the state Constitution." In resolving this issue, the court emphasized that:

> [T]he pertinent inquiry should center on the substance of the education provided by these three schools, not on their religious character. Therefore, whether the schools are pervasively sectarian (as the parties have assumed) is not a controlling

> factor in determining the validity of the bond funding program under our state Constitution. Rather, the program's validity turns on two questions: (1) Does each of the recipient schools offer a broad curriculum in secular subjects? (2) Do the schools' secular classes consist of information and coursework that is neutral with respect to religion? This test ensures that the state's interest in promoting the intellectual improvement of its residents is advanced through the teaching of secular information and coursework, and that the expression of a religious viewpoint in otherwise secular classes will provide a benefit to religion that is merely incidental to the bond program's primary purpose of promoting secular education. [152 P.3d at 1072.]

Having established the conditions that a religious institution must meet to qualify for a bond issue in its behalf, the court remanded the case to the trial court for consideration of whether the two religious universities (and one religious school) requesting the bond issues met the court's conditions.

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LHE 4th Sec. 1.7. The relationship between law and policy

<u>Erratum</u> – p. 80

In the first line of page 80, the parenthetical reference to fn. 21 should be fn. 22.

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<u>Selected Bibliography</u> – Chapter 1.

LHE 4th, p. 88 (under Sec. 1.6.) / SV p. 680 (under Chap. 1): New Development

Laycock, Douglas, "*Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty,*" 118 Harv. L.Rev. 155 (2004).

LHE 4th, p. 81 (under Sec. 1.1.)/ SV p. 679 (under Chap. 1): New Development

Brown, Deborah, Przypyszny, John, & Tromble, Katherine (eds); *Legal Issues in Distance Education: A Legal Compendium* (Nat'l Ass'n of College & Univ. Attys., 2007) (comprehensive compendium); for further information, go to www.nacua.org, and click the "publications" button at the top of the webpage.

LHE 4th p. 81 (under Sec. 1.1.): Clarification

The NACUA Handbook for Lawyers New to Higher Education is now in a 2d edition, published in 2007. The 2d edition editors are Melissa Rooker and William Thro.

LHE 4th p. 86 (under Sec. 1.2.)/ SV p. 680 (under Chap. 1): New Development

Tierney, William & Hentschke, Guilbert, *New Players, Different Game: Understanding the Rise of For-Profit Colleges and Universities* (Johns Hopkins, 2007).

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LHE 4th Sec. 2.2.2.2. Access to court – Other technical doctrines
New Development

Student journalists who wish to challenge institutional policies or actions will need to expedite their claims or file class action lawsuits in the wake of *Lane v. Simon*, 2007 U.S. App. LEXIS 17814 (10th Cir. July 26, 2007). The plaintiffs, former editors of the student newspaper at Kansas State University, sued the university after administrators relieved the faculty advisor to the student newspaper of his duties. The removal came after substantial campus controversy about the quality of the student newspaper and, in particular, its coverage of issues related to diversity. The editors claimed that the removal of the faculty advisor without consultation with the board of student editors violated their first and fourteenth amendment rights; they sought a

declaratory judgment that the student editorial board had the right to select its own advisor and a preliminary injunction ordering the university to reinstate the faculty advisor.

A federal trial court had granted the university's motion to dismiss. The appellate court ruled that, because the student plaintiffs had graduated, their claims were moot and the court lacked jurisdiction to entertain them. The current editors had not asked to be substituted for the previous plaintiffs, and because the former editors were no longer students, the university could not impinge on their free speech rights.

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LHE 4th Sec. 2.5.1. Overview and suggestions (for institutional management of liability risk)

New Development

The tragic effects of Hurricane Katrina on New Orleans, LA, and its higher education institutions has served to cast a spotlight on the intricacies of property insurance and its role in institutional risk management. A group of cases consolidated under the title *In Re: Katrina Canal Breaches Litigation* provides a striking example. The cases were all suits against insurance companies that had refused to pay claims for property damages resulting from Katrina and the failure of the New Orleans levees. One of the plaintiffs was Xavier University, which alleged that it had suffered damages in excess of $30 million and sought recovery under its commercial, "all-risk," property insurance policy (*Xavier University of Louisiana v. Travelers Property Casualty Co. of America*, 495 F.3d 191(5th Cir. 2007).

In the *Xavier* case and the other cases consolidated with it, the insurance companies argued that damages caused by "flood" were specifically excluded from the plaintiffs" policies. The plaintiffs argued "that the massive inundation of water into the city was the result of the negligent design, construction, and maintenance of the levees and that the policies' flood exclusions in this context are ambiguous because they do not clearly exclude coverage for an inundation of water induced by negligence." In a complex opinion, the federal appellate court drew upon the law regarding insurance contracts, rules for construing contact terms, cases on

flood exclusion clauses, other cases on water damage claims, and various sources containing definitions of "flood." On this basis, the court rejected the plaintiffs' arguments:

> [W]e conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term "flood." When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood. This is precisely what occurred in New Orleans in the aftermath of Hurricane Katrina.
>
> . . . . That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood. [495_F.3d at 221.]

(In the concluding part of the opinion, the court also addressed technical matters concerning the "doctrine of efficient proximate cause," relied on by the plaintiffs, and the "anti-concurrent-causation clauses" in many of the insurance policies at issue, concluding that the doctrine, and the clauses, did not apply to the case (495 F.3d at 221-23).

LHE 4th Sec. 3.3.1./ SV Sec. 3.2.1. Overview of tort liability

New Development

Although charitable immunity remains an important source of protection for institutions of higher education in states in which the doctrine is recognized, one state's supreme court carved out a significant exception to charitable immunity in cases where claims of intentional acts or willful, wanton, or grossly negligent conduct are alleged. In *Hardwicke v. American Boychoir School*, 902 A.2d 900 (N.J. 2006), the New Jersey Supreme Court rejected the defendant boarding school's claim that the plaintiff's negligence lawsuit, alleging claims of sexual abuse when he was a twelve-year-old residential student, was barred by charitable immunity. The court also held that the defendant could be held vicariously liable for acts of its employees if they were found to have engaged in child abuse.

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LHE 4th Sec. 3.3.2./ SV Sec. 3.2.2. Negligence
Erratum – p. 207

The citation for the Texas Supreme Court's opinion in *Texas A&M University* should be: 156 S.W.3d 580 (Tex. 2005).

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LHE 4th Sec. 3.3.2.5./ SV Sec. 3.2.2.5. Student suicide
New Development

A state trial court has rejected the claim of parents of a student who died of a heroin overdose that the college was negligent, and fraudulently misrepresented its efforts to maintain a safe environment for its students. In *Bash v. Clark University*, 2006 Mass. Super. LEXIS 657 (Mass. Super. Ct., Worcester, November 20, 2006), the father of the deceased student sued the university, eight administrators, and the student who had supplied the heroin to his daughter. He claimed that the university and its administrators had been negligent because they did not take steps to prevent his daughter from obtaining and using heroin, and that he had relied on statements made in university documents and by a university administrator that the university would provide a safe environment for its students. The administrators filed a third-party complaint against the plaintiff and his wife, asserting that their knowledge and omissions with respect to their daughter's previous drug use created a special relationship, and thus was the proximate cause of her death.

The university requires students in their first four semesters to live in university housing, and the student handbook included language that the university provided services "to ensure the health and safety of the individuals who are living and learning at Clark University." Nevertheless, there had been over 20 on-campus drug-related violations in each of the three years before Michele Bash died, a fact that the university had reported in compliance with federal law. The university was aware that Michele had abused alcohol on at least two occasions during her first semester. In addition, her parents contacted the university during her first semester after reading her online journal that suggested that she had used illegal drugs while at

the university. A university counselor subsequently met with Michele, who denied using drugs. When the counselor met with Michele again several times early in the spring semester, Michele finally admitted using heroin once, but said that it had made her sick and she would not use it again. The university notified Michele's mother with this information. One month later, Michele obtained heroin from a fellow student and died as a result of using it.

Citing *Baldwin* and *Bradshaw* (Sec. 3.3.2.) for the proposition that the doctrine of *in loco parentis* no longer applies, the trial court ruled that the university did not have a duty to prevent Ms. Bash from taking heroin because it was not reasonably foreseeable. She had stated that she would not use heroin again, and the court noted that she was not suicidal. Because of this lack of foreseeability, no special relationship existed between the university and Ms. Bash. The court characterized Ms. Bash's actions as voluntary and said she was responsible for her own conduct. The court distinguished the outcome in *Mullins v. Pine Manor College* (Sec. 8.6.2.) because that case involved the physical safety of students in residence halls rather than the "burden associated with maintaining the moral well being of students." The court distinguished *Schieszler v. Ferrum College* and *Shin v. Massachusetts Institute of Technology*, saying that the suicide in those cases was foreseeable because administrators had specific information indicating that the student was suicidal. And finally, the court said that recognizing a legal duty for university officials to prevent voluntary use of illegal drugs would "conflict with the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students."

With respect to the misrepresentation claim, the court stated that, "generalized statements in promotional materials or brochures are too vague and indefinite to give rise to a cause of action." In addition, the promise of an administrator that she would "get rid of heroin on the Clark campus" was not sufficiently strong to induce a parent to send a child only to that particular institution.

The court was careful to distinguish the rulings of other courts, including a court in the same state that had either found institutions and their staff negligent or ruled that such a result was possible. The result is important for situations where a student engages in self-destructive behavior about which the institution and its staff had little or no warning.

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LHE 4th Sec. 3.3.5. Other sources of tort liability

New Development

As technology makes employee surveillance easier and less expensive than in prior years, the scope of employees' privacy rights has become a prominent issue for the courts. The Supreme Judicial Court of Massachusetts issued an opinion in 2006 that is instructive.

In *Nelson v. Salem State College*, 845 N.E. 2d 338 (Mass. 2006), the plaintiff, Gail Nelson, was a receptionist and administrative assistant at the college's small business development center (SBDC). After a former client of the SBDC had gained unauthorized access to the office after business hours, the administration decided to install a hidden video camera in an emergency light fixture on the back wall of the office to enhance after-hours security. Although the administration's concern was for unauthorized access after business hours, the camera operated 24 hours per day. Staff were not informed that the camera had been installed. On several occasions, the plaintiff removed her top to apply medicine to a bad sunburn, and also changed her clothes at the back of the office when others were not present. Although the cameras were focused on the areas that she used for these activities, no videotapes of her disrobing were preserved. When she learned about the secret videotaping, Nelson sued the college for violations of her Fourth Amendment right of privacy under 42 U.S.C. §1983, as well as state law claims.

The court first established that Nelson had an expectation of privacy in that she engaged in disrobing only after work hours or when others were not present. But the court did not believe that this expectation was reasonable because the work area was "public" in that other employees had keys and could have accessed the work area while she was disrobing. The court characterized the space as an "open work area" that lacked the characteristics of a private space. Although the court agreed with the plaintiff that the 24-hour taping was unnecessarily broad given the purpose of the surveillance, that did not make the plaintiff's expectation of privacy reasonable. With respect to the plaintiff's state law invasion of privacy claim, the court ruled that the defendants acted in good faith and thus were protected by common law immunity. Similarly, the court dismissed the plaintiff's claim that the college negligently supervised its security employees by allowing them to install a 24-hour taping system. The court affirmed the lower court's award of summary judgment to the college on all counts.

