

AGENDA

COMMITTEE OF THE WHOLE

Meeting: 4:00 p.m., Tuesday, September 17, 2002
Glenn S. Dumke Auditorium

Debra S. Farar, Chair
Murray L. Galinson, Vice Chair
Roberta Achtenberg
William D. Campbell
Martha C. Fallgatter
Bob Foster
Harold Goldwhite
William Hauck
Ricardo F. Icaza
Shailesh J. Mehta
Dee Dee Myers
Ralph R. Pesqueira
Frederick W. Pierce, IV
Charles B. Reed, Chancellor
Erene S. Thomas
Kyriakos Tsakopoulos
Anthony M. Vitti

Consent Items

Approval of Minutes of Meeting of July 18, 2002

Discussion Items

1. Proposed Revision to Title 5 Regulations -- Second Hand Smoke Policy, *Action*
2. Litigation Report Number 16, *Information*

**MINUTES OF MEETING OF
COMMITTEE OF THE WHOLE**

**Trustees of the California State University
Glenn S. Dumke Conference Center
401 Golden Shore
Long Beach, California**

July 18, 2002

Members Present

Debra S. Farar, Chair
Roberta Actenberg
Martha C. Fallgatter
Bob Foster
Murray L. Galinson
Harold Goldwhite
William Hauck
Shailesh J. Mehta
Ralph R. Pesqueira
Frederick W. Pierce, IV
Charles B. Reed, Chancellor
Erene S. Thomas
Kyriakos Tsakopoulos
Anthony M. Vitti

Members Absent

William D. Campbell
Ricardo F. Icaza
Dee Dee Myers

Chancellor's Office Staff

Richard P. West, Executive Vice Chancellor and Chief Financial Officer
Louis Caldera, Vice Chancellor, University Advancement
Jackie R. McClain, Vice Chancellor, Human Resources
Christine Helwick, General Counsel

Chair Farar called the meeting to order at 9:32 a.m.

Consent Items

The minutes of March 13, 2002 were approved as submitted.

Discussion Items**Regulation of Second Hand Smoke on the Campuses of the California State University**

Chair Farar introduced the item stating that at the May Board of Trustees meeting, several speakers had urged the Board's attention to this matter and Trustee Galinson had asked for a discussion at the July meeting. The item recommends that the Board expressly delegate authority to campus Presidents to regulate second-hand smoking on campus grounds. She asked Jackie McClain, Vice Chancellor, Human Resources, to present the item.

Vice Chancellor McClain reported that California Government Code currently prohibits smoking on state owned or leased buildings and in outdoor areas within five feet of a main exit or entrance of such buildings; smoking is allowed in any outdoor area of those buildings unless specifically prohibited by law. California Education Code grants Trustees authority to regulate California State University buildings and grounds, she continued, including authority to establish additional regulations regarding smoking on campus grounds. To date, the Board has not taken any action in the area. Ms. McClain stated that the Board can amend Title V to grant presidents the authority to set policy regarding regulation of second hand smoking on campus grounds in excess of the government code minimum requirement by adding section 42356 to Article 9, Use of California State University Buildings and Grounds. This amendment would provide campus presidents the authority to extend second hand smoking policy to all individuals including members of the public; willful violation of the campus rule would then be a misdemeanor under Education Code Section 89031. Ms. McClain concluded that staff recommends that this authority be delegated to presidents and correspondingly looks to the committee to direct the staff to place the appropriate notices and schedule an action item to amend Title V at the September meeting of the Board of Trustees.

Chair Farar called for discussion. Trustee Hauck moved that the Board ask staff to prepare the necessary notices and language for consideration of this item in September. Trustee Pierce stated that he was in favor of giving expanded authority to campus presidents in regards to this matter, however, he thought the Board should take a more proactive measure, such as increasing the distance to a minimum of 20 feet and then giving presidents discretion to further increase the provisions. Vice Chancellor McClain replied that it was certainly within the authority of the Trustees should they want to set a specific regulation; staff had recommended that that authority be delegated to the presidents as there are significant differences in the physical set up of individual campuses and the campus cultures and, therefore, discretion to setting an exact number of feet for the campuses was better left a campus decision.

