

## SPECIAL ARTICLES

# Liability and Litigation Risks for Colleges and Schools of Pharmacy

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The potential for legal liability involving faculty members and students in higher education settings is a topic that warrants serious attention by administrators. Specific areas identified as high risk include dismissal of a faculty member, denial of tenure, misappropriation of grant-funding, intellectual property conflicts, Family and Medical Leave Act (FMLA) issues, sexual harassment, student suspension, disabilities, and student privacy issues. Examples of litigation in the higher-education setting are presented, along with a list of online resources for additional information. It is important for higher education administrators, faculty members, staff members, and students to recognize the currently accepted legal rights and responsibilities associated with these high-risk areas.

**Keywords:** liability, litigation, discrimination, disability, tenure, termination

## INTRODUCTION

Over the past 30 years, emerging laws and legal liabilities have dramatically changed the academic workplace and the institution's legal relationships with employees and students. With these changes, the educational environment has become a highly complex and regulated forum rife with opportunity for missteps by the unsuspecting pharmacy administration team. Unfortunately, even with the best-laid plans — consultation with university attorneys, specific agreements, and detailed policies, for instance — administrative decisions can lead to litigation. Private civil claims or those brought by agencies for alleged federal or state violations can burden both the organization and any administrators individually named in the complaint with years of time-consuming and expensive legal events, detracting from the purpose of the organization. To protect both the entity and the individuals involved, administrators must become familiar with areas most likely to result in litigation and take prudent steps to prevent opportunistic attorneys from dragging the organization through an extended period of uncertainty.

## NO LITIGATION-FREE ZONES

While much can be done to prevent litigation, even the best planning does not eliminate the risk of litigation. Employee training in the appropriate handling of student requests for disability accommodations, attorney oversight

of a tenured professor's dismissal, and the use of outside agencies to handle hazardous substances can help reduce risk but may not prevent conflict involving lawyers, courtroom drama, or action by a government agency.

There are so many areas of risk that few administrators can fully appreciate the significance associated with each. It is important for college administrators to consider and address the potential legal ramifications of any action related to sexual harassment, student privacy, wrongful termination or eviction, disabilities, workers' compensation, employment contracts, employee handbooks, student rights, academic integrity, due process, and intellectual property issues prior to the administration initiating any action or university legal counsel rendering opinions. Even if an administration proceeds with the best intentions and plans a prudent course of action, legal guidance provides the surest footing in creating a plan, coordinating efforts, and directing steps to mitigate litigation.

Unfortunately, litigation can occur despite the most rigorous planning. Administrators must learn not to take these legal attacks personally but rather become familiar with the protections provided by both their employer and the state and take steps to protect their private lives and assets to limit loss from potentially adverse legal judgments. Such preparation might include purchasing a personal liability policy that would cover losses resulting from administrative actions taken as a university employee.

## REQUIREMENT OF THE LEGAL COMPLAINT

Irrespective of the appearance of harm to employees or students as a result of university action, the law requires that any legal action filed against an entity include a statement of

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complaint with an effective cause of action and also that the injured individual bear the burden of meeting the necessary standards for the case to proceed to trial. If these standards are not met, the defendant institution's motion for summary judgment may be granted, resulting in dismissal of the case.

While administrators of colleges and schools of pharmacy may not necessarily understand their defense team's legal tactics, they should recognize that there may be opportunities to defeat legal complaints without opening the organizational checkbook. Rather than automatically settling claims of current or former students or employees, counsel will determine the best course of action by carefully scrutinizing each complaint for legitimacy, factual accuracy, liability claims, and probability of success at trial and reviewing past case law for historical outcomes prior to rendering an opinion.

### **AREAS OF POTENTIAL LITIGATION**

The academic environment faces many areas of legal concern (Appendix 1). For the most part, legal actions involve people who believe, rightly or not, that they have been treated unfairly. Events prompting litigation can be emotional for students and faculty members alike because of their potential to impact livelihood, security, safety, and emotional stability. Circumstances surrounding such cases may play on the emotional heartstrings of a jury, but few are ever brought to a jury trial. Legal maneuvering by way of motions can and frequently does result in dismissal or resolution by settlement.