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LHE 4th Sec. 4.5.3. Organization, recognition, and certification
New Development

The U.S. Court of Appeals for the Second Circuit dealt a blow to faculty unions when it ruled that the union may not require faculty members who pay an agency fee (see 4th edition, p. 290), rather than union dues, to file objections annually to expenditures that are not related to the collective bargaining process. In *Seidemann v. Bowen*, 2007 U.S. App. LEXIS 18243 (2d Cir., August 1, 2007), Seidemann, a professor at Brooklyn College (CUNY), was not a member of the faculty union, but was required to pay an agency fee in lieu of membership dues. The union's agency policy required faculty who objected to certain non-bargaining expenditures to file an annual objection, after having received from the union a list of the previous year's expenditures. Seidemann argued that the requirement that objections be made annually violated his first amendment rights. He also argued that this procedure violated the union's duty of fair representation.

Although a magistrate judge awarded summary judgment to the union, the appellate court reversed that ruling. Noting that unions' objection procedures and policies for returning the portions of agency fees to which the faculty member objects are designed to protect the faculty member from subsidizing speech or conduct with which the faculty member disagrees, the court reviewed challenges in other circuits to an annual objection requirement. The court ruled that requiring annual objections burdened the agency fee payers' first amendment rights, and found no "legitimate need" for the annual objections. Furthermore, said the court, the requirement that objectors state specifically what percentage of the agency fee they objected to in order to be entitled to arbitration of the dispute was also a first amendment violation. Because the lower court had not addressed Seidemann's duty of fair representation claim, the court remanded that claim for resolution by the trial court.

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LHE 4th Sec. 4.5.6. Students and collective bargaining

New Development

The National Labor Relations Board issued two opinions in June of 2007 in which they found that graduate students who are employees of nonprofit research foundations have the right to unionize under the National Labor Relations Act. In both cases, the research foundations were linked to public universities – the State University of New York and the City University of New York. Both foundations manage and administer grant funds, and pay graduate research assistants directly, rather than sending the funds through the university's payroll system. In *The Research Foundation of the State University of New York Office of Sponsored Programs and Local 1104, Communication Workers of America, AFL-CIO*, 350 N.L.R.B. No. 18 (June 29, 2007), the Foundation had argued that the students were enrolled at the universities, were working on research that related to their dissertations, and that in some cases their dissertation advisors were the principal investigators on the grants. The Board ruled that the relationship between the students and the foundations was economic, not educational, and that the primary *educational* relationship was between the students and the university in which they were enrolled. The Board explicitly refused to apply the *Brown University* ruling (4th edition, pp. 302-303), stating that because the private research foundations did not issue academic degrees, its ruling in *Brown* was not binding. In *The Research Foundation of the City University of New York and Professional Staff Congress of New York*, 350 N.L.R.B. No. 19 (June 29, 2007), the Board ruled that there was even less of an educational relationship between the students and the Foundation. Research assistants paid by the foundation did not need to be CUNY students, and they often performed tasks unrelated to their dissertations or educational programs.

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LHE 4th Sec. 5.2.1./ SV Sec. 4.5.2.1. Title VII

New Development

The U.S. Supreme Court issued a ruling involving the timeliness of a pay discrimination complaint in May of 2007. In *Ledbetter v. Goodyear Tire and Rubber*, 127 S. Ct. 2162 (2007),

the court ruled 5-4, in an opinion by Justice Alito, that employees claiming pay discrimination under Title VII must file their claims within the 180 or 300 day limitations period. The plaintiff had argued that the regular issuance of paychecks that were less than those of men doing the same job was a continuing violation and should toll the statute of limitations. The majority explained that, in order to apply Title VII's requirement that the discrimination be intentional, the specific date on which an allegedly discriminatory pay decision was made must be the date of reference for the beginning of the limitations period. The dissent, written by Justice Ginsburg, argued that pay discrimination decisions are more difficult to detect than decisions such as failure to hire or promote, or termination decisions. She noted that pay discrimination decisions have a cumulative effect and thus should be treated as continuing violations rather than a single decision at a particular point in time.

New Development

The U.S. Court of Appeals for the Third Circuit has ruled that a woman who was denied promotion to a locksmith position has established a prima facie case of sex discrimination. In *Scheidemantle v. Slippery Rock University*, 470 F.3d 535 (3d Cir. 2006), the court ruled that the university's decision to select an applicant who did not meet the stated criteria of two years of locksmithing experience meant that the position criteria had changed. Neither the plaintiff nor the man who was hired met the original criteria for the position. Said the court, "because Slippery Rock placed similarly 'unqualified' males in the locksmith position, it could no longer point to the job posting's objective qualifications as a valid reason for refusing to promote Scheidemantle." The lower court had ruled against the plaintiff; the appellate court reversed that ruling and remanded the case for trial.

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LHE 4th Sec. 5.2.6./ SV Sec. 4.5.2.6. Age Discrimination in Employment Act
New Development

For over a decade it has been unclear whether plaintiffs may use the "disparate impact" theory (see Sec. 5.2.1) to attack alleged discrimination that is unintentional under the Age Discrimination in Employment Act (ADEA), although this theory is available to plaintiffs under Title VII of the Civil Rights Act of 1964. The U.S. Supreme Court has resolved that issue in plaintiffs' favor, but in a way that is narrower than the theory's interpretation under Title VII.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the court addressed the claim of a group of police officers who asserted that the city's method of allocating salary increases had a disproportionately negative impact on officers over the age of 40. In order to recruit and retain beginning officers by raising starting salaries to the level of starting police salaries in surrounding communities, the city had given proportionately higher salary increases to officers with seniority of five years or less. Although a few individuals who were older than 40 were in this group, most of the over-40 officers had more than five years of seniority and received a proportionately smaller raise.

The Court ruled 8-0 that the disparate impact theory may be used in ADEA claims. It explained that federal judges had routinely allowed plaintiffs to state disparate impact claims under the ADEA until the Court's 1993 decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which the Court had stated that it specifically was not addressing whether a disparate impact claim could be brought under the ADA. The Court addressed the language in the ADEA that permits an employer to take an action that would otherwise violate that law if a "reasonable factor other than age" (RFOA) is the justification, even if that "reasonable factor" is linked to the employee's age. In *Hazen Paper,* the employer had discharged a worker just before his pension would have vested. The Court had ruled that it was the anticipated vesting, not the plaintiff's age, that was the reason for the discharge, and that the employer had not violated the ADEA because the employer's reason was a "reasonable factor other than age."

The court stated that the RFOA language in the ADEA means that the scope of disparate impact liability under the ADEA is narrower than under Title VII. In a disparate impact case brought under Title VII, the defendant employer must demonstrate that the challenged "neutral practice" is a "business necessity." Under the ADEA, the "neutral practice" need only be

"reasonable" and not facially related to the employee's age. The Court then ruled that the city's decision to base salary increases on rank and seniority was a RFOA and thus did not violate the ADEA.

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement. [544 U.S. at 243]

Although the ruling in *City of Jackson* may initially stimulate more disparate impact claims brought by older workers, the lighter burden borne by the employer to demonstrate that its actions were "reasonable" rather than discriminatory will make these claims more difficult to win than disparate impact claims brought under Title VII.

* *

LHE 4th Sec. 5.3.3.3./ SV Sec. 4.5.2.1. Sexual harassment
New Development

Although there have been numerous lawsuits by college faculty and staff claiming harassment by peers or supervisors, very few cases have involved the harassment of a faculty member by a student. A federal trial court ruled that a school district could be liable for the harassment of a teacher by a student, even though the student was in a special education classroom. In *Mongelli v. Red Clay Consolidated School Dist. Bd. Of Educ.*, 2007 U.S. Dist. LEXIS 40255 (D. Del., June 4, 2007), the teacher had complained to her supervisor about persistent sexual harassment and disruptive behavior by a male special education student. The student had physically and verbally abused the teacher sexually. Although the supervisor met with the teacher about her complaints, the student was not disciplined. Finally the teacher filed a criminal complaint against the student, who was removed from the school. When her contract was not renewed, the teacher sued the school board for sexual harassment and retaliation.

Although the court ruled that a school district could be liable for sexual harassment by a special education student, it found that, because the behavior had occurred for only a few weeks, it did not meet the "severe or pervasive" standard required to meet Title VII's prohibition on sexual harassment. The court also ruled that the plaintiff was not retaliated against for filing written complaints about the student's behavior, since she was required to submit such reports as part of her job duties.

Given the nature of the student's behavior, the school's delayed response to the teacher's complaints is surprising. Although this case occurred in a secondary school setting, it is fully applicable to classroom situations in colleges and universities. It also demonstrates that, even if a student claims that harassing behavior is a manifestation of a disability, the employer will be required to protect the employee from harassment, and may face legal liability if it does not.

* *

LHE 4th Sec. 5.5./ SV Sec. 4.7. Application of Religious Discrimination Laws to Religious Institutions

New Development

Subsequent to, and consistent with, the *Catholic University* case, other U.S. courts of appeals have agreed that the "ministerial exception" defense is not limited to claims of persons who have been ordained as ministers. In *Hollins v. Methodist Healthcare Inc.*, 474 F.3d 223 (6th Cir. 2007), for example, the court applied the exception to "a resident in [a] hospital's clinical pastoral education program," reasoning that the exception depends on "the function of the plaintiff's employment position rather than the fact of ordination."

* *

LHE 4th Sec. 6.3.1./ SV Sec. 5.3. Bargaining unit eligibility of faculty

New Development

The U.S. Court of Appeals for the D.C. Circuit has considered two cases involving the attempt of faculty at private institutions to unionize under the NLRA. In both cases, the appellate court rejected the finding of the NLRB that the faculty were entitled to the protections of the NLRA because the NLRB had not provided sufficient detail or analysis to enable to reviewing court to determine whether or not the faculty's involvement in governance met the *Yeshiva* criteria (see LHE 4th, pp. 491-492).

In *LeMoyne-Owen College v. National Labor Relations Board*, 357 F.3d 55 (D.C. Cir. 2004), the college appealed the ruling of the NLRB (Board) that its faculty did not meet the *Yeshiva* criteria and thus the college was required to bargain with the faculty union. Although the college had argued that the faculty had significant authority over curriculum, admission standards, graduation requirements, grading standards, and academic standing, the Board had rejected that argument because the faculty did not have "absolute control" over any of the college's operations and didn't "effectively recommend" policies. The appellate court, noting that the Board had only cited precedent that favored the faculty and none that had been cited by the college, remanded the case to the Board for further proceedings. The court emphasized that it did not necessarily disagree with the Board's ruling, saying: "The NLRB may have an adequate explanation for the result it reached in this case. We cannot, however, assume that such an explanation exists until we see it" (357 F.3d at 61).

On remand, the NLRB reversed itself and ruled 2-1 that the faculty were, indeed, "managerial employees" and thus unprotected by the NLRA (*LeMoyne-Owen College and Faculty Organization*, 345 N.L.R.B. No. 93, 178 L.R.R.M. 1225 (September 30, 2005). The two-member majority found that the faculty had either complete control or effective recommending authority for a wide array of academic issues, and met the *Yeshiva* criteria. The majority was particularly influenced by the college president's unrebutted testimony that he and the trustees accepted all of the faculty's recommendations on academic matters, and that if the faculty objected to an administration proposal with respect to an academic matter, the proposal was not implemented.