Trustee Galinson stated his agreement with the staff recommendation with the proviso that presidents institute changes as quickly as possible and report back to the Board. He questioned what union issues might be involved. Trustee Vitti asked what kind of accommodations would campuses need to arrange for students and employees who smoke. Vice Chancellor McClain responded that there would be a need to discuss the impact of new regulations on employees with the unions and that bargaining would be necessary if a policy impacting the environment and the working conditions of the employees were enacted. Trustee Vitti then questioned, as bargaining may be called for, if it were preferable for uniform regulations throughout the system be enacted. Chair Farar stated that these issues needed to be addressed and that the Board should direct the staff to come back with a comprehensive report and recommendations.

Trustee Galison suggested that an informal poll of the presidents to see what issues they envision would be helpful. Trustee Pierce pushed for a greater buffer for the benefit of those entering campus buildings, questioning how complex the differences between campuses could be. Vice Chancellor McClain replied that in doing staff analysis in conjunction with legal counsel and Human Resources, it was agreed that staff here could not know the physical set up of every building on every campus the way the presidents on those campuses would; that intimate knowledge of the campus environ was the rationale behind staff recommendation that authority be delegated to the presidents. Trustee Pierce then questioned if there were any presidents who believed a 20 ft ban would be tremendously problematic. President Esteban stated that the Academic Senate at CSU Chico had recommended a buffer area of 25 feet. When the president questioned legal counsel, he was told that the campus did not have the authority to enforce a ban beyond five feet.

Trustee Pesqueira, voicing his concern on micro management by the Board, opined that this was a campus issue best resolved between the campus administration, faculty and students. He was in favor of the Board adopting a general policy and leaving specifics to the presidents.

Vice Chancellor McClain, responding to President Esteban, stated that once trustees took action granting authority to the presidents, presidents would be able to enforce any restriction they felt appropriate for their campus.

Chair Farar stated that there was a motion for the committee to direct Chancellor's Office staff to place the appropriate notices and schedule an action item to amend Title V at the September meeting of the Board of Trustees. It was so moved.

Adjournment

The meeting adjourned at 9:47 a.m.

COMMITTEE OF THE WHOLE

Revision of Title 5, California Code of Regulations, Adding Section 42356 “Smoking on Campus”

Presentation By

Jackie R. McClain
Vice Chancellor
Human Resources

Summary

This item recommends adding Section 42356 to Article 9, Subchapter 5, Chapter 1, Division 5 of Title 5 of the California Code of Regulations. Section 42356 would delegate authority to campus presidents and the chancellor to adopt rules regulating smoking on campuses and properties of the California State University. The purpose of the regulations would be to mitigate exposure to secondhand smoke in the California State University. Notice of smoking regulations would be posted at principal entrances to the California State University campuses and other properties.

Background

California Government Code sections 19994.31 and 19994.32 provide in part as follows:

Commencing January 1, 1994, no state employee or member of the public shall smoke any tobacco product inside a state-owned and state-occupied or a state-leased and state-occupied building, or, in an outdoor area within five feet of a main exit or entrance to such a building, or in a passenger vehicle, as defined by Section 465 of the Vehicle Code, owned by the state. (19994.31)

Except as specified in Section 19994.31, a state employee or other person may smoke in any outdoor area of a state-owned and state-occupied or a state-leased and state-occupied building unless otherwise prohibited by state law and a sign describing the prohibition is posted by the state agency or other appropriate entity. (19994.32)

At the present time, there is no other state law prohibiting smoking outside of state buildings. Education Code section 89031 grants the trustees authority to establish rules and regulations for the government and maintenance of the buildings and grounds of the CSU, which would include rules about smoking in or around state buildings. The trustees have prohibited smoking inside of campus buildings (Executive Order No. 599). They have not established any rules or regulations governing smoking on campus grounds.

At the May 15 Board of Trustees' plenary session, a student group representing a statewide effort identified as C.O.U.G.H. (Campuses Organized and United for Good Health) spoke of the dangers of secondhand smoke and asked the Board of Trustees to delegate authority to the presidents to prohibit smoking on campus grounds at least 20 feet from buildings, systemwide. In response, a trustee request was made that the matter be discussed at the July board meeting. Accordingly, the board discussed the matter at the July meeting and recommended that the board delegate authority to campus presidents to regulate secondhand smoking on campus grounds. The Committee directed staff to prepare the necessary notice and action item to amend Title 5 at this meeting.

