

AGENDA

COMMITTEE OF THE WHOLE

Meeting: 10:30 a.m., Wednesday, September 15, 1999
Glenn S. Dumke Conference Center

William Hauck, Chairman
Joan Otomo-Corgel, Vice Chairman
William D. Campbell
Martha C. Fallgatter
Bob Foster
Harold Goldwhite
Laurence K. Gould, Jr.
Dee Dee Myers
Ralph R. Pesqueira
Frederick W. Pierce, IV
Ali C. Razi
Charles B. Reed, Chancellor
Michael D. Stennis
Anthony M. Vitti