The same federal appellate court rejected another NLRB finding that faculty were entitled to bargain in *Point Park University v. National Labor Relations Board*, 457 F.3d 42 (D.C. Cir. 2006). An NLRB regional director had held that the faculty did not meet the *Yeshiva* criteria, and the Board ordered the university to bargain with their union. The university appealed the Board's order to the federal appellate court.

As was the case in *LeMoyne-Owen College*, the appellate court stated that it could not evaluate the Board's rationale for its decision because the regional director had not made specific findings, using the *Yeshiva* criteria, as to the basis for the conclusion that the faculty were not managerial employees. Relying heavily on its earlier opinion in *LeMoyne-Owen College,* the court criticized the Board for failing to explain which of the factors were significant, and why they supported the ultimate conclusion that the faculty were entitled to the protections of the NLRA. Concluding that the Board's findings were not supported by substantial evidence, the court remanded the case to the Board for further proceedings.

* *

LHE 4th Sec. 6.4.3.3. Disability discrimination (faculty)
New Development

In *Gardiner v. Nova South Eastern University*, 2006 U.S Dist. LEXIS 92774 (S.D. Fla., December 22, 2006), a federal trial court rejected the university's motion for summary judgment in a disability discrimination claim brought under Section 504 (see the 4th edition, Sec. 5.2.5). Gardiner, an associate professor of business, underwent a divorce and the dean believed that he had a drinking problem. Although Gardiner apparently taught his courses up until the date of his suspension, the dean alleged that he had missed meetings and exhibited "physical signs" of alcohol abuse. The dean ordered Gardiner to meet with him to discuss his alleged alcoholism, but Gardiner did not comply. The dean went to Gardiner's home one evening unannounced, and found Gardiner reading a dissertation and stated that he "appeared to be drinking." The dean placed Gardiner on medical leave. Several months later, the dean informed Gardiner that he either had to provide certification that he was now fit to work or he would be terminated. Gardiner did not respond, and was dismissed.

The court denied the university's summary judgment motion because Gardiner claimed that he was teaching without a problem up until the date of his placement on medical leave, while the dean claimed that his teaching was problematic and that he did not participate in important meetings. The court ruled that this dispute over important facts did not permit an award of summary judgment. The case is instructive because the factual dispute is over whether the faculty member is "qualified," which he must demonstrate in order to state a claim under Section 504.

* *

LHE 4th Sec. 6.4.5. Other workplace issues
New Development

At most institutions, administrators do not have tenure in their administrative positions, and either serve at will or return to the faculty when their term of service expires. (They also may be removed for cause.) However, if an administrator is not reappointed because of exercising his or her First Amendment rights at a public institutions, a legal challenge may ensue.

In *Ray v. Montana Tech of the University of Montana*, 2007 Mont. LEXIS 26 (Montana, January 30, 2007), a department chair's contract was not renewed after less than one year of service after he had had numerous conflicts with administrators and other faculty members. Although all contracts for department chairs were renewable annually, the typical practice had been for chairs to serve for five to seven years on annual contracts. Ray filed a complaint with the state Department of Labor and Industry, alleging discrimination on the basis of his political beliefs and also on the basis of marital status (his wife was a member of his department and he had clashed with administrators on her behalf). The administrative hearing found that the university had legitimate business reasons for the nonrenewal. Ray then filed similar claims in state court, and added free speech claims, as well.

The court found that the university had carried its burden to demonstrate that Ray had engaged in a number of activities during his months as department chair that were unprofessional and disruptive, including refusing to meet with administrators without either bringing a lawyer or

taping the meeting; refusing to deal with a faculty member who came to class intoxicated; refusing to schedule evening classes; and a variety of other conflicts. The institution's reasons for not renewing his contract were related to "internal structural arrangements and administrative procedures," and were not matters of public concern, according to the court. The court also rejected Ray's marital status discrimination claim, ruling that the multiple reasons for the nonrenewal were unrelated to the fact that Ray's wife was a member of his department. And, it rejected Ray's due process claim, noting that the institution had a written policy that made departmental chair positions discretionary on the part of the President, which meant that Ray had no property interest in that position.

This case reinforces the importance of written policies stating that faculty who hold administrative positions serve at will (or for a specific contractual term), and that there is no right to renewal absent some affirmative act of a designated administrator. These written policies will help institutions defend against claims that "past practice" supersedes the written policy language.

New Development

A federal appellate court has ruled that denial of emeritus status is not an "adverse action" for the purpose of First Amendment retaliation claims. In *Zelnik v. Fashion Institute of Technology*, 464 F.3d 2d Cir. (2006), a professor who had vociferously opposed the institution's plans to close a street that bisected its campus was denied emeritus status when he retired. The professor owned land that fronted on that street, and organized public resistance to the institution's plans. The court ruled that, despite the fact that the plaintiff was apparently the only retired faculty member who had been denied emeritus status by the institution, the title was merely "honorific" and conferred no benefits on the individual. Because emeritus status provided "de minimus" benefits to retired professors, the court said, it need not apply the standard of review for retaliation claims brought under the First Amendment: whether retaliatory conduct "that would deter a similarly situated individual or ordinary firmness from exercising his or her constitutional rights" constituted an adverse action.

* *

LHE 4th Sec. 6.6.2. Terminations of tenure for cause

Erratum – p. 533

Line 7 of the indented quotation in the *San Filippo* case should read:

It is not unfair or unforeseeable for a tenured professor to be expected to behave . . .

* *

LHE 4th Sec. 6.6.3. Denial of tenure

New Development

A federal appellate court ruling has confirmed the legitimacy of collegiality as a criterion for making a tenure decision. In *Ward v. Midwestern State University*, 217 Fed. Appx. 325 (5th Cir. 2007), Ward, an associate professor of public administration, was denied tenure by the university because he "lacked the interpersonal skills necessary to serve…as an associate professor." Ward, an African-American, sued the university, alleging race discrimination and a variety of constitutional claims. The university provided evidence that Ward had shouted at faculty colleagues during meetings, had sent chastising emails to fellow faculty members, and failed to attend mandatory college and program faculty meetings. The lack of collegiality appears to be the university's primary defense; the case does not discuss the quality of Ward's teaching, scholarship or service. The appellate court affirmed the trial court's award of summary judgment.

For another case upholding a university's decision to deny tenure to a professor on the grounds of noncollegiality and difficult interpersonal relationships with students, see *Sawicki v. Morgan State University*, 2005 U.S. Dist. LEXIS 41174, *affirmed*, 170 Fed. Appx. 271 (4th Cir. March 1, 2006).

* *

LHE 4th Sec. 6.7.2.4. Other personnel decisions

New Development

A trial court case provides an interesting commentary on an institution's attempts to deal with a "difficult" faculty member. In *Appel v. Spiridon*, 463 F. Supp. 2d 255 (D. Conn. 2006), Appel, a tenured professor of art at Western Connecticut State University testified on behalf of an individual who was not hired by her department and who subsequently claimed discrimination. The other departmental faculty were angry that Appel had participated in the hearing, and developed a petition objecting to that behavior and other alleged problems, including disruptive behavior and lack of collegiality. A committee was formed, which included a faculty member from another state university, to assess the complaints against Appel and to recommend a course of action. The committee developed a "plan for remediation" which, among other things, required that Appel undergo a psychiatric evaluation, and that she behave in a more collegial fashion. The institution adopted the findings and recommendations of the committee, and told Appel to consult a psychotherapist. She refused, and was suspended without pay.

Appel filed claims of denial of equal protection and due process, and sought a preliminary injunction ordering her reinstatement with back pay. She claimed that her discipline was in retaliation for her testimony on behalf of the individual who was suing the college, and thus violated her first amendment rights. The trial court rejected Appel's first amendment retaliation claim, ruling that the administrators who suspended her were unaware of her earlier testimony against the university. For the purposes of the preliminary injunction, the court ruled that Appel might be able to make out an equal protection claim of arbitrary and discriminatory treatment because the administration, having identified her alleged problematic behavior, did not give her an opportunity to correct it, but insisted that she see a psychiatrist, and suspended her when she refused. The judge enjoined the university from requiring Appel to consult a psychiatrist, but left undisturbed the other aspects of the "plan of remediation."

* *

LHE 4th Sec. 7.1.1./ SV Sec. 6.1.1. Faculty freedom of expression in general
New Development

The U.S. Supreme Court has added another important decision to its *Pickering*/*Connick* line of cases on public employee speech. In *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), a case involving a free speech claim of a deputy district attorney, the Court held by a 5 to 4 vote that the First Amendment does not protect public employees whose statements are made as part of their official employment responsibilities. The Court majority emphasized and relied on the distinction between speaking as an employee and speaking as a private citizen. It is not clear, however, whether or how this opinion will apply to faculty members at public colleges and universities. Justice Kennedy, speaking for the majority in *Garcetti,* noted at the end of his opinion that:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. [126 S. Ct. at 1962].

Justice Kennedy was reacting to Justice Souter's concern, expressed in his dissenting opinion in *Garcetti*, that:

> The ostensible domain [of cases that the majority puts] beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter v. Bollinger,* 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition");

Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread"). [126 S. Ct. at 1969-1970; Souter, J., dissenting.]

* *

LHE 4th Sec. 7.2./ SV Sec. 6.2. Academic freedom in teaching
New Development

The U.S. Supreme Court's decision in *Garcetti v. Ceballos* (LHE 4th Sec. 7.1.1 above (new development); SV pp. 243-44) has injected additional uncertainty into the First Amendment law concerning faculty classroom speech and grading. The key question, yet to be resolved, is whether the courts will evaluate classroom speech and grading at public institutions by using the "employee speech" versus "private citizen speech" dichotomy emphasized in *Garcetti*. If so, much of the protection now afforded faculty classroom speech and grading under cases such as *Hardy* (*LHE* 4th pp. 642-44; SV pp. 272-73) and *Parate* (*LHE* 4th pp. 645-46; SV pp. 274-75) would apparently terminate.

In *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006), the appellate court considered *Garcetti*'s application to the speech of a cosmetology instructor in a community college. Focusing on the "educational setting" in which the case arose, and the case's implications for classroom academic freedom, the court determined that *Garcetti* "is not directly relevant to our problem" (except as a reminder of the Supreme Court's concern that courts give

appropriate weight to the public employer's interests). This was so because "[c]lassroom or instructional speech . . . is inevitably speech that is part of the instructor's official duties, even through at the same time the instructor's freedom to express her views on the assigned course is protected" by academic freedom.

* *

LHE 4th Sec. 7.2.2./ SV Sec. 6.2.2. The classroom (Academic freedom in teaching)
New Development

The case of *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005), continues a trend toward reliance on institutional academic freedom (see LHE 4th Secs. 7.1.6 and 7.2.4, point 1/ SV Sec. 6.2.2) to reject faculty claims regarding course administration. The trend is illustrated by the *Webb* and *Edwards* cases (LHE 4th p. 634; SV pp. 264-65) and the earlier *Wirsing* case (LHE 4th p. 629; SV p. 261). In *Johnson-Kurek,* the plaintiff faculty member challenged a directive from her departmental supervisor that she provide specific individual statements to students on what they must do to change their "incompletes" to final grades. The appellate court cited and quoted the *Urofsky* case (LHE 4th Sec. 7.3; SV Sec. 6.3) – the leading institutional academic freedom case, decided after *Webb* and *Edwards* – in rejecting the faculty member's claim. Unlike the *Urofsky* court and the *Edwards* court, however, the court in *Johnson-Kurek* did not construe institutional academic freedom so broadly as to virtually eliminate the possibility of viable faculty academic freedom claims. Rather, after relying on *Urofsky* and institutional academic freedom, the court cautioned that:

> This is not to say that professors must leave their First Amendment rights at the campus gates. That a teacher does have First Amendment protection under certain circumstances cannot be denied. [Citations omitted.] . . . . [T]he term academic freedom is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without inference from the academy . . . . [423 F.3d at 594.]