The proposed section would delegate authority to presidents and the Chancellor to regulate secondhand smoke at their campuses and headquarters building. A delegation of authority would permit the adoption of rules that are more responsive to local conditions. It would provide for the posting at principal entrances of notice of the existence of smoking restrictions. This notice would comply with the requirement of "a sign describing the prohibitions ... posted by the state agency" (Gov't Code § 19994.32). Under authority granted in Education Code section 89031, every person who violates or attempts to violate the rules would be guilty of a misdemeanor.

Proposed Revision

In light of the well established health risks associated with exposure to secondhand smoke and the desire of the CSU to provide an environment for learning that is as free of health hazards as possible, the following resolution is recommended for adoption:

RESOLVED, By the Board of Trustees of the California State University, acting under the authority prescribed herein and pursuant to Section 89030.1 of the Education Code, that the board hereby adopts Section 42356 of Article 9, Subchapter 5, Chapter 1, Division 5 of Title 5 of the California Code of Regulations as follows:

§42356. Smoking on Campus.

The president of each campus and the Chancellor for the headquarters office may adopt rules regulating smoking on the campuses and property of the California State University. The regulation shall seek to mitigate exposure to secondhand smoke. Notice shall be posted at or near the principal entrances of each campus or property calling attention to the existence of the rules.

NOTE: Authority cited: Sections 89030 and 89031, Education Code. Reference: Sections 89031, Education Code; Sections 19994.30 et seq., Government Code.

And, be it further

RESOLVED, That the Board of Trustees has determined that the adoption of the proposed section will not impose a cost or savings on any state agency; will not impose a cost or savings on any local agency or school district that is required to be reimbursed under Section 17561 of the Government Code; will not result in any nondiscretionary cost or savings to local agencies; will not result in any cost or savings in federal funding to the state; and will not impose a mandate on local agencies or school districts.

And, be it further

RESOLVED, That the Board of Trustees delegates to the Chancellor of the California State University authority to further adopt, amend, or repeal this revision if further adoption, amendment or repeal is required and is nonsubstantial or solely grammatical in nature, or sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.

COMMITTEE OF THE WHOLE

Litigation Report No. 16

Presentation By

Christine Helwick
General Counsel

Summary

This is the twice-annual report on the status of significant litigation confronting the CSU, which is presented for information. “Significant” for purposes of this report is defined as litigation: (1) with the potential for a systemwide impact on the CSU; (2) which raises public policy issues of significant interest or concern; (3) brought by or against another public agency; or (4) which, for other reasons, has a high profile or is likely to generate widespread publicity. *New information since the date of the last report is printed in italics.*

The cases contained in this report have been selected from over 145 currently active litigation files.

New Cases

Barcelo, et al. v. CSU, Fullerton - Los Angeles County Superior Court

Six Hispanic plaintiffs, employed in several different departments at CSU, Fullerton claim that they have been harassed, discriminated and retaliated against on the basis of their race. Two have left the university. Four remain employed at CSUF. The case is in the early discovery stage. A court ordered mediation has been scheduled for September 2002.

BDM Construction Co. v. CSU – Sonoma County Superior Court

BDM Construction Co. built student apartments at Sonoma State University, and is now suing for over \$4 million for delays, costly changes in the project, and change orders that it alleges were signed under fraud and duress. The CSU Claims Review board previously granted BDM \$58,204.00 and CSU \$1,542,510.00. The case is in the early pleading stage.

CSU v. CollegeUnits.com, Inc., et al. – San Diego County Superior Court

Jack Logan is a SDSU professor granted release time to develop a methodology to deliver online university courses. After developing this methodology, he turned it over to a corporation in which he is a principle, CollegeUnits.com, which then licensed it to 2Learn2.com. CSU has now filed suit against Logan, his associate, Samantha Mills, CollegeUnits.com, and 2Learn2.com for profits resulting from the use of this methodology, and to enjoin CollegeUnits.com from representing that it has offered SDSU classes in the past. An early effort to enjoin a related arbitration proceeding where Logan was attempting to compel the university to pay 2Learn2 for

courses offered through SDSU extended education was not successful. 2Learn2 was awarded \$525,000 in that proceeding. This matter is in the discovery phase.