The following discussion is not intended to serve as legal advice but rather as general information regarding areas of concern for administrators and managers of colleges and schools of pharmacy. Any event that has a negative impact on an individual associated with a pharmacy program should be viewed as a potential source of litigation. The current discussion highlights only the most common types of litigation initiated by students or faculty members against institutions. In a conservative approach to minimizing risk, administrators should consider every adverse encounter or event involving pharmacy personnel and/or students as a possible source of future litigation.

### **Dismissal of Faculty Members**

Few actions are more devastating to a faculty member than involuntary loss of employment. While the general rule of law may be that an employer can terminate an employee "for good cause, no cause, or morally wrong cause," there are public policy exceptions.<sup>1</sup> Many of these exceptions are codified in Title Seven of the Civil Rights Act of 1994,<sup>2</sup> including a prohibition of adverse employment action based on race, color, national origin, age, gender and disability. Other federal provisions prohibit

employment termination based on criteria such as military service, and many states have specific public-policy exceptions, such as jury duty. There are also university-imposed protections, such as tenure and employment contracts.

In the case of *Pollock v. University of Southern California*, the plaintiff, a tenured professor at the university, was moved from a research position to a clinical position at a hospital.<sup>3</sup> The faculty member alleged the move was part of a scheme to "actively force Professor Pollock from her tenured position." After 2 years, during which the faculty member reported to the hospital only 2 days a week, the university charged her with serious neglect of duty and misconduct for her refusal to comply with her chair's directive and scheduled a dismissal hearing. The faculty member filed an action to enjoin the hearing. As is common with cases of this type, the faculty member brought a number of claims against the university to prevent the termination action from proceeding. Her complaint included inequitable pay, sexual harassment, secret modification of the bases for dismissal in the faculty handbook, false charges, retaliation, sex and age discrimination, breach of duty, breach of contract, and wrongful termination.

While at first blush, the complaint might seem overwhelming and difficult to defend, the entire complaint was dismissed because the claims were time-barred. In its opinion, the court addressed each of the claims carefully and explained in detail why each allegation failed based on case and/or state law. Based on the holding of the court, the university was permitted to continue the dismissal hearing.

In another case, *Edmonds v. Board of Regents of the University System of Georgia*, a biology professor who was employed at Georgia Institute of Technology (GIT) from 1985 until 2006,<sup>4</sup> received tenure in 1991 but was never promoted higher than associate professor. In the professor's first post-tenure review in 2002, the Periodic Peer Review (PPR) Committee found that the professor needed considerable improvement in the area of teaching and recommended that he be reviewed again in 3 years. In his second post-tenure review in 2005, a different PPR Committee recommended the professor be reviewed again in 3 years "due to the continuing concerns about research productivity and teaching effectiveness." However, following this review, a dean initiated dismissal proceedings against the professor on the grounds of professional incompetence and neglect of duty in teaching, research, and scholarship.

The Faculty Hearing Committee found that GIT had failed to prove the professor's incompetence in teaching by a preponderance of credible and convincing evidence. However, the committee recommended the professor be

placed “on suspension without pay for a minimum of one full contract year,” that he “work on developing a remediation plan with the School of Biology and the Dean of the College of Sciences to address deficiencies in his teaching,” and that if the parties could not agree on a remediation plan, the professor’s suspension without pay could be extended indefinitely. Within 4 months, the parties had met, formulated and agreed to a 3-part remediation plan, one component of which required the professor to enroll in an undergraduate microbiology class at Georgia State University. However, because he never fulfilled this requirement, he was placed on indefinite suspension without pay. The professor subsequently brought suit against the university, the state board of regents, the chairman of his department, and the university’s president, provost, and dean. The professor alleged violations of Georgia’s Whistleblower Act based on laboratory safety concerns he had voiced years before this action, breach of contract, and due process violations. When the University System filed a motion for summary judgment, the court ruled in favor of the motion and dismissed the case, leaving the university free to resume dismissal proceedings.