As an example of faculty academic freedom protections, the *Johnson-Kurek* court addressed and confirmed its own prior decision in the P*arate* case on grading (LHE 4th Sec. 7.2.3, p. 645; SV Sec. 6.2.3, p. 274). It could also have cited its own prior decision in the *Hardy* case on classroom teaching methods (LHE 4th p. 642; SV p. 272).

New Development

The "germaneness" analysis for classroom speech issues (discussed in LHE 4th pp. 630-31, 636, 643-44, and 651-52; and SV pp. 262, 266, & 273) was also used in the more recent case of *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006). The plaintiff was an instructor of cosmetology whose speech involved both verbal comments and distribution of pamphlets to students about religion and "the sinfulness of homosexuality." The court emphasized that the defendant College had an interest "in the instructor's adherence to the subject matter of the course she had been hired to teach" and thus "an interest in ensuring that its instructors stay on message" while instructing students. The instructor's speech was inconsistent with the College's interests, and not protected by the First Amendment, because it "was not related to her job of instructing students in cosmetology." According to the court, the "evidence shows, at a minimum, that the college reasonably took the position that *nongermane discussions* of religion and other matters had no place in the classroom, because they could impede the school's educational mission" (464 F.3d at 672; emphasis added).

New Development – LHE 4th p. 644/ SV p. 274

Another example of an academic freedom claim arising in a nontraditional instructional setting comes from the case of *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006). The setting was a "clinical beauty salon," and the instructor whose speech was at issue was a cosmetology instructor who supervised the students working in the salon. The instructor argued that the salon was not an instructional setting furthering the College's curricular interests but merely a "store." The court "[had] little trouble" rejecting this argument:

> [T]he beauty salon was, in fact, one of the places where cosmetology instruction was taking place. It is undisputed that students enrolled in this program must participate in two different kinds of instruction: classroom, and hands-on clinical work. This type of program is exceedingly common, especially for those learning some type of service. Law students almost universally have the opportunity to work in instructional clinics, which typically are open to the public and offer legal services to indigent clients; medical students begin supervised work with real patients in university-affiliated hospitals and clinics while they are still in medical school, even before they complete their formal education with a residency. The beauty clinic operated by Carl Sandburg College served exactly the same function: students were able to learn their trade by serving customers under the supervision of trained instructors . . . . [464 F.3d at 671-72.]

Since the speech at issue thus occurred in an instructional setting, academic freedom concerns were implicated in the dispute. In this case, these concerns weighed in the College's favor; it had institutional interests in limiting an instructor's discussion of matters that are unrelated to the course's subject matter, and it "was entitled it insist" that instructors maintain "a professional relationship" with their students.

* *

LHE 4th Sec. 7.2.4. Methods of analyzing academic freedom in teaching claims.
New Development

For more on "germaneness" analysis (LHE 4th pp. 651-52), see the first "new development" posting on *Piggee v. Carl Sandburg College*, above, under LHE 4th Sec. 7.2.2 / SV Sec. 6.2.2.

* *

LHE 4th Sec. 7.3./ SV Sec. 6.3. Academic freedom in research and publication
New Development

The U. S. Supreme Court's decision in *Garcetti v. Ceballos* (see entries for Sections 7.1.1 and 7.2 above) has injected additional uncertainty into the First Amendment law concerning faculty research and publication. The key questions are whether the courts will now determine

the protection accorded faculty research and publication by relying on the "employee speech"/ "private citizen" speech dichotomy emphasized in *Garcetti*; and if so, how that dichotomy will apply to faculty research and writing. *Urofsky v. Gilmore* (*LHE* 4th, pp. 658-64), a U.S. Court of Appeals case that preceded the Supreme Court's decision in *Garcetti*, already provides an example of how protection for faculty research would be diminished (or emasculated) by courts emphasizing the employee speech/private citizen speech distinction.

* *

LHE 4th Sec. 7.7. Protection of confidential academic information
New Development

It is well developed that plaintiffs may have access to otherwise confidential letters of evaluation, performance assessments, or other documents as part of the discovery process during employment discrimination litigation. A federal appellate court has refused to protect performance assessments of physicians, which are otherwise protected by a "medical peer review privilege" when a physician is sued for malpractice, from discovery in a discrimination lawsuit. In *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), an African-American physician sued the Houston Medical Center (GA) and several of its doctors after he was terminated for alleged problems with patient care. During the discovery process, Adkins requested the peer evaluations of other physicians at the hospital. The hospital refused, and a trial judge sided with the hospital, awarding it summary judgment. Adkins appealed. The appellate court reversed the trial court, ruling that Adkins' need for the peer review evaluations outweighed the hospital's interest in keeping them confidential and thus encouraging candor in the peer review process.

* *

<u>Selected Bibliography</u> – LHE 4th, Chapter 7; SV Chapter 6
LHE 4th p. 718 (under Sec. 7.1.)/ SV p. 683: New Development

Olswang, Steven, & Cameron, Cheryl (eds.), *Academic Freedom and Tenure: A Legal Compendium* (Nat'l Ass'n of College & Univ. Attys., 2006) (2 vols.); for further information, go to: www.nacua.org, and click the "Publications" button at the top of the page.

* *

LHE 4th Sec. 8.1.3./ SV Sec. 7.1.3. The contractual rights of students
<u>New Development</u>

A New Jersey appellate court has reaffirmed the principles of *Beukas v. Board of Trustees of Fairleigh Dickinson* (4th ed., p. 728) by ruling that the relationship between a college and its students is not merely a matter of contract law, particularly in situations where the institution has reserved the right in its student handbooks or other written policies to eliminate programs or courses. In *Gourdine v. Felician College*, 2006 WL 2346278 (N.J. Super. App. Div., August 15, 2006), two former student sued the college for breach of contract when a nursing program in which they were enrolled was discontinued due to low enrollments. The college had advertised a joint BSRN/master's degree, but only two students (the two plaintiffs) enrolled. Although the college terminated the combined program, it continued a BSRN program for the two students, who completed it and then completed master's degrees at other institutions.

The court rejected the students' breach of contract claim, noting that the catalog reserved the right to "withdraw or modify the courses of instruction" at any time. The court also noted that the college had made numerous efforts, despite the financial drain of offering a degree program to only two students, to ensure that the students could complete their undergraduate degrees. Furthermore, it cited the college's determination that the combined program was discontinued for pedagogic as well as financial reasons. Said the court, "We perceive no basis in this record to conclude that more was required of [the college] in order to discharge their good faith obligation."

* *

LHE 4th Sec. 8.1.5./ SV Sec. 7.1.5. Students' legal relationships with other students
Clarification – p. 747

In the *Yale University* case, the court stated that the student-plaintiff had been "sexually assaulted." The Title IX issues were whether this harassment, which the student alleged to be rape, and its consequences for the student, was "severe, pervasive, and objectively offensive" (see pp. 3- 4 in Westlaw version of case); and whether the university had been deliberately indifferent to this harassment, in particular by denying residential accommodations for the student (see pp. 4-5 in Westlaw version of case). Denying the university's motion for summary judgment on the Title IX claim, the court remanded the case for further proceedings on these issues. There has been no further published opinion in the case.

Erratum – p. 752

The web page address for the *Revised Sexual Harassment Guidance* should be: http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

* *

LHE 4th Sec. 8.2.5./ SV Sec. 7.2.5. Affirmative Action programs
New Development

The U.S. Supreme Court re-visited and reviewed the *Grutter* and *Gratz* cases (LHE 4th pp. 791-795; SV pp. 346-349) in *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007). The case concerned race-conscious student assignment plans used by two school districts as a means of achieving diversity in K-12 education. In the course of holding that these plans used racial classifications that violated the equal protection clause, the Court majority emphasized that *Grutter* and *Gratz* do not apply to K-12 education and

that, at any rate, the student assignment plans before the Court did not meet the *Grutter* and *Gratz* requirements.

There were five opinions issued in the *Seattle School District* case. The lead opinion by Chief Justice Roberts contains four parts. Parts I, II, III.A and III.C speak for a majority of five Justices, and Parts III.B and IV speak for a plurality of four Justices; Justice Kennedy provided the fifth vote for the parts that speak for a majority and declined to support the parts that speak only for a plurality. In addition to the Roberts opinion, there are concurring opinions by Justice Thomas (for himself alone) and Justice Kennedy (for himself alone); and dissenting opinions by Justice Breyer (for four Justices) and Justice Stevens (for himself alone). Each opinion in its own way recognizes the continuing authority of the *Grutter* and *Gratz* cases, meaning that the entire court recognized these cases' continuity authority. Thus, rather than undercutting the permissibility of voluntary race-conscious admissions plans, as some in academia had feared, the *Seattle School District* case reaffirms the *Grutter* and *Gratz* cases. Nevertheless, the Roberts opinion and the Kennedy opinion add important new perspective to the understanding of *Grutter* and *Gratz*.

Chief Justice Roberts' Opinion

In addition to reaffirming *Grutter* and *Gratz*, Chief Justice Roberts' opinion places extra emphasis on certain of the *Grutter* and *Gratz* requirements for voluntary, race-conscious admissions plans and embroiders new detail into some of these requirements. By doing so, the opinion apparently sends a message that courts should be especially rigorous in enforcing these requirements in future cases. Here are the major examples of this added emphasis and detail:

- In part III.A of the Roberts opinion (127 S. Ct. at 2751-52, for a majority) the Chief Justice quotes the statement from *Gratz* that "'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification'" (*Gratz*, 539 U.S. at 270, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (Stevens, J. dissenting)). Roberts thus emphasizes the strictness of the strict scrutiny review applicable to admissions plans that employ racial classifications. But the opinion does not similarly emphasize or commend the deference that, under *Grutter*, the courts are to accord the institution's judgments about its educational mission (LHE 4th, p. 793; SE, p. 348). Instead, in part IV of his opinion (127 S.Ct. at

2766, for a plurality), Chief Justice Roberts sharply criticized Justice Breyer's reliance on deference in his dissent (127 S. Ct. at 2811, 2820-21, 2835-36, Breyer, J.). Acording to the Chief Justice, "[s]uch deference 'is fundamentally at odds with our equal protection jurisprudence'" (127 S. Ct. at 2766, quoting *Johnson v. California,* 543 U.S.499, 506 n.1 (2005), a case decided after *Grutter* and *Gratz*). The Roberts opinion then portrays *Grutter* as the only case in which the Court has ever "deferred to state authorities," and the Court's use of deference in *Grutter* as an exception unique to higher education. While the Roberts opinion does thereby acknowledge a role of deference in high education admissions cases, it also seems apparent that he and the other three Justices joining part IV of his opinion (for a plurality) would seek to narrowly confine the role that deference may play.