Koslosky v. CSU – Alameda County Superior Court

Major v. CSU – Alameda County Superior Court

Carole Koslosky, an office assistant in the Department of Public Safety at CSU Hayward, claims she was sexually harassed by her supervisor, Bob Pitta, and is seeking damages resulting from that harassment and retaliation. Her husband, Michael Koslosky, has filed a loss of consortium claim. The case is in the early pleading stage.

Darryl Major, an African-American police officer at CSU Hayward, claims he has been discriminated against on the basis of his race and disability. He further claims he was harassed and retaliated against for complaining about the discrimination. He is represented by the same counsel as Koslosky. The case is in the early pleading stage.

Moser v. SDSU, et al. -- San Diego County Superior Court

Kenneth Moser, an unsuccessful candidate for the Community College Board in San Diego in November 2000, filed this petition for writ of mandate to compel SDSU to produce telephone and computer records for Martin Block, a successful candidate who is also Director of Policy Compliance and Analysis at SDSU. SDSU has now produced the relevant documents. The parties are negotiating resolution of Moser's attorneys' fee claim.

Neighborhoods North of Foothill, Inc v. Trustees of the California State University, et al. - San Luis Obispo County Superior Court

Neighborhoods North of Foothill, Inc., a homeowners' association in San Luis Obispo, filed a petition challenging the Trustees' certification of the environmental impact report for the faculty and staff housing project on the Cal Poly campus. The petition alleges that the EIR failed to adequately address a number of impacts, including traffic safety and circulation. Additionally, the complaint asks for a judicial declaration that the project is subject to planning and zoning laws of the County and/or City of San Luis Obispo.

The court severed the CEQA and zoning issues. A hearing on the CEQA issues is scheduled for September 18, 2002. A hearing on the zoning issue is scheduled for October 15, 2002.

Pearl Development Corp. v. CSU Dominguez Hills – Los Angeles County Superior Court

Pearl Development was the general contractor on the Extended Education Building Project at CSU Dominguez Hills. Shortly after occupying the buildings, the campus discovered that they leak through the masonry walls. Consequently, the campus held back the final retention payment due under the contract (approximately \$150,000). Pearl has sued, claiming the campus breached the contract by withholding payment of the retention. Pearl acknowledges that the buildings leak, but asserts this is because the campus provided defective building plans, made unwarranted changes during construction, and interfered with Pearl's ability to complete the project in a workmanlike manner. The case is in the discovery stage. CSU has sought bids to

repair the leaking walls, and is seeking to determine the extent of damage caused by the water intrusion, including the possibility of mold. The parties have been ordered to mediation, but a date has not yet been set. Trial is set for February 3, 2003.

Construction Cases

Board of Trustees v. Dillingham Construction - San Francisco County Superior Court
CSU filed this lawsuit against Dillingham Construction, contractor for the Humanities Building on the San Francisco campus, which has experienced leaks through the windows and walls as a result of the failure of the exterior insulation finish system *The case was settled for \$2.2 million which represents a full recovery of the university's loss.*

Board of Trustees v. Perini Building Company – San Francisco County Superior Court
CSU filed this action against Perini Building Company, the design-build contractor on the Guest Center/Resident Apartments on the San Francisco campus, which has experienced significant leaks through the windows and walls as a result of the failure of the exterior insulation finish system. An early mediation was not successful. Additional seismic issues in the building were later uncovered. *The case was settled for \$16.7 million and a complete repair of the building. This represents a full recovery of the university's loss.*

Employment Cases

Beyene v. CSU, et al. -United States District Court, San Diego
Asfaw Beyene, an African Lecturer in the School of Engineering at San Diego State University for eleven years, claims that he was not hired into a tenure track position because of his race. He also claims to have been defamed in the search process by Dean Pieter Frick, a former South African military officer, who purportedly stated that Beyene was not qualified. An early motion eliminated all of his claims, except for race discrimination. *Beyene has now dismissed this case.*

Boze v. CSU – San Diego County Superior Court
Gomez v. CSU – San Diego County Superior Court
Fraday v. CSU – San Diego County Superior Court