### **Denial of Tenure**

Faculty members spend tremendous amounts of time planning and completing a course of action that will place them in a favorable light when applying for tenure, including successful research endeavors, positive teaching reviews, and appropriate service to the university and their department. Because denial of tenure can be devastating from a professional, emotional, and financial perspective, it should come as no surprise when litigation follows an adverse tenure decision. Of course, the results of litigation will depend on whether there is a valid cause of action surrounding the facts.

In the case of *Brown v. Trustees of Boston University*, a faculty member had been on the tenure track for the requisite 6-year period when she underwent her initial evaluation.<sup>5</sup> The first stop for Professor Brown was a committee composed of all the tenured professors in the English department. The 22 committee members voted unanimously to promote her to associate professor with tenure, giving high praise for her teaching and scholarship. In her next review, the Appointments, Promotions and Tenure Committee of the College of Liberal Arts also unanimously recommended tenure, citing her as an excellent teacher and a first-rank scholar.

The dean of the college also recommended promotion and tenure, yet expressed reservations about Brown’s “historical scholarship,” citing certain negative comments from a previous review and noting deficiency in

her advisement of students. Notwithstanding the dean’s reservations, the next level of review convened a university-wide Appointments, Promotions and Tenure Committee, which recommended Brown’s promotion and tenure by a vote of 9-2.

At the level of provost’s review, an assistant provost evaluating Brown’s candidacy expressed concern about the quality of a book she had written and recommended a 3-year extension. Soon afterward, Brown requested and was granted maternity leave. The provost eventually recommended denying tenure.

At that point, her case was forwarded to a 3-member *ad hoc* Tenure Review committee, which voted 2-1 in favor of tenure. Despite this outcome, the university president recommended against tenure and the trustees of the university followed this recommendation, denying her tenure.

Professor Brown raised the issue of sex discrimination as a factor in her tenure denial. She compared her qualifications to those of several men in her department who had been granted tenure to support her opinion that women being considered for tenure are held to a higher standard than their male colleagues.

Soon after receiving the final letter of denial from the president, Brown filed suit claiming sex discrimination. At trial, the jury found in favor of Professor Brown on the basis of gender discrimination under Title VII of the Civil Rights Act of 1964, awarded her \$200,000 plus an additional \$15,000 in damages for emotional distress, and ordered the university to grant her the position of associate professor with tenure.

### **Misappropriation of Grant Funds**

Accountability of grant funding requires significant oversight to ensure appropriate use of grant funds. Misuse of grant funds may be not only a financial liability to the institution but a source of embarrassment as well. Employee claims of misappropriation may be in the form of a *qui tam* action, a civil action brought by an informer (known as a *relator*) that can result in a penalty for the commission or omission of a certain act. Under this type of claim, the penalty paid by the offender may be allocated to both the government and the person who brought the action. In some cases, there is a tremendous payoff for the relator.

Such was the action in *U.S.A. ex rel. James Zissler v. Regents of the University of Minnesota*.<sup>6</sup> Zissler filed suit as a *qui tam* relator against the university on behalf of the United States under the False Claims Act.<sup>7</sup> The government intervened and filed claims of unjust enrichment, payment by mistake, disgorgement of profits, and breach of fiduciary duties arising from fraudulently submitted

grant applications on a National Institutes of Health (NIH) grant entitled Program for Surgical Control of the Hyperlipidemias (POSCH) and 28 other federal grants. The university had charged to the POSCH grant the salaries of 36 employees who were not working on that project, as well as the salaries of other employees in excess of their work on the grant. The university also charged to the grant unrelated supplies and annual leave accrued by personnel working on other projects.

To accomplish this fraud, officials in the Department of Surgery improperly used and falsified university forms, vouchers, and time and effort cards, resulting in inappropriate charging of expenditures to the grant. The Department of Surgery went as far as to maintain a second set of secret books to record the mischarging. The Federal Bureau of Investigation interviewed employees to determine the scope of the mischarging. Once the investigation was complete, there was no question as to the fraud, but there was a dispute regarding damages to be assessed to the university. In the end, the court granted the government's motion for summary judgment related to damages, requiring the university to pay \$1,959,383 for the fraudulent charges plus \$628,599, as prejudgment interest, for a total of \$ 2,587,982.