- Part III. A of the Roberts opinion also emphasizes that an institution's interest in student body diversity may not be "focused on race alone" but must "encompass[ ] 'all factors that may contribute to student body diversity'" (127 S.Ct. at 2753, quoting *Grutter*, 539 U.S. at 337). The particular factors that Roberts emphasizes are whether the applicant has "lived or traveled widely abroad," is "fluent in several languages," has "overcome personal adversity and family hardship," has an "exceptional record[ ] of extensive community service," or has had a "successful career[ ] in [another field]" (127 S.Ct. at 2753, quoting *Grutter*, 539 U.S. at 338). These delineations of "a specific type of broad-based diversity" are "key limitations" on the *Grutter* holding, according to Chief Justice Roberts. (See 127 S.Ct. at 2753-54, Roberts, C.J., for a majority).
- Part III.A of the Roberts opinion places great emphasis on the *Grutter* and *Gratz* requirement of "highly individualized, holistic review" of applications (see LHE 4th pp. 793-94, 802 (points 13 & 14); SV pp. 348-349, 357), calling this requirement "[t]he entire gist of the analysis in *Grutter*." The opinion also quotes the *Grutter* Court's statement that "'[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount'" (127 S. Ct. at 2753, quoting *Grutter*, 539 U.S. at 337), and emphasizes that racial classifications may be used in admissions only as "part of a broader assessment of diversity . . . ." (See 127 S.Ct. at 2753, Roberts, C.J., for a majority.)

- Also in part III.A of his opinion, Chief Justice Roberts emphasizes that, even with respect to race, the institution must have a broad interest in diversity. The institution must not express its interest "exclusively in white/nonwhite terms" or "black/'other' terms" and instead apparently must include "African-American," "Native American," "Latino," and "Asian-American" students, separately identified, in its conception of racial diversity. (See 127 S. Ct. at 2754, Roberts, C.J., for a majority.)

- In part III.B, the Roberts opinion emphasizes that institutions must be exceedingly careful in determining the numbers or percentages of minority students that would satisfy the interest in student body diversity. Such numerical or percentage goals may not be determined "solely by reference to demographics," and the goal may not be a "racial balance" that reflects the racial demographics of the locality, state, region, or nation, or of the applicant pool. Instead, the institution must have a "pedagogic concept of the level of diversity needed to obtain [its] asserted education benefits." Thus, the institution must "work[ ] forward from some demonstration of the level of diversity that provides the purported benefits," rather than "working backward to achieve a particular type of racial balance." Taking the latter approach would be a "fatal flaw." (See 127 S.Ct. at 2755-57, Roberts, C.J. for a plurality.)

- Part III.C of the Roberts opinion emphasizes the importance of *Grutter's* requirement that the institution identify and consider race-neutral alternatives before employing any racial classification in an admissions plan (see LHE 4th p. 802, SV p. 357, guideline 15). This requirement, in fact, was central to the Court's holding that the two student assignment plans at issue both violated the equal protection clause. The Seattle School District had rejected race neutral alternatives "with little or no consideration;" and the Jefferson County district had "failed to present any evidence that it considered alternatives . . . ." Moreover, the school districts' use of racial classifications had only a "minimal effect" on student assignments, which "casts doubt on the necessity of using racial classifications" and "suggests that other [race-neutral] means would be effective." (This last point seems counter-intuitive at best.) In thus invalidating the school districts' plans, the Roberts opinion may have signaled not only the centrality of the race-neutral-alternatives requirement but also the strictness with which the court will apply the requirement in future cases. It emphasizes that institutions have the

burden of proving that "the way in which they have employed individual racial classifications is necessary to achieve their stated ends." In addition, the opinion suggests that the use of racial classifications must be "indispensable" to achieving the institution's diversity objectives and may be used only "as a last resort" (127 S.Ct. at 2762, quoting *Richmond v. Croson*, 488 U.S. at 519 (Kennedy, J. concurring). (Justice Kennedy uses the same quoted language to make this same point in his concurring opinion in the *Seattle* case.) (See 127 S.Ct. at 2759-61, Roberts, C.J., for a majority.)

As these various examples suggest, the majority's support in *Seattle School District* for the *Grutter* case is carefully limited. There are indications throughout the Roberts opinion that at least four Justices (and sometimes five, with Justice Kennedy included) would vigorously enforce the various requirements that institutions must meet to have an admissions plan valid under *Grutter*. There are also indications that these Justices would engraft some revised understandings onto *Grutter* that would make its requirements more difficult to meet. The mindset of the four Justices who subscribe in full to the Roberts opinion is captured in the Chief Justice's statement: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (127 S. Ct. at 2768) – a statement that suggests a disinclination to accept any use of racial classifications in voluntary affirmative action plans.

Justice Kennedy's Opinion

In light of the implications of the Roberts opinion, Justice Kennedy's separate concurring opinion assumes particular importance. Justice Kennedy's vote was the fifth vote needed to form a majority, and only pronouncements in the *Seattle School District* case that are agreed upon by a majority of the Justices become law as such. Thus, the Roberts opinion – its reasoning and the implications of its reasoning – may be considered law, and an authoritative guide to what the Court will do in future cases, only to the extent that Justice Kennedy agrees with this reasoning and its implications. It is critical, then, to determine how Justice Kennedy's analysis differs from that of Chief Justice Roberts.

Justice Kennedy's opinion is consistent with the Roberts opinion in insisting on a vigorous enforcement of strict scrutiny review for voluntary admissions plans that employ racial classifications (127 S.Ct. at 2789-91; Kennedy, J., concurring). But within this strict scrutiny

framework, Justice Kennedy, unlike Chief Justice Roberts, takes pains to carve out some room for the permissible use of race-conscious measures. According to Justice Kennedy: "[P]arts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The [Roberts] opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race" (127 S.Ct. at 2791). In explanation, the Kennedy opinion then emphasizes that the concept of a "color-blind" Constitution is "an aspiration [that] must command our assent," but that "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle" (127 S.Ct. at 2791-92).

Justice Kennedy's differences with Chief Justice Roberts manifest themselves in the "compelling interest" analysis that is one component of strict scrutiny review (see LHE 4th pp. 787-788, SV pp. 343-344). (The other component is "narrow tailoring" analysis, discussed below.) Justice Kennedy is more amenable than the Chief Justice to finding compelling interests sufficient to support race conscious plans. While the Chief Justice rejected the school districts' compelling interest claims, Justice Kennedy did not. Instead, Justice Kennedy determined that a "compelling interest exists in avoiding racial isolation [of students]" – at least for K-12 education and apparently for higher education as well. Moreover, Justice Kennedy, unlike Chief Justice Roberts, determined that, for K-12 education, it is "a compelling interest to achieve a diverse student population," and "[r]ace may be one component of that diversity" (127 S.Ct. at 2797). In these respects, Justice Kennedy is aligned with the four dissenting Justices rather than with the four Justices joining in the Roberts opinion, thus making the Kennedy view the majority view.

Regarding the other component of strict scrutiny review, the "narrow-tailoring" requirement, the Kennedy opinion is consistent with the Roberts opinion, and the Kennedy analysis supplements the Roberts analysis. For his part, Justice Kennedy asserts that, to comply with narrow tailoring, a school district or higher educational institution "must establish, *in detail,* how decisions based on an individual student's race are made," including "who makes the decisions; what if any oversight is employed; [and] the *precise* circumstances in which" race will be used in making decisions (127 S. Ct. at 2789-90; emphasis added). The four Justices joining the Roberts opinion would apparently agree with these requirements, making them the majority view.

Of broader importance, Justice Kennedy's opinion emphasizes that, in his view, there are other "race conscious measures," beyond the specific type of admissions plans permitted by *Grutter* and *Gratz*, that educational institutions may use to "pursue the goal of bringing together students of diverse backgrounds and races" (127 S.Ct. at 2792). Examples that Justice Kennedy used include: "allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race" (127 S.Ct. at 2792). According to the Kennedy opinion: "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. This reasoning seems particularly pertinent to outreach, recruitment, financial aid, and academic support programs that take race into account in some way but do not make individual decisions based on racial classifications. Although it is not clear what specific types of initiatives or plans would fall within Justice Kennedy's reasoning, at least he has provided us with the two ends of the spectrum on which he would analyze problems. On one end is the principle that decision makers may "with candor . . . consider[ ] the impact a given approach [to recruitment or allocating resources, for example] might have on students of different races" (*id.)*. On the other end is the principle that decision makers may not "treat[ ] each student in different fashion solely on the basis of a systematic, individual typing by race" *(id.)*.

The Roberts opinion, in part IV, makes a similar point that may be supportive of at least part of Justice Kennedy's position. Disagreeing with Justice Breyer's reading of the breadth of the Roberts opinion, the Chief Justice suggests that there may be "other means for achieving greater racial diversity in schools" that are not precluded by the *Seattle School District* ruling and may be constitutional. The examples Roberts uses include "set[ting] measurable objectives to track the achievement of students from major racial and ethnic groups," "allocat[ing] resources among schools," and determining "which academic offerings to provide to attract students to certain schools." The first example, Roberts said, "has nothing to do with the pertinent issues" in the *Seattle* case; and the other examples "implicate different considerations than the explicit racial classifications at issue in the *Seattle* case." Taking account of the character of these examples, Chief Justice Roberts' suggestion seems to be that some race-conscious planning and some race-conscious programs may be permissible when race is not used to make decisions about particular individuals. To the extent that the Kennedy reasoning is consistent with the

Roberts reasoning, it becomes a majority view (indeed, a view that all the dissenters would apparently accept as well).

There is one further point regarding Justice Kennedy's suggestion about alternative diversity "mechanisms" that may not require strict scrutiny review. He calls these mechanisms "facially race-neutral means." It is not clear how this characterization squares with his earlier description of these mechanisms as "race-conscious." Perhaps Kennedy means that such mechanisms do not expressly or explicitly use race to distinguish among individual students, but instead permit consideration of race in other ways to implement initiatives (perhaps using non-racial criteria for any decisions about individual students) that the decision makers have pre-determined would enhance racial diversity. If so, there would be issues – not raised by Kennedy – of whether the facially neutral means employed would nevertheless, in its purpose and effect, benefit minority students over non-minority students and thus be subject to strict scrutiny review. (See LHE 4th, p. 782, SV, p. 339; and see generally LHE 4th Sec. 13.5.7.2; SV Sec. 10.5.5.).

<u>Clarification</u> – p. 783, LHE 4th

In the fourth line from the bottom of p. 783, the date of the Policy Interpretation is 1979, not 1997. The reference is to the Title VI Policy Interpretation (44 Fed.Reg. 58509) cited in the middle of the page.

* *

LHE 4th Sec. 8.3.2./ SV Sec. 7.3.2. Federal [student aid] programs
<u>Erratum</u> – p. 813

At the end of the first full paragraph, the last sentence should read: "Specific requirements of program participation agreements are found at 20 U.S.C. § 1094; regulations concerning these agreements are codified at 34 C.F.R. § 668.14."