These three cases were brought by a current and two former employees of the Fiscal Operations department at CSU San Marcos. Each claims that she was subjected to gender and pregnancy discrimination, harassment, retaliation, and denied promotional opportunities. Boze, a Filipino, also alleges race and national origin discrimination. All three are represented by the same law firm. These cases are in the discovery phase. *Consecutive trials are set in February and March of 2003.*

Broadnax v. SJSU – Santa Clara County Superior Court

Dillon v. SJSU – Santa Clara County Superior Court

Dodd v. SJSU – Santa Clara County Superior Court

Elsbery Broadnax, H. Kimberly Dodd and Patricia Dillon, while still employed in the Human Resources department at San Jose State University, testified in support of a former supervisor, Steve Bartz, in his race discrimination suit against SJSU. Subsequently, a long contemplated department reorganization was implemented, their existing positions were eliminated, and each was offered a new position at the same salary and benefits levels. They quit instead, claiming to have been constructively discharged in retaliation for their deposition testimony. *All three cases settled at an early mediation for a total payment of \$260,000.*

Brown v. California State University - Fresno County Superior Court

Horsford, et al. v. California State University - Fresno County Superior Court

Auwana Brown, a former employee in the CSU Fresno Police Department, filed a lawsuit claiming to have been sexually harassed by the former chief of police, Willie Shell. *As a part of the settlement of this lawsuit, Brown agreed to resign her university employment. After Brown's resignation became effective, however, she petitioned the State Personnel Board to reinstate her. The State Personnel Board refused, and Brown then filed this action, which asks the Court of Appeal to order the State Personnel Board to set aside her resignation. Brown is represented by the same attorneys who represented her in the earlier sexual harassment case, and who also represent the plaintiffs in the Horsford and Zamora cases (described below). The Court of Appeal's decision will be based on briefs. A schedule has not yet been set.*

Daniel Horsford and five other employees or former employees in the CSU Fresno Police Department filed a separate lawsuit claiming that a variety of actions in the CSU Fresno Police Department while Shell was chief constituted reverse discrimination. The plaintiffs in the second action are white, Hispanic and Asian; Shell is black. Shell resigned his employment at CSU Fresno before the lawsuit was filed, and later pled no contest to felony charges of misconduct while he was chief of police at CSU Bakersfield before coming to Fresno. CSU filed motions for summary judgment against all six plaintiffs. Three were granted. The other three were granted in part, leaving significant but narrowed issues for trial. The trial of this case began in May and continued through August 2000. The jury rendered a verdict for plaintiffs in the total amount of \$4.25 million. On December 22, 2000, the court reduced this verdict to \$1.17 million. The court awarded plaintiffs' attorneys \$1.2 million in fees. Both the verdict and the attorneys' fee award are on appeal. Briefing is underway.

Dupris, et al. v. CSU – United States District Court, San Francisco

Three professors in the Native American Studies Department at Humboldt State University filed this action against the university and its Foundation, alleging race, national origin (Native American) and religious discrimination, improper termination from a grant-funded project, retaliation, refusal to grant promotion, hostile work environment, and conspiracy to violate their civil rights. *On August 2, 2002, the parties met with a mediator in an unsuccessful attempt to resolve the matter. The matter is in the discovery stage. Trial is set for April 7, 2003.*

Elsayed v. CSU, Hayward, et al. – United States District Court, Oakland

Osman Elsayed, an African male, was denied tenure at Hayward in May of 1996. He sued claiming to have been the victim of discrimination on the basis of his Islamic religion, race and national origin. The case was tried for two weeks in September 2000. The jury returned a verdict for the plaintiff in the total amount of \$637,000. Elsayed was awarded \$100,000 for economic loss, \$500,000 for emotional distress, and \$37,000 in punitive damages against the president, provost and a dean. At a post trial motion, the court dismissed the provost and reduced the punitive damages to \$22,000. The CSU has filed an appeal from the judgment. *On August 7, 2002 the Court of Appeal granted CSU's request to vacate the jury's verdict, and ordered the case back to the District Court for a new trial.*

Elimimian v. Board of Trustees of the California State University, et al. – San Luis Obispo County Superior Court and United States District Court, Los Angeles

Isaac Elimimian, a former tenure track faculty member in the Department of English at San Luis Obispo, filed a lawsuit in both state and federal court claiming he was denied tenure and promotion because of his race and national origin. He is a Nigerian.