In this case, the university supplied false information regarding the POSCH grant when it reported inaccurate charges for personnel, supplies, and vacation time in the grant applications, progress reports, financial status reports, and reports of expenditures to the NIH and other federal agencies. Strict oversight and accountability must be a part of each grant administered by a university. While labor intensive and expensive, oversight provides some assurance that grant monies and benefits are being distributed in accordance with grant objectives and requirements.

### **Intellectual Property Conflicts**

University personnel and students are regularly involved in scholarly activities that include teaching, research, and other creative activities. Although the primary focus of such efforts is the advancement of the central purposes of the university, the products of scholarship often have broader and differing applications. Thus, these products—intellectual properties—may be of benefit to the individuals involved as well as to the university.

Virtually all universities have policies intended to support faculty, staff, and students in identifying, protecting, and administering matters related to intellectual property, defining the rights and responsibilities of the involved parties, and establishing support offices to provide the required assistance. However, policies that are intended to provide direction on intellectual property ownership or division of profits may include textually

ambiguous language, which can lead to disputes. Even when an agreement is clearly stated, leaving no question regarding distribution of profits, legal problems will likely ensue if one party ignores the basic intent of the document, as was the case in *Singer v. Regents of the University of California*.<sup>8</sup>

In the *Singer* case, Jerome R. Singer and Lawrence E. Crooks were among several inventors of important new patented discoveries related to magnetic resonance imaging (MRI). As university employees, they were required to execute a single-page patent agreement designed by the university. Under the terms of the agreement, Singer and Crooks would assign their patent rights to the university and the university and inventors would share patent royalties on a 50%-50% basis. However, before royalties were paid to either party, university officials designated the portion received by its patent licenses as “research fees,” which would not be split with the inventors, thereby artificially lowering the inventors' portion of the royalty payments.

Singer and Crook filed suit against the university, alleging breach of contractual obligations to pay them half of all royalties for the MRI patent. The university responded by impounding the designated royalties, which were otherwise indisputably due and payable to appellants, even under the university's theory.

The appellate court ruled that no party to a contract, not even a university, can escape its contractual obligations by sleight of hand. To rule otherwise would mean that the university would have “absolute discretion” in deciding whether to comply with any of its patent agreements or other contracts or to simply appropriate all patent royalties by redefining them as research fees. The court ruled that because the patent agreement incorporated the patent policy, which required sharing royalties equally with the inventors, the university could not “in its sole discretion” breach the contract by renaming royalties as nonshared research fees.

### **Honoring FMLA**

The purpose of the Family and Medical Leave Act is to allow employees time off from work to care for a newborn or newly adopted child; to care for a sick child, spouse or parent; or to attend to a serious health condition that precludes performance of job functions.<sup>9</sup> Provisions within this Act allow for up to 12 weeks of unpaid leave within a 12-month period, providing the employee has worked for at least 12 months prior to taking leave. The Act has been expanded to include coverage for family members who have served in the military. FMLA leave is now available to certain family members of a “covered service member” who is undergoing medical treatment,

recuperation, or therapy, is otherwise in outpatient status, or is on the temporary disability retired list for a "serious injury or illness." Eligible employees are permitted up to 26 work weeks in a 12-month period on a "per-covered-service member, per-injury," basis. This federal law requires that employers provide time off per the limitations of the Act and failure to do so could be viewed as discriminatory.

In *Raith v. Johns Hopkins University*, Debbie Jo Raith brought an action alleging that the Defendants terminated her employment in violation of FMLA. Raith had been hired in 1993 as an Assistant Research Coordinator with responsibilities that included drawing blood, taking vital signs, preparing patients' charts, and recruiting study participants. With performance evaluations reflecting that she was "outstanding," Raith was later promoted to Drug Study Coordinator. The group she was working for began experiencing financial difficulties in the late 1990s. In 1996, there were 42 people in her work group, and 2 years later, only 5 remained. Raith approached the program director about the security of her job and was informed that her position was secure.

