The Academic Workplace

ABA Associate Deans Conference June 28, 2019

Susan E. Cancelosi, Wayne State University Law School

Ruben J. Garcia, UNLV Boyd School of Law

Joseph P. Mastrosimone, Washburn University School of Law
I. Questions for audience (show of hands):

• How many have been in the role 3 years or more? 2 years? 1 year? Not started yet?
• How many do evaluations of employees?
• How many supervise other employees? Faculty or staff?
• How many have had to discipline or terminate?
II. The Academic Workplace is an Onion with Layers of Regulation

- A. Constitutional (Public Sector) - 1st Amendment, 4th Amendment, 14th Amendment
- B. Federal (e.g. FLSA, Title VII, Title IX, ADEA, ERISA, Internal Revenue Code)
- C. State (public and private rules)
- D. Local (Paid leave laws or living wage ordinances for contractors)
- E. University (Board statutes/delegation, University-wide policies/procedures)
- F. Agreements (collective bargaining agreements, individual contracts)
III. The Academic Workplace is A Workplace, But It Is Unique

• What’s the same: (Employment rules - e.g., FLSA, nondiscrimination, benefits) Academic Employees can misbehave like other employees
What is different?

1. Academic Freedom for faculty
2. Tenure for faculty, sometimes staff (tendency of courts to defer on tenure issues)
3. Shared Governance (hiring/promotion/tenure, approval of policies)
4. AAUP Principles of Academic Freedom and Tenure
5. Different rules for staff, adjuncts
Caveats

• This is not legal advice
• Don’t try to be the institution’s lawyer
IV. Best Practices

• A. Recognizing your role
• B. Communications
• C. Working with HR/General Counsel
• D. Confidentiality/Discretion
V. Scenario 1 (hiring)

- Marty Manager wants to hire a new employee because “we’re just overwhelmed with work and need someone to help.” Marty likes soon-to-graduate law student Harry Hardworking, who has been working as a student assistant in Marty’s department. Marty wants to hire Harry because “he’s just so hardworking and happy to help”. What issues might arise?
Scenario 2 (hiring/diversity):

- Polly Professor is the chair of the faculty recruiting committee. The law school has been trying to diversify the racial composition of its faculty for years. Polly has insisted that the faculty opening must be filled with a “diversity candidate.” The committee has reviewed the AALS candidate information forms and chose only candidates who indicate a diverse racial background. When questioned, Polly states “well if we could not use the candidate’s racial backgrounds in making interview decisions AALS would not give us the information. What issue might arise? Do you engage university counsel to train faculty on proper hiring practices?
Scenario 3 (employee/supervisor):

- Polly Professor asks her faculty support assistant, Steve Secretary, to make copies, send mail and schedule appointments. Steve does not “report” to Polly, but Polly directs Steve’s work and gives feedback to the business manager (to whom Steve reports) about how Steve is doing as well as feedback on specific projects directly to Steve. Is Polly Steve’s supervisor? What kinds of issues might arise if so/if not?
Scenario 4 (discipline/termination of staff):

- Marty Manager has become increasingly frustrated with an employee in Marty’s department, but has continued to give the employee the top rating on annual reviews each year because “the ratings don’t really matter when our raises are so miniscule.” After a particularly visible set of mistakes involving a conference the employee was responsible for coordinating, Marty wants to fire the employee. What happens?
Scenario 5 (discipline/termination of tenured faculty):

• Tommy Teacher is a tenured member of the faculty who specializes in federal courts, criminal law and criminal procedure. Tommy was caught by the Vice Dean and several students smoking marijuana in the courtyard of the law school. The law school is a private religious institution in a state which allows medical marijuana but not recreational marijuana. The law school has a strict no illegal drugs on campus policy. The law school seeks to terminate Tommy. What happens now?
Scenario 6 (Public Employee Speech):

- Craig Controversial is a tenure-track member of the faculty at a public law school. Craig intends to send a letter to the editor of the local paper. In this letter, Craig criticizes the state legislature for adopting policies that Craig views as anti-immigrant. The law school relies heavily on state funding from the legislature. After consulting with the President of the University, the Dean has asked you to speak to Craig about the letter. Both are concerned not only about blow-back from the legislature but also blow-back from the fairly conservative alumni base. The Dean wants you to instruct Craig that he is not permitted to use his faculty title or indicate his affiliation with the university in the letter. What issues might arise?
Scenario 7 (termination of employment/retirement issues):

- Terry Tenured has been a member of the faculty for 40 years. Recent teaching evaluations from students are very positive. Terry, however, has been making some comments that lead the Vice Dean to wonder if Terry is considering retirement. Terry teaches Corporations, Contracts, and Securities Regulation, all important classes and ones for which the law school does not have many other faculty who are willing to teach. What can the Vice Dean do? Terry is your friend and comes to you seeking advice on what Terry should do regarding retirement. What restrictions does your role place on you during that conversation?
VI. Questions, Conclusions, Caveats?

- Thank you!!!
-Susan, Ruben & Joe