The state court action was transferred to San Luis Obispo County and dismissed. The federal court action went to trial on January 23, 2001. After eight days of testimony, the jury returned a unanimous defense verdict. Elimimian has filed an appeal. *Briefs have been filed.*

Green v. SFSU -- San Francisco County Superior Court

Marcia Green, a 15 year Lecturer at San Francisco State University, was not hired into a tenure track position and subsequently was not rehired as a Lecturer. She alleges that she was the victim of discrimination on the basis of her Polish ancestry, marital status and age. The case was tried for three weeks in August and September 2000. The jury returned a verdict in favor of the CSU on the discrimination claim, but awarded Green \$1.56 million for retaliation. The CSU appealed. *Oral arguments were heard on August 7, 2002.*

Green and her husband, Geoffrey, who is also a professor at SFSU, sent a draft copy of a second lawsuit in which they claim to have been retaliated against following the verdict in Ms. Green's first lawsuit. This second complaint has not been filed or served.

Losco v. Board Of Trustees, et al. – Orange County Superior Court

David J. Losco, the former Executive Director of Human Resources at California State University, Fullerton, was reassigned to the position of Director of Risk Management. He seeks money damages against the university and four individuals based on the contention that his reassignment was in retaliation for assisting campus whistleblowers in making their claims and for assisting his sister, Pamela Losco, in pursuing her sexual harassment and discrimination claims against her supervisor at the Fullerton campus. *The case was settled in May 2002 for \$457,000.*

May v. Trustees – Monterey County Superior Court

James May is a former faculty member at CSU Monterey Bay who retired in 2000. He alleges that he was forced to take an early retirement due to continuing mistreatment, race, disability and age discrimination, harassment, retaliation, failure to prevent discrimination, and wrongful termination. *Trial began on January 29, 2002. On February 28, the jury returned a \$375,000 verdict in favor of May for harassment and retaliation only on the basis of race and national origin. On May 9, 2002, the court granted CSU's motion for a new trial. May has appealed both the trial court's grant of a new trial and the defense verdict on his discrimination claims.*

Rivas, et al. v. CSU Monterey Bay – Monterey County Superior Court

This action is brought Vicente Rivas, the former Vice President for Student Affairs at CSU Monterey Bay, who retired, Octavio Villalpando, the former Director of Institutional Research, who resigned, and Cecilia Burciaga, a current employee who was reassigned from the President's area. All allege discrimination on the basis of their race, ethnicity and sex, harassment and retaliation. *On April 30, 2002, the parties agreed to a settlement. CSU paid the plaintiffs \$1 million (including their attorneys' fees), and established a scholarship for needy local students entitled the "Tri-County Vision Statement Scholarship." The case has been dismissed.*

Triggs v. California State University, Fresno – Fresno County Superior Court

Charles Triggs, a part-time temporary parking officer, alleges that from July 1999 through August 2000 he was subjected to unwanted sexual harassment and discrimination by CSU Fresno police dispatcher Melinda Combs. The case has been stayed by order of the U.S. Bankruptcy Court because plaintiff failed to disclose this lawsuit as an asset in his bankruptcy.

Zamora v. Trustees, et al. - Fresno County Superior Court

Mark Zamora, formerly an officer in the CSU Fresno Police Department, filed a lawsuit claiming that Sgt. Lupe Shrum sexually harassed him and then retaliated against him from January 1995 through December 1999, and that Chief Lynn Button and Lt. Sergio Silva did nothing to stop it. Zamora also complains that the university discriminated against him because of his disability (diabetes), and refused his requests for reasonable accommodation. Zamora resigned from his university employment, but claims that he was constructively discharged. Zamora is represented by the same attorneys who represent the plaintiffs in the Brown and Horsford cases (described above). *The case is in the discovery stage. Trial is scheduled to begin on June 23, 2003.*

Environmental Cases

City of Arcata v. Humboldt State University et al. – Humboldt County Superior Court

The City of Arcata filed this action to set aside the negative declaration in connection with the CEQA process for the HSU Behavioral and Social Sciences Building, which was approved by the Trustees in 1993. *On May 2, 2002, the court denied the City's petition, ruling that the building height and use have not changed, and that other alleged changes were too minor to*

require further CEQA review. The City filed and then withdrew an appeal, and the decision is now final.