Soon thereafter, Raith began experiencing problems with her elbows and needed to take leave from work for surgery. Upon hearing this news, the program director told her in a raised voice that her timing could not have been worse because new studies were about to begin. Nonetheless, she filled out the proper paperwork and the director granted her leave. When asked to help perform some of her duties while on leave, Raith refused, explaining that one of her arms would be in a cast after the operation. When she subsequently scheduled a second surgery on the other elbow without coming back to work, the program administrative manager "snapped," stating, "You mean you're not coming back to work between surgeries?"

In the meantime, the program director had an opportunity to hire a pediatric gastroenterologist but was told that hiring the specialist would require terminating another employee. While out on leave, Raith was notified that, for funding reasons, her position was being abolished. On receiving this letter, Raith contacted a representative of the human resources department, who informed her, "Well, you know, that happens a lot when people go out on disability."

In cases such as this, the plaintiff must be granted an opportunity to prove by a preponderance of the evidence that the legitimate reasons for her termination provided by the employer are not its true reasons but rather a pretext for discrimination. In this case, the court found strong causal connection between her protected activity of taking time off under FMLA and having suffered an adverse employment action. First, Raith was fired while on FMLA

leave, despite having been previously told that her position was secure. Second, both the program director and the administrative manager had expressed hostility about Raith's use of FMLA leave. Finally, with Raith's termination and the hiring of the gastroenterologist, the clinic's personnel expenses actually increased. At the time of her termination, Raith's annual salary was \$26,788, compared with the pediatric gastroenterologist's salary of \$90,000. The request for summary judgment by the defendant in this case was denied, as the court found that Raith had raised a triable issue: whether she was terminated for exercising her FMLA leave.

All individuals involved with administering the requirements of federal laws such as FMLA need to be initially trained regarding these laws and retrained on a regular basis. It would also be wise to educate employees about their rights under FMLA. In most situations, this is accomplished by the posting of employee rights' posters mandated by federal law. Further, sensitivity training on the handling of employee FMLA requests should be conducted. Failure to provide employees the opportunity to enjoy benefits to which they are entitled by statutory or regulatory provisions can be both illegal and discriminatory. Any questions regarding employee rights should be directed to the department that oversees compliance with state and federal mandates.

### **Sexual Harassment of Faculty or Students**

A sexual harassment claim against a faculty or staff member by a student or employee is a challenging situation and must be taken seriously. Sexual harassment is considered sex discrimination under Title VII of the Civil Rights Act of 1964 and is broadly defined to include any physical or verbal offensive action involving sexuality. Title IX of the Educational Amendments of 1972 also protects against sexual harassment of students.<sup>11</sup> Even subtle actions or comments can create a hostile work environment, which is actionable. Legal actions brought by students or employees for hostile work environment and sexual harassment are most likely to be successful if the harassed person reported the harassment at the time it occurs. Once reported, the university must not ignore the complaint.

In *Morse and Handley v. Regents of the University of Colorado*, 2 female students in the university's Reserve Officer Training Corps (ROTC) filed an action against the university, claiming they were subject to acts of gender bias and harassment by a superior ROTC officer in violation of Title IX of the Education Amendments of 1972.<sup>12</sup> They alleged that a fellow student who was a higher-ranking cadet in the ROTC program was responsible for the acts that created a sexually hostile environment. The

plaintiffs asserted that university representatives had not adequately responded to their report of harassment. The university's response to the plaintiffs' legal complaint was a motion to dismiss. The university argued that it could not be held liable for the actions of the ROTC members because they were not agents of the university. The trial court found for the defendant and dismissed the case.

The U.S. Court of Appeals, however, overturned the decision and remanded the claims for further proceedings. The appellate court ruled that the ROTC program could be construed as a university-sanctioned program and that a fellow student acting with authority bestowed by that program committed acts forbidden by Title IX. Because the ROTC was a program of the university and university officials had been informed about the harassment but had not responded adequately, the court concluded that the university could be reasonably considered liable for the plaintiffs' suffering.

In the world of pharmacy education, early and advanced experiential programs place students under the direction of variety of individuals, including other students and active practitioners. Every report of sexual harassment by a student or faculty member must be viewed as a possible risk of loss and subjected to immediate investigation. Thus, to prevent or mitigate potential claims, administration should promptly address any student report of sexual harassment.