* *

LHE 4th Sec. 8.6.3./ SV Sec. 7.6.3. Federal statutes and campus security
New Development

A federal trial court has ruled that an institution's compliance with the requirements of the Clery Act (LHE 4th, pp. 885-86, SV, pp. 400-401) does not expose it to liability for defamation. In *Havlik v. Johnson & Wales University*, 2007 U.S. Dist. LEXIS 34690 (D.R.I., May 11, 2007), the plaintiff, Havlik, a student at the university, assaulted a fellow student, causing him to fracture his skull. The police charged Havlik with assault, and he was also charged with violations of the student code of conduct at Johnson & Wales. He was found responsible for the assault and was dismissed from the university. He appealed the dismissal, but it was upheld. The plaintiff was found guilty by a state district court judge and placed on probation. He appealed that finding and was given a jury trial. The jury acquitted him.

Immediately following the attack, administrators at the university posted a "Crime Alert" in which they described the assault and named Havlik as the assailant. The Crime Alert also stated that the assault occurred because two fraternity members (of which Havlik was one) were angry that the victim had not joined the fraternity. After he was acquitted by the jury, Havlik sued the university for defamation and breach of contract. For the purposes of the litigation, the court assumed that the Crime Alert was defamatory because it ruled that the university had a qualified privilege to issue such alerts. The university had defended its actions by stating that it believed that the Clery Act required it to publish the Crime Alert. The court agreed, ruling that the incident occurred in an area contiguous to campus, and that the law required the college to make "timely" reports to the campus community on a variety of crimes, of which the assault was one. The court awarded the university summary judgment on the defamation claim.

The court also rejected Havlik's breach of contract claim. He had claimed that the administrator who ruled on the appeal of his dismissal was influenced by the bias against him of the vice president for student affairs, who had called him a "thug" during a meeting that the plaintiff had initiated. The court found no evidence that the administrator who ruled on the appeal had been influenced by the vice president, nor that he had repeated his opinion of the plaintiff to her before she acted on the appeal. The court granted the university's motion for summary judgment

* *

LHE 4th Sec. 8.7.2. Health services/ SV Sec. 7.7.1. Overview (of support services)
New Development

For very practical information on the Health Insurance Portability and Accountability Act, see Melissa Bianci, *The HIPAA Privacy Regulations and Student Health Centers* (Nat'l Ass'n of College & Univ. Attys., 2006) (pamphlet).

* *

Selected Bibliography – LHE 4th, Chapter 8; SV Chapter 7
LHE 4th, p. 902 (under Sec. 8.1.)/ SV p. 684: New Development

Geller, Randolph, *Criminal Conduct of Students: The Institution's Response* (Nat'l Ass'n of College & Univ. Attys., 2006) (monograph); for further information, go to: www.nacua.org, and click the "Publications" button at the top of the page.

* *

LHE 4th Sec. 9.4.2./ SV Sec. 8.4.2. Public institutions: disciplinary sanctions
New Development

A case decided by the U.S. Court of Appeals for the Sixth Circuit provides a "floor" for the amount of procedural due process to which a student already convicted of a criminal offense is due from a public institution. The fact that the student had pled guilty to a drug possession offense (a felony) was critical to the outcome of this case.

In *Flaim v. Medical College of Ohio*, 418 F.3d 629 (6th Cir. 2005), a third-year medical student was arrested for possession of a variety of illegal drugs (including cocaine, LSD, and Ecstasy). The university notified him by letter shortly after his arrest that he was suspended and that he had the right to an internal hearing at his request. The student decided to delay the

internal hearing until the criminal charges were disposed of. He pleaded guilty to a lesser count and was sentenced to two years of probation. The university did not permit Flaim to return to campus until the internal hearing had been completed.

After his guilty plea and sentencing, Flaim requested an internal hearing. It was held before the college's Student Conduct and Ethics Committee within a month of his request. Under college policy, Flaim was not allowed to have an attorney present; however, the college allowed one to accompany Flaim, but not to participate in the questioning nor to speak with Flaim. The arresting officer testified before the committee, but Flaim was not allowed to cross-examine him. Flaim was asked numerous questions by committee members. Although the committee informed Flaim that it would prepare a written recommendation for the dean, none was prepared. The dean notified Flaim by letter that he had been expelled from the college. No appeal process was available to Flaim.

Flaim sued the college, asserting that he had inadequate notice of the charges against him, that he was denied the right to counsel, the right to cross examine witnesses, the right to receive written findings of fact and recommendations, and the right to appeal the expulsion decision. Citing *Goss v. Lopez* (sec. 9.4.2.), the court ruled that, because Flaim's guilt had already been adjudicated, he had received sufficient due process from the college. The court ruled that the notice to Flaim had been sufficient, that he was given the right to be present at the hearing, and that he did not have the right to be represented by counsel because he was not facing criminal charges. He had been given the right to respond to the charges and had been allowed to call witnesses. Although the court said that due process does not require that a written (or recorded) record be made, it said "fundamental fairness counsels that if the university will not provide some sort of record, it ought to permit the accused to record the proceedings if desired." The plaintiff was not entitled to a statement of reasons for the decision if the reasons "are obvious," and due process does not require a right to appeal as long as the hearing was "fundamentally fair," although the court noted that "most colleges and universities do wisely and justly provide for such appeals." Although the court ruled in the college's favor, it noted that, "the procedures used here were far from ideal and certainly could have been better." Had the facts of Flaim's criminal behavior been disputed, or had there not been a previous resolution regarding these factual matters, the court said, he would have been entitled to more procedural protections than the college afforded him in this case.

* *

LHE 4th Sec 9.5.1. Student free speech in general
<u>Erratum</u> – p. 951

After the cite to *Healy v. James* in the first full paragraph on p. 995, the cross-reference should read: "discussed further in Sections 9.5.4 and 10.1.1."

* *

LHE 4th Sec. 9.5.2./ SV Sec. 8.5.2. The public forum concept
<u>New Development</u>

Bowman v. White, 444 F.3d 967 (8th Cir. 2006), is another useful example of a court struggling to apply properly the public forum doctrine. The case concerned an outside speaker's challenge to university regulations that restricted his use of campus outdoor space (see the posting for this case under LHE 4th Sec. 11.6.3 below). The primary public forum issue was whether the sidewalks, streets, and park-like areas (e.g., malls, quads, plazas) of a public university campus are "traditional public forum" property, as they generally would be if they were the property of a city, town, or county government; or whether, because of the unique purposes of higher education, such property on a campus is instead more likely to be considered "designated public forum" property. The difference is substantial. A designated public forum may be re-designated for more restrictive expressive uses or even closed to speech activities; a traditional public forum may not. The court majority in *Bowman* took the position that the defendant university's sidewalks, streets, and park-like areas are designated public forums:

> The physical characteristics of these spaces, "without more," might make them traditional public fora . . . . However, ... [w]e must also . . . examine the traditional use of the property, the objective use and purposes of the space, and the government intent and policy with respect to the property, not merely its physical characteristics and location. In particular, we must acknowledge the

presence of any special characteristics regarding the environment in which those areas exist. See, e.g., *Tinker v. De Moines Indep. Sch. Dist.,* 393 U.S. 503, 506 (1969) (noting the "special characteristics of the school environment") . . .

A university's purpose, its traditional use, and the government's intent with respect to the property is quite different because a university's function is not to provide a forum for all persons to talk about all topics at all times. Rather, a university's mission is education and the search for knowledge . . . .

Thus, streets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus. [444 F.3d at 978.]

One judge dissented from this ruling (although otherwise agreeing with the majority's analysis of the case): "I cannot adopt the Court's view as to public areas on a public university campus not being traditional public fora but instead *designated* public fora which the University can redesignate to a non-public forum on a whim" (emphasis supplied).

* *

LHE 4th Sec. 9.5.3. Regulation of student protest
<u>Erratum</u> – p. 1004

The sentence leading into the long set-off quote should read: "Invalidating this regulation, the court reasoned that . . . ." (The regulation was invalidated, not validated.)

* *

LHE 4th Sec. 9.5.6. Posters and leaflets
<u>Erratum</u> – p. 1014

The sentence leading into the set-off quote should read: "The first requirement was met because . . . ."

* *

LHE 4th Sec. 9.5.6./ SV Sec. 8.5.5. Posters and leaflets

<u>Clarification</u> –LHE 4th p. 1015 /SV p. 491

The cross-references in line 4 of p. 1015 (LHE 4th) should be to Secs. 10.3.5 and 10.3.6. (The cross-references are correct in SV.) Regarding the regulation of obscenity and defamation, institutions generally would have more leeway to regulate the former than the latter. This is because obscene speech, as narrowly defined by the U.S. Supreme Court, is considered to be outside of, or unprotected by, the First Amendment. To take advantage of this leeway, however, an institution would have to accurately follow the U.S. Supreme Court's technical definition of obscenity and its guidelines for applying the definition. As Sec. 10.3.5 (LHE 4th) and Sec. 9.3.4 (SV) indicate, this is very difficult to do.

<u>New Development</u> – LHE 4th p. 1015, SV p. 491

A U.S. Court of Appeals considered the extent of protection for anonymous student speech in *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005), a case challenging the literature distribution policy of the University of Texas at Austin. The leaflets at issue were distributed by students in areas of the campus that were designated limited forums (see LHE 4th Sec. 9.5.2; SV Sec. 8.5.2). The university required that all such leaflets must carry the identification of the student or student group responsible for the distribution. Such a requirement was necessary, the university claimed, because the forums were designated for student use, and university administrators who enforced the university's policy therefore needed "to know whether a given leaflet is or is not affiliated with the University . . . ."

The court agreed that, "within a forum that only certain persons may use," student leafleters could be required to identify themselves to the responsible university administrators, and that to this extent anonymity is lost. But there is a "residual anonymity" – a right of leafleters to remain anonymous in relation to other university staff, faculty members, and students – that is "critical to the expression of controversial ideas on university campuses."

Since the university's Literature Policy required that student leafleters identify themselves, not only to university administrators, "but to every person who receives the literature being distributed," the court held that the Policy violated the right of anonymity protected by the First Amendment's free speech clause. The Policy, said the Court, "sacrifices far more anonymity than is necessary to effectively preserve the campus forum for its intended beneficiaries."

* *

LHE 4th Sec. 10.1.4. Principle of nondiscrimination
<u>New Development</u> – p. 1069

The case of *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), has generated the first substantial judicial debate on the clash between student religious organizations' interest in restricting membership or office holding to students who profess the organization's beliefs, and public institutions' interest in enforcing nondiscrimination policies. The side of the debate supportive of the student organizations' interest is represented by the majority opinion of the federal appellate court in *Walker*. The side of the debate supportive of the institutions' interest is represented by the dissenting opinion in the appellate court and the federal district court's opinion in the case (2005 WL 1606448 (S.D. Ill. 2005). Several important *amicus curiae* briefs were also filed with the appellate court.

In this case, the law school dean at Southern Illinois University had revoked the recognition of the plaintiff, Christian Legal Society (CLS), a local chapter of a national organization, because its "membership policies, which preclude membership to those who engage in or affirm homosexual conduct, violated SIU's nondiscrimination policies." CLS, claiming that the dean's action violated the group's First Amendment rights of expressive association and free speech, brought suit and moved for a preliminary injunction. The federal district court denied the motion, but the appellate court reversed and ordered the district court to issue the injunction because "CLS has carried its burden of proving a likelihood of success on its claim[s] . . . ."