City of Marina v. CSU, et al. – Monterey County Superior Court

Fort Ord Reuse Authority v. CSU, et al. – Monterey County Superior Court

Plaintiffs in these two lawsuits are challenging the adequacy of the final environmental impact report prepared for CSU Monterey Bay's Physical Master Plan. They allege that the city and FORA will suffer unmitigated adverse impacts if the plan is implemented and that the CSU improperly fails to recognize the jurisdiction of FORA over campus development that does not involve education or research. After settlement discussions failed, the court issued its decision in favor of the City of Marina and FORA. CSU has filed an appeal. Briefing is completed. *Oral argument has not yet been set.*

Personal Injury Cases

Albecz v. SFSU et al. - San Francisco County Superior Court

Plaintiff, age 4, claims that she was injured when a five-year-old SFSU HeadStart Program enrollee placed her hands up plaintiff's shorts and inserted a hair barrette into her vaginal area. Plaintiff alleged that she informed the HeadStart Program personnel but they sent her home without informing plaintiff's parents. Plaintiff's mother discovered the existence of the incident after finding her daughter huddled on the couch with blood covering her private areas. The University tendered the defense of this case to HeadStart's insurance carrier, which is now providing the defense for the CSU. The case is in the discovery phase. Mediation was not successful. *A court-ordered non-binding arbitration is being scheduled.*

Mora v. State of California et al - Los Angeles County Superior Court

Timoteo Mora, a CSU Dominguez Hills student, received a significant electrical shock upon plugging in a microscope in his chemistry class in February of 1999. A campus investigation determined that the plug was faulty. Mora filed this action to recover for his physical injuries. The university confessed liability and the only remaining issue to be tried was the extent of Mora's injuries attributable to this incident. *The case was tried in May 2002, and the jury returned a verdict in Mora's favor in the amount of \$420,000. (He had asked the jury for \$10,000,000.) Because the jury awarded Mora less than was offered in settlement, CSU is entitled to offset costs (approximately \$120,000) against the amount of the judgment. Mora filed bankruptcy immediately following the jury verdict and the case has now been stayed until the bankruptcy issues are resolved.*

Viboolpanth v. CSU San Bernardino; San Bernardino County Superior Court

Kanokpun Viboolpanth, a CSU San Bernardino student, claims that the campus was negligent in not warning her about, and keeping her safe from, the high winds on the campus. As she left a classroom building in December 1998, she was allegedly swept off her feet and thrown into a concrete pillar causing severe head trauma. A motion for summary judgment in the CSU's favor

has been granted. Plaintiff appealed this ruling. *The Court of Appeal upheld the summary judgment.*

Student Cases

Campos, et. al. v. San Francisco State University, et. al. - United States District Court, San Francisco

Elizabeth Campos, a disabled San Francisco State student, and STARS, an unincorporated association of 20 other disabled students at SFSU, filed this action alleging various civil rights violations and a denial of educational opportunity based on the alleged existence of multiple, although unspecified, architectural barriers throughout the campus. The plaintiffs sought to represent a class of disabled CSU students. The California Faculty Association is also named as a plaintiff in the action claiming injury on behalf of disabled SFSU faculty. The CFA, however, expressly did not seek certification of any class. The plaintiffs are collectively represented by Disability Rights Advocates, an organization that has gained some publicity in the past for pursuing similar litigation against other organizations involving these issues.

A class of mobility disabled and/or visually impaired students who have been denied access to university programs, services and/or activities due to the existence of physical barriers was certified. Following extensive mediation, a tentative settlement was reached in October of 1999, which, among other things, commits SFSU to \$5 million over seven years for various construction projects to improve campus access. After a variety of disputes and complications, a fairness hearing on the settlement was held on October 12, 2001. The judge granted the parties' joint motion for final approval of the settlement and has dismissed all remaining claims for individual damages. Fee arbitration *resulted in an award to plaintiffs' attorneys of \$234,000 in fees and costs.*