### **Student Suspension**

Student suspension may result from a variety of actions by a student, including cheating. As with faculty, students will go to great lengths to protect their standing within an academic program. In *Atria v. Vanderbilt University*, a premed student sued the university after the school's honor council found him guilty of cheating on an examination, failed him in the course, and suspended him for summer session.<sup>13</sup>

Atria had taken an organic chemistry class, in which the professor routinely stacked students' examination answer sheets on a table outside the classroom for them to retrieve and review. Any student who believed an answer had been erroneously marked as incorrect could submit the sheet for a "regrade." The professor retained photocopies of all answer sheets to prevent altering of incorrect answers.

When Atria requested regrading on one of his tests, the professor determined that original answers had been changed and reported the fraud to Vanderbilt's Honor Council. Vanderbilt's student handbook contains a detailed description of the university's honor system, including its Honor Code, the applicability of the Code, procedures for the adjudication of asserted violations,

and appeals from a finding of guilt. The professor did not appear at the subsequent hearing but did submit a written accusation with copies of the altered original and unaltered photocopied answer sheets attached. Despite Atria's testimony that he had not altered the answer sheet, the Honor Council found him guilty. Several days later, Atria paid for and took a polygraph test conducted by a local examiner, who concluded that the student had answered truthfully about the incident. When Atria petitioned the Honor Council with the polygraph results, he was notified that they would not be considered. He then sought a preliminary injunction in state district court requiring Vanderbilt to accept the appeal and consider the results of the polygraph examination, which the court denied.

Atria followed with a second appeal to Vanderbilt's Appellate Review Board (ARB), introducing the possibility that another student had tampered with the test because he resented the extra time Atria was given to complete written examinations based on his disability and was fearful that Atria might surpass him in the class curve. Without consulting other members of the ARB, the chairman notified Atria that his appeal was without merit, denying his request for a hearing.

In response, Atria filed suit against Vanderbilt, making multiple claims, one of which was breach of contract. Atria alleged that, in handling his case and appeal and refusing to consider his polygraph results, the university had failed to follow the Honor's Council procedural rules, as embodied in the student handbook. Vanderbilt argued that the ARB was justified in refusing to accept polygraph evidence because of its scientific unreliability.

The court noted that, while Vanderbilt's assertion about polygraphs was true, the reliability of hearsay evidence is also questionable. In its decision against Atria, Vanderbilt's Honor Council had relied heavily on hearsay evidence, ie, the professor's written statement. The court found in favor of Atria, based on its conclusion that a reasonable juror could surmise that Vanderbilt's decision to accept some forms of unreliable evidence but not others was arbitrary as well as a breach of its implied contract with Atria. This case illustrates how critically important it is for university committee members who evaluate complaints and make decisions about the discipline or dismissal of students or faculty members to understand and follow hearing procedures established by the university.

### **Accommodating Disabled Students**

Many applicants are denied admission to pharmacy school. Those with disabilities, however, may see their denial as the educational institution's unwillingness to provide reasonable accommodation as required by 2 federal

laws. Such was the situation in *Southeastern Community College v. Davis*, a case decided by the United States Supreme Court.<sup>14</sup> The student, who had a serious hearing disability, enrolled at the college to be trained as a registered nurse. An audiologist found that even with a hearing aid the student would not be able to understand speech directed toward her except through lip reading. Trial testimony cited numerous situations in which such a disability would render her unable to function properly as a nurse. The college noted that in many situations, such as in an operating room, intensive care unit, or postnatal care unit, doctors and nurses wear surgical masks, which would make lip reading impossible.

The student was notified that she was not qualified for nursing study because of her hearing disability. When she request reconsideration of the decision, the entire nursing staff assembled and voted to deny her admission. The student filed suit, claiming the college had violated §504 of the Rehabilitation Act of 1973.<sup>15</sup> When the trial court found in favor of the college, the student appealed and the court of appeals reversed the decision. The United States Supreme Court later reversed the appellate court's decision and held that the college's academic policies were legitimate and that the Rehabilitation Act did not require an educational institution to lower its standards or limit its freedom to require reasonable physical qualifications for admission to a clinical training program. The court ultimately determined that the purpose of the college programs was to train people who could serve the nursing profession in all customary ways and that the student would not be able to participate unless the standards were lowered.