On the expressive association claim, the appellate court determined that the university's "application of [its] antidiscrimination policy to force inclusion of those who engage in or affirm

homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity." Specifically:

> . . . . [W]hile voting members and officers of CLS must affirm and abide by the standards of sexual conduct contained in its statement of faith, CLS meetings are open to all. SIU's enforcement of its antidiscrimination policy upon penalty of derecognition can only be understood as intended to induce CLS to alter its membership standards – not merely to allow attendance by nonmembers – in order to maintain recognition. There can be little doubt that requiring CLS to make this change would impair its ability to express disapproval of active homosexuality.
>
> CLS is a faith-based organization. One of its beliefs is that sexual conduct outside of a traditional marriage is immoral. It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct. CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist. We have no difficulty concluding that SIU's application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas. [453 F.3d at 862-63.]

SIU could justify such a restriction on expressive association, said the court, only by showing that the restriction served a "compelling state interest [unrelated] to the suppression of ideas" – a burden that SIU had not met. Specifically:

> Certainly the state has an interest in eliminating discriminatory conduct and providing for equal access to opportunities . . . . But the Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint . . . .
>
> . . . . What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none. The only apparent point

> of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition.

[453 F.3d at 863.]

On the free speech claim, the appellate court utilized public forum analysis (see LHE 4th Sec. 9.5.2) to determine that "CLS has also demonstrated a likelihood of success on its claim that SIU has unconstitutionally excluded it from a speech forum in which it is entitled to remain." Specifically:

> [G]overnment violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter. *See Rosenberger*, 515 U.S. at 829-30; *Hosty v. Carter*, 412 F.3d 731, 737 (7th Cir. 2005). SIU has created a speech forum for student organizations and has bestowed certain benefits on those who are qualified to enter the forum. CLS alleges that SIU violated its free speech rights by ejecting it from that speech forum without a compelling reason.

[453 F.3d at 865.]

The dissenting judge disagreed with various aspects of the majority's reasoning and its application of U.S. Supreme Court precedents and also asserted that the scant facts in the record did not provide support for CLS's claims sufficient to justify the issuance of a preliminary injunction. Thus the dissenting judge would have "allow[ed] SIU to enforce its nondiscrimination policy while the case proceed[ed] through a full exploration of the merits." He would then decide the case in the following way:

> If in the end, the facts show that the nondiscrimination policy does not apply to student organizations, or that SIU is discriminating against CLS based upon its evangelical Christian viewpoint, the district court should certainly enjoin SIU from enforcing its policy. If on the other hand SIU, as it claims, is merely applying its Affirmative Action/Equal Employment Opportunity Policy (AA/EEO) to an "education opportunity" in a neutral and even-handed manner to religious and nonreligious groups alike, and it is not taking any actions that

"force" CLS to accept members with views that do not comport with CLS's interpretation of the Bible, then SIU is entitled to prevail.

[453 F.3d at 868.]

The dissenting judge would also emphasize this guideline for decision making:

> Here, the State of Illinois, through its universities, has a strong countervailing interest – indeed, in many instances, a compelling constitutional duty – in giving equal treatment to all of its citizens. If CLS wanted to forbid membership to all African-Americans, or to mixed-race wedded couples, or to persons of Arabic heritage, surely SIU would be entitled at a minimum to say that such an organization would have to sustain itself without any state support – even if it could root such a membership policy in a religious text. Furthermore, while the direct impact of CLS's membership policy might be to exclude certain people from that student group, the indirect impact of CLS's recognition of a student group maintaining such a policy is that SIU, intentionally or not, may be seen as tolerating such discrimination. Given that universities have a compelling interest in obtaining diverse student bodies, requiring a university to include exclusionary groups might undermine their ability to attain such diversity. As the Supreme Court noted in *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003): The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.

[453 F.3d at 875; Wood, J., dissenting.]

* *

LHE 4th Sec. 10.4.6./ SV Sec. 9.4.6. Sex discrimination [in athletics]

New Development

The U.S. Court of Appeals for the Sixth Circuit has affirmed a lower court's finding that a state high school athletic association violated both the Constitution and Title IX in its scheduling of high school sports seasons. Although the case involves high school rather than college sports, the opinion in *Communities for Equity v. Michigan High School Athletic Association*, 2006 U.S. App. LEXIS 20918 (6th Cir. August 16, 2006) may be relevant to

institutions that schedule women's sports events at times that are less advantageous than those times allocated to men's sports. The trial court had ruled that the Michigan High School Athletic Association (MSHAA) was a "state actor" because of its close ties to public schools in the state, and thus was subject to the Equal Protection requirements of the U.S. Constitution. That court had ruled that the MSHAA had violated both the Equal Protection Clause and Title IX.

In affirming the trial court's ruling, the appellate court engaged in a lengthy discussion of whether the plaintiffs' Title IX claim precluded them from also claiming Constitutional violations in a Section 1983 claim. Ruling that the plaintiffs could state both Section 1983 and Title IX claims, the appellate court agreed that the MSHAA had engaged in disparate treatment by its discriminatory scheduling practices, and had violated both federal laws, as well as the Michigan law against sex discrimination (M.C.L. §37.2302(a)).

* *

LHE 4th Sec. 11.6.3./ SV Sec. 10.1.2. Trespass statutes and ordinances, and related campus regulations

<u>New Development</u> – LHE 4th pp. 1222-1224; SV pp. 600-601

In *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006), a Christian street preacher challenged several provisions of the University of Arkansas' policy on use of its grounds by "Non-University Entities." Bowman, who used outdoor spaces on the campus for preaching, claimed that several requirements in the policy violated the First Amendment by restricting his freedom to speak on public property. (In LHE 4th, the case may usefully be compared with *Orin v. Barclay*, *State v. Spingola*, and *Bourgault v. Yudof*, all of which address different ways of regulating on-campus speech by outsiders, including religious speakers.)

At issue in *Bowman* were these requirements: (1) a requirement that a permit be obtained in advance for each use of space "for one eight-hour day;" (2) a "three-business-day advance notice" requirement for when the user must apply for the permit; (3) a prohibition on using space during "dead days," that is, final exam periods, days of commencement activities, and "one quiet study day per semester;" and (4) a "five-day cap per semester" on the number of times a particular outsider could use the university grounds. The court determined that each of these

requirements was content-neutral (unlike the major requirement addressed in *Orin v. Barclay*, LHE 4th, pp. 1222-23*)* and that, in Bowman's case, these requirements were applied to speech in a designated public forum (see LHE 4th Sec. 9.5.2; SV Sec. 8.5.2, as well as the posting on *Bowman* under these sections above). The court therefore subjected each requirement to the accepted U.S. Supreme Court test applicable to these circumstances: whether the restriction is "narrowly tailored to serve a significant governmental interest" and "leaves open ample alternative channels of communication" (see LHE 4th Sec. 9.5.3, pp. 1004-05; SV Sec. 8.5.3, pp. 484-85).

Using this test, the court held that the first three of the university's requirements were constitutional but the fourth (the five-day cap) was not. Regarding the five-day cap on permits, the university did have significant interests in "fostering a diversity of viewpoints and avoiding the monopolization of space." But the cap was not "narrowly tailored" to these interests:

> The Policy as written does not by itself foster more viewpoints; it merely limits Bowman's speech. If no one else wants to use the space after Bowman has used his five permits, the space will go unused even if Bowman still wants to use the space. A more narrowly tailored policy might grant Bowman more than just five days per semester to speak if the space is not being used, but give preference to other speakers who have not already obtained five permits. [444 F.3d at 982.]

* *

LHE 4th Sec. 12.5. Other state regulatory laws affecting postsecondary education programs

New Development

An interesting example of the effect of state laws on the autonomy of institutions of higher education occurred in Utah. Utah Code section 63-98-102 prohibits state or local entities from promulgating a statute, policy, or rule that in "any way inhibits or restricts the possession or use of firearms on either public or private property." The University of Utah has, for several years, had a policy that prohibits faculty, staff, and students from possessing firearms on campus.

The Attorney General issued an opinion stating that the University's policy violated state law. In response, the university sued the Attorney General in federal district court, seeking a ruling on whether its policy was enforceable. The federal court declined to rule on the university's state law claims because the Attorney General was protected by Eleventh Amendment immunity from suits under state law in federal court. The federal court, citing the *Pullman* doctrine (*R.R. Comm'n v. Pullman Co*., 312 U.S. 496 (1941)), refused to consider the university's federal law claims until a court of competent jurisdiction had decided the university's state law claims. The university then sued the Attorney General in state court. It sought a ruling that its policy against firearms did not violate state law; in the alternative, it sought a ruling that the Utah constitution, under which the university was chartered, gave it the autonomy to regulate firearms on campus.

The Utah Supreme Court ruled against the university in *University of Utah v. Shurtleff*, 2006 Utah LEXIS 143 (September 8, 2006). Although the university did enjoy a form of autonomy under the state constitution, the court said, that constitution also guaranteed the citizens of Utah the right to keep and bear arms. Furthermore, the constitutional protection for the university does not limit the legislature's power to exercise "general control and supervision" over the university, said the court. For that reason, the university cannot promulgate policies that contravene a state law, such as the law cited above. And, in response to the university's claim that the firearms law violated its academic freedom, the court responded that, although the university enjoyed "broad powers," it was not free from legislative oversight. The court further said, "the Utah Constitution does not grant the University authority to promulgate firearms policies in contravention of legislative enactments, and it is not our place to do so. To the extent their constituents disagree with the legislature's choice, their remedy is to express their dissatisfaction at the ballot box" (2006 Utah LEXIS 143 at **39). The Chief Justice dissented, believing that the state constitution gave the university the authority to forbid the use and bearing of firearms on campus.

In March 2007, the Utah legislature passed S.B. 251, which amends Section 53B-3-103 of the Laws of Utah. It specifically requires the board of trustees of universities and colleges in Utah to acknowledge "that the Legislature has the authority to regulate, by law, firearms at higher education institutions." After such acknowledgement, the law authorizes the board of trustees to allow the colleges and universities under its purview to "make a rule that allows a

resident of a dormitory located at the institution to request only roommates who are not licensed to carry a concealed firearm" under the relevant state laws.

* *

LHE 4th Sec. 13.2.7. Trademark laws

New Development

A federal trial court has held a company that manufactures and sells T-shirts liable for intentional patent infringement. In *Board of Supervisors of Louisiana State University v. Smack Apparel*, 438 F. Supp. 2d 653 (E.D. La. 2006), the court issued summary judgment in favor of Louisiana State University, The University of Oklahoma, Ohio State University, the University of Southern California, and the Collegiate Licensing Company. The plaintiffs had alleged the following violations: trademark infringement under the Lanham Act, unfair competition under the Lanham Act, unfair trade practices under the Louisiana Unfair Trade Practices Act (with respect to LSU), federal trademark dilution, state trademark dilution, common law trademark infringement, and common law unfair competition. The plaintiff universities had registered trademarks for not only their names, but for the initials used to identify them (LSU, OU, OSU, and USC). The universities also had adopted school colors, which the T-shirt company had used in designing T-shirts that incorporated the schools' initials in various slogans on the T-shirts. The judge ruled that the institutions' color schemes had attained a "secondary meaning" that identified the products in the public's eye with those institutions, thereby giving them trademark protection.

The judge also ruled that the plaintiffs established all four prongs of the test for "likelihood of confusion." Since the institutions themselves sold T-shirts, said the judge, it was likely that the public would believe that Smack's T-shirts were actually marked by the institutions. Furthermore, the institutions' marks (school colors, logos, initials) were "extremely strong," according to the court, and thus the likelihood of confusion was quite strong, as well.