Fields v. CSU Hayward – United States District Court, San Francisco

Philip Fields, a student at CSU Hayward, filed this action alleging violations of the Americans With Disabilities Act and various other civil rights statutes. He was also active in the Campos litigation (described below) against San Francisco State. Fields claims he has been discriminated against because of his disabilities, which he describes as mobility impairments, vision problems and learning disabilities. He also claims he has been retaliated against for complaining about the alleged discrimination. His claims are primarily that the accommodations the University provided for a chemistry course he took, and is now retaking, were and are inadequate. Fields moved for a temporary restraining order to require the University to provide him with further accommodations. The court denied his motion. Fields has moved for a preliminary injunction on the same grounds, but no hearing date has been set. *A mediation was scheduled for August 27, 2002, but Fields failed to attend. The mediation has been rescheduled for September 25, 2002, and CSU's motion for summary judgment is set for hearing on September 18, 2002.*

Neal, et al. v. Board of Trustees of the CSU, et al. - United States District Court, Fresno

Members of the CSU Bakersfield wrestling team, both men and women, filed this lawsuit to enjoin the elimination of wrestling, or the placement of any cap on the male membership of the team, in order to comply with the Consent Decree in the Cal NOW litigation. The plaintiffs argued that both the Consent Decree and the federal regulations implementing Title IX are discriminatory.

In December of 1997, the court ruled that achieving proportionality in male and female participation in athletics is not a “safe harbor” against claims of (reverse) discrimination. The opinion acknowledged its inconsistency with five federal appellate opinions that have considered this same issue. It followed instead a lone Louisiana district court opinion.

In February 1999, the court granted plaintiffs’ request for a preliminary injunction, stating that capping men’s teams is a quota in violation of Title IX. CSU appealed. In December 1999, the Ninth Circuit Court of Appeals reversed the lower court, ruling that the capping of men’s teams is not a violation of Title IX.

The plaintiffs filed and lost a petition for rehearing in the Ninth Circuit. The case was returned to the trial court, where the plaintiffs argued a need for further discovery. On September 25, 2001, the court granted CSU’s motion for summary judgment. In conformity with the Ninth Circuit’s earlier decision, the court ruled that Title IX does not prevent a university from making gender-conscious decisions where there is a disproportionately higher percentage of athletic availability for the male students. Plaintiffs again appealed this ruling to the Ninth Circuit. *Briefing is underway.* Plaintiffs have expressed their intent to take this issue to the United States Supreme Court.

Other Cases

Board of Trustees v. Bello’s Sporting Goods – San Luis Obispo County Superior Court

This lawsuit seeks a permanent injunction to prevent Bello’s Sporting goods, a store in San Luis Obispo, from engaging in further sales of clothing and other merchandise bearing the “Cal Poly” name. Bello’s contends that it has a right to do so because: (1) it sold clothing with the “Cal Poly” name before CSU began doing so; and (2) CSU waived its rights by not filing suit earlier. In April 1999, the court denied CSU’s request for a preliminary injunction.

The court subsequently granted CSU’s request to amend its complaint to include claims against Bello’s based upon state and federal trademark, unfair competition and anti-dilution laws. Bello’s filed a cross complaint for damages against CSU and the Cal Poly Foundation. After further motions, Bello's dropped its complaint for money damages, and is seeking an injunction only to prevent the CSU from enforcing its trademark rights.

Whole
Agenda Item 2
September 17-18, 2002
Page 10 of 10

On July 24, 2001, the trial court denied most of the relief sought by CSU in a ruling that the phrase "CAL POLY" is not protected under trademark law because it is not understood by the public as a name for a particular educational institution but rather, is a generic term that identifies and refers to all polytechnic or technical schools located in California. Thus, Bello's Sporting Goods can continue using the phrase because it is generic. However, the court did enter a limited injunctive order directing that Bello's Sporting Goods place labels on all goods indicating that the CSU did not approve, sponsor or authorize the clothing goods sold by Bello's that are marked with the words CAL POLY. Also, the court denied and dismissed Bello's cross-complaint against CSU. Both CSU and Bello's appealed this ruling.

Effective January 2, 2002, the Legislature amended the Education Code to clarify that the name "Cal Poly" and other abbreviated campus names are state property and may not be used without CSU's express permission. CSU's appeal will rely on this statutory clarification.

Briefing is in progress.