A similar case occurred at an optometry college in Tennessee. In *Dougherty v. Southern School of Optometry*, a student suffered from retinitis pigmentosa and an associated neurological condition.<sup>1,16</sup> After he had completed part of the program of study, the college revised its graduation requirements in response to changes in state laws permitting optometrists to use drugs in the diagnosis of eye pathology. Because of his disabilities, the student was unable to perform competently on 2 instruments. Based on the student's failure to meet the clinical proficiency requirements of the program, the court ruled that he did not meet the criteria to be considered an otherwise-qualified handicapped individual under the Rehabilitation Act, and thus, the college had no obligation to substantially accommodate the student. Amendments to the Americans with Disabilities Act will make it easier for plaintiffs to establish that they are indeed disabled under the law, and cases such as this one may be more likely to proceed to trial instead of being dismissed on the threshold issue of disability.

### **Student Privacy**

The Family Education Rights and Privacy Act (FERPA) is the primary piece of federal legislation that ensures confidentiality of educational records and other information as well as student access to certain educational records.<sup>18</sup> Because of this legislation, administrators are reluctant to release information that may be deemed a breach of student privacy. While "directory information," which is defined in FERPA, may be released without student consent, some situations raise questions about what can and cannot be disclosed legally, as releasing too much or too little information can trigger litigation. FERPA does not provide a private cause of action by a student against a university. Instead, the United States acts as the plaintiff in such cases.<sup>19</sup>

Because of reluctance to release information that may be considered private, universities have increasingly found themselves defending their refusal to disclose. In *Dallas Morning News v. Board of Regents of the University of Oklahoma*, the university provided the newspaper with records about student athletes only after redacting certain information allegedly required by FERPA.<sup>20</sup> The newspaper filed suit, seeking relief under the Oklahoma Open Records Act (OORA).<sup>21</sup> The university asserted that FERPA required that it maintain confidentiality of the requested documents and OORA supports that protection. By OORA standards, any person denied access to records of a public body may bring a civil suit for declarative or injunctive relief, which is not permitted under FERPA. In this instance, the court determined that the *Dallas Morning News* had a sufficient basis for its allegation and that it had been improperly denied access to records, in violation of OORA. The court further found that the records in question were not subject to FERPA and that, even if they were, FERPA would not be construed as inapplicable to information that is already public, or alternatively, the university had redacted more information than is protected by FERPA. In essence, the university had withheld information that should have been open to the public.

In contrast to the above case, releasing too much information may have the same legal implications. In *U.S.A. v. Miami University; Ohio State University*, Miami University first refused to release certain disciplinary records in response to a written request from university newspaper editors.<sup>22</sup> Based on a previous case in which the Ohio Supreme Court determined that university disciplinary records are not "educational records," as defined by FERPA and thus, are not subject to protection under either FERPA or the Ohio Public Records Act, both universities prepared to release certain disciplinary records along with personally identifiable information without the student's consent.<sup>23</sup>

When the United States Department of Education learned of the impending release, it filed a complaint seeking a permanent injunction to prevent disclosure of personally identifiable information, except as permitted by FERPA. The United States Court of Appeals determined that student disciplinary records should remain protected under the term “educational records,” and that the Department of Education would suffer irreparable harm without an injunction. Therefore, the court issued a permanent injunction to prohibit release of the records.

### LEADING WITHOUT FEAR

After reviewing the presented cases, administrators may find themselves second-guessing each personnel or student decision. Walking in fear is not a good strategy for making coherent decisions. Decisions must be based on the best interest of the organization, general faculty, and overall student body. Any decision may be subject to review by a jury. Leaders must arm themselves with confidence, good information, and wise counsel. Because making decisions is a significant part of being an administrator, there will occasionally be decisions that negatively impact faculty members or students. Administrators and faculty members should always investigate thoroughly *before* making decisions. They should understand the risks of making or not making a decision that has the potential to impact a faculty member or student. When advice is needed, they should seek legal counsel and ask colleagues on other campuses how they handle high-risk situations involving faculty members or students (Appendix 2). Taking advantage of the experience and expertise of other administrators who have walked these paths before and struggled to find the right answer to challenging issues can be tremendously beneficial in finding direction.