The court also awarded summary judgment to the Collegiate Licensing Company (CLC), an entity that licenses the institutions' trademarks to various manufacturers. Rejecting the

defendant's claims that the CLC lacked standing to sue, the court noted that the CLC could establish that the infringing actions of Smack Apparel were likely to damage its interests.

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LHE 4th Sec. 13.2.15. False Claims Act and other fraud statutes
New Development

The U.S. Supreme Court issued a ruling in March 2007 that should help colleges and universities defend some of the "qui tam" cases that have been increasing in frequency. Although it did not involve higher education, the case, *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), is important because it limits recovery only to those individuals filing these "whistleblower" cases who are the "original source" of the information leading to the fraud allegations by the U.S. government. In this case, a former Rockwell employee had told the FBI of alleged fraud in certifying compliance with certain contractual requirements. The FBI used the former employee's information, but by the time the federal government sued Rockwell, its allegations were different and did not rely on the information originally provided by the former employee.

This case confirms the ruling of an earlier case, discussed below.

* * * *

Section 3730(b) of the False Claims Act (FCA) provides that an individual may bring a claim under this law on behalf of the federal government if a government contractor makes one or more false or fraudulent claims for payment. Section 3730(h) prohibits a federal contractor from retaliating against an individual who exercises his or her right to bring such a lawsuit, or who assists the federal government in investigating a possible false or fraudulent claim. In *Graham County Soil & Water Conservation Dist. V. United States ex rel Wilson*, 545 U.S. 409 (2005), the U.S. Supreme Court resolved a split among the federal circuits as to which statute of limits should apply to retaliation claims brought under §3730(h). The plaintiff alleged that she had been retaliated against and then constructively discharged after she reported that co-workers

had submitted false claims for reimbursement to the federal government. She resigned from her job in 1997, but did not bring her *qui tam* lawsuit until 2001. The employer argued that the state statute of limitations for retaliatory discharge, three years, should govern her lawsuit, and thus her suit was untimely. The plaintiff argued that the False Claim Act's general six-year statute of limitations should govern the case.

Section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

The Supreme Court, in a 7-2 opinion written by Justice Thomas, agreed with the employer. The Court reasoned that the six-year statute of limitations had been intended to cover only the bringing of a *qui tam* lawsuit, and that Section 3730(h)'s language concerning retaliation did not require the employer to have made a false or fraudulent claim, but only to have retaliated against an individual for assisting with an FCA investigation or a proceeding. The majority explained that the cause of action should accrue when the retaliation occurs; to apply the six-year statute of limitations to retaliation claims would mean that the cause of action would accrue when the suspected false or fraudulent claim was made. Furthermore, reasoned the majority, because §3730(h) is silent on a limitations period, borrowing the most closely analogous state statute's limitations period appeared to be what Congress intended when it enacted the FCA.

The dissenters, Justices Breyer and Ginsburg, read the FCA as providing for a six-year statute of limitations for all civil claims brought under its authority. They agreed that such a reading might mean that an individual retaliated against for assisting in a FCA investigation more than six years after the alleged false or fraudulent claim was filed would have no recourse under the statute, but they stated that that such an event had apparently never occurred and was unlikely to in the future.

* * * *

Several colleges have been sued under the False Claims Act for allegedly failing to offer the requisite amount of class hours to satisfy accreditation guidelines. Because an institution must be accredited in order to be eligible to participate in the federal student financial aid programs (see Sec. 8.3.2), the plaintiffs (or relators, as they are called in FCA litigation) are claiming that these colleges have defrauded the federal government.

Oakland City University was sued under the FCA by a former recruiter of students for the university who claimed that the university had paid them contingent fees for successfully recruiting students, which is a violation of 20 U.S.C. § 1094 and 34 C.F.R. § 668,14(b)(22)(i), which forbids such payments. In order to be eligible to participate in the federal student financial aid program, an institution must certify that it complies with this (and other) portions of the Higher Education Act (see Sec.8.3.2). In *United States ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), the appellate reversed the ruling of the trial court, which had dismissed the case. The trial court had reasoned that the university had not violated the FCA in its false assertion because that document did not directly lead to payment by the U.S. government. A second document (the "phase-two application") resulted in payment, but did not contain the false certification.

The appellate court rejected this reasoning, stating:

> The University "uses" its phase-one application (and the resulting certification of eligibility) when it makes (or "causes" a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true. . . . (The statute requires a causal rather than a temporal connection between fraud and payment. . . . If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork. [426 F.3d at 916]

The university had argued that there was no evidence that its violation of the law led to any loss by the U.S. government. The court rejected that argument, stating that the issue was whether

university officials knew about the law and intentionally certified falsely to the U.S. Department of Education that they did not pay capitation fees to recruiters. The court remanded the case for trial; the U.S. Supreme Court denied to review the case (126 S. Ct. 1786 (2006)). The college settled the case in July 2007, agreeing to pay $5.3 million to Main and the federal government. Elizabeth Quill, "University Will Pay $5.3-Million to Settle Whistleblower's Lawsuit Over Incentive Payments to Recruiters." *Chronicle of Higher Education*, July 31, 2007, available at http://chronicle.com/daily/2007/07/2007073103n.htm.

Another appellate panel of the Ninth Circuit has followed the reasoning of the court in the *Oakland City University* case, reversing a trial judge's finding that the University of Phoenix could not be sued under the FCA for making incentive payments to enrollment counselors. The relators in the University of Phoenix case claimed that the university kept two sets of files regarding the performance of enrollment counselors: one that evaluated the counselors on the number of students they enrolled (regardless of their qualifications), and a second, transmitted to the U.S. Department of Education, that had performance evaluations based on "legitimate qualitative factors." In *United States of America, ex rel. Handow and Albertson v. University of Phoenix*, 2006 U.S. App. LEXIS 22568 (9th Cir. 9/5/06), the appellate panel rejected the University's defense that its allegedly false statement concerning the payment of enrollment counselors related to participation in the federal student aid program, not to payment from the program. The appellate panel adopted the reasoning of the court in *Oakland City University*, reasoning that "promissory fraud" was contemplated by the FCA as well as the making of a false certification. The court stated:

> The University argues that the ban [on payments to enrollment counselors] is merely a condition of *participation*, not a condition of *payment*. But in this case, that is a distinction without a difference. In the context of Title IV and the Higher Education Act, if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all – and thus, an educational institution could flout the law at will. [Id. at *25-*26]

The court reversed the trial court's dismissal of the case.

In another FCA case, *United States of America v. Chapman University*, 2006 U.S. LEXIS 53686 (C.D. Cal. May 23, 2006), a federal trial judge refused to dismiss a FCA complaint brought by Chris Moyers and another former instructor at a satellite campus of Chapman University. Moyers alleges, among other claims, that most instructors at the satellite campus did not give the required amount of classroom time, conducting a five-hour class for three hours and then dismissing the students. Moyers asserted that, for a period of ten years, Chapman had certified to the Western Association of Schools and Colleges (WASC) that all of its campuses had complied with class-time requirements. She also alleged that Chapman had signed contracts with the U.S. military to provide instruction to servicemen and women, again falsely certifying that it met all WASC accreditation standards. Although the judge dismissed certain of the relators' claims, she rejected Chapman's motion to dismiss the primary FCA claims, stating that the relators' pleadings raised sufficient factual issues to survive dismissal, and that, viewing the allegations by the relators as true for the purpose of the motion to dismiss, they stated colorable claims under the FCA.

University counsel are watching these cases closely, as they have the potential to raise the stakes dramatically for, in some cases, relatively minor violations of federal regulations. Furthermore, a false certification to an accreditation agency gives the appearance of being bootstrapped into a False Claims Act violation because the U.S. government relies upon the determinations of accrediting agencies in order to determine eligibility for participation in federal programs. In both of these cases, the record has not yet been developed, so it is unclear whether any students were harmed by the alleged false claims of either of these institutions, or whether federal funds were misused. It is important to recognize that the FCA requires the relator to demonstrate "scienter" – a knowing, intentional violation of a law or regulation. But, given the preliminary outcomes in these three cases, careful compliance with federal law and regulations, which always has been important to colleges and universities, has become even more critical.

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New Development

A ruling by the U.S. Court of Appeals for the Eleventh Circuit demonstrates the impact of the U.S. Supreme Court's ruling in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (see New

Development for Sec. 7.1.1.) on False Claim Act litigation and potential First Amendment claims by public sector employees. In *U.S. ex rel. Battle v. Board of Regents for Georgia*, 468 F.3d 755 (11th Cir. 2006), the plaintiff, an employee in Fort Valley State University's financial aid office, challenged the nonrenewal of her contract on First Amendment grounds, and initiated a False Claims Act lawsuit against her former employer. The trial court granted summary judgment to the university, ruling that the First Amendment claims were barred by sovereign immunity and that the plaintiff could not maintain an FCA action because she was not the "original source" of the allegedly fraudulent practices that were the subject of the litigation. The appellate court affirmed on both counts, although its reasoning differs somewhat from that of the trial court.

Although the plaintiff had observed and documented allegedly fraudulent practices by her supervisor, as well as alleged falsification of documents, the appellate court rejected the plaintiff's First Amendment claim because it ruled that it was part of the plaintiff's job responsibilities to report possible fraud in the university's financial aid program and therefore, under *Garcetti*, her speech was not protected by the First Amendment. With respect to the FCA claim, the court ruled that the plaintiff had relied on the results of an independent audit of the Fort Valley State University financial aid office (which had found substantial evidence of noncompliance with federal student assistance regulations). Because the plaintiff had relied on these audit results, and had not provided independent evidence of wrongdoing to the government prior to filing her FCA action, she was not the "original source" of the evidence and thus, under 31 U.S.C. §3730(e)(4)(A) of the act, the court lacked jurisdiction to hear her FCA claim.

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LHE 4th Sec. 13.4.4. "Cross-cutting" aid conditions

New Development

The Department of Defense has issued proposed regulations that would amend current requirements with respect to military recruiting under the Solomon Amendment. The proposed regulations, found at 72 Fed. Reg. 25713-25720 (May 7, 2007), would amend 32 C.F.R. Part 216. The proposed regulations implement 10 U.S.C. §983, as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375)(October 28,

2004). That law requires colleges and universities to give military recruiters access to campuses and their students "in a manner that is at least equal in quality and scope to that provided to any other employer." The proposed regulation interprets that language as requiring that the military be given "the same access to campus and students provided to the nonmilitary recruiter receiving the most favorable access."

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LHE 4th Sec. 15.4.7. Conflicts of interest
<u>New Development</u> – p. 1659

For more on federal regulation of conflicts of interest that may arise in human subject research, see Lance Shea, Frederick Robinson, & Lara Parkin, *Managing Financial Conflicts of Interest in Human Subjects Research* (Nat'l Ass'n of College & Univ. Attys., 2004) (pamphlet).

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Selected Bibliography – Chapter 15.
LHE 4th, p. 1662 (under Sec. 15.2.): New Development

Blakeslee, Wesley & Gallitrano, Dennis, *Contracting for Large Computer Software Systems* (Nat'l Ass'n of College & Univ. Attys., 2006) (very practical pamphlet); for further information, click on "NACUA Publications" on the menu at the beginning of this *Law of Higher Education* web site.