Finally, administrators should recognize that even the best thought-out decision is not a guarantee against litigation. It is probably best to expect litigation and be pleasantly surprised when it does not materialize. Although moving an organization forward is not without risk, not moving at all may be an even bigger risk.

### CONCLUSION

Litigation is a common occurrence in society today and the higher education workplace is no exception. Understanding areas commonly associated with litigation can help everyone in higher education recognize the rights, responsibilities, and risks in the workplace. Higher education administrators should seek legal counsel to obtain insight into the potential risks and direction to prevent litigation whenever possible.

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21. Okla Stat tit 51, x24A1 et seq.
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23. *State ex rel Miami Student v Miami University*, 79 Ohio St 3d 168, 680 NE 2d at 958-59 (Ohio 1997).



Appendix 1. Areas of Legal Concern for the Academic Environment

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Employment Contracts  
Breach of Contracts  
Academic Integrity  
Sexual Harassment  
Grant Funding Misapplication  
Hazing  
Termination  
Denial of Promotion/Tenure  
Wrongful Termination  
Age, Race, Gender, or National Origin Discrimination  
Intellectual Property  
Hazardous Substances  
Salary Equity  
Family and Medical Leave Act  
Disabilities  
Student Dismissal  
Student Denial of Admission  
Student Privacy  
Health Information Privacy  
Due Process  
Employee Handbooks  
Civil Rights Violations  
Electronic Communication Privacy  
Religious Issues  
Faculty Discipline  
Patriot Act  
Interviewing  
Research  
Defamation  
Drug Testing  
Conflict of Interest Issues  
Export Controls related to Research Materials

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Appendix 2. Resources for Administrators

**Sexual Harassment**

Office of Civil Rights (OCR) Sexual Harassment Guidance

Available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> Accessed October 1, 2010

Equal Employment Opportunity Commission (EEOC)

Available at: [http://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm) Accessed October 1, 2010

**Disabilities**

Student with Disabilities: AJPE Article

Available at: <http://www.ajpe.org/legacy/pdfs/aj650206.pdf> Accessed October 1, 2010

Employees with Disabilities: EEOC

Available at: <http://www.eeoc.gov/laws/types/disability.cfm> Accessed October 1, 2010

**Family and Medical Leave**

United States Department of Labor

Available at: <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm> Accessed October 1, 2010

United State Office of Personnel Management

Available at: <http://www.opm.gov/oca/leave/HTML/fmlafac2.asp> Accessed October 1, 2010

**Student Privacy**

Student Privacy: AJPE Article

Available at: [http://www.aacp.org/resources/academicpolicies/studentaffairspolicies/Documents/AJPE\\_StudentPrivacy.pdf](http://www.aacp.org/resources/academicpolicies/studentaffairspolicies/Documents/AJPE_StudentPrivacy.pdf)  
Accessed October 1, 2010

**HIPAA**

United States Department of Health and Human Services

Available at: <http://www.hhs.gov/ocr/privacy/> Accessed October 1, 2010

Centers for Medicare and Medicaid Services

Available at: <http://www.cms.gov/HIPAAGenInfo/> Accessed October 1, 2010

**Sponsored Research**

NIH Guide

Available at: <http://www.nih.gov/science/index.html> Accessed October 1, 2010

Human Subjects

Available at: [http://grants.nih.gov/grants/policy/hs/hs\\_policies.htm](http://grants.nih.gov/grants/policy/hs/hs_policies.htm) Accessed October 1, 2010

Animal Welfare

Available at: <http://grants.nih.gov/grants/olaw/olaw.htm> Accessed October 1, 2010

**Intellectual Property**

Patent and Trademark Law

Available at: <http://www.uspto.gov/> Accessed October 1, 2010

Copyright Law

Available at: <http://www.copyright.gov/> Accessed October 1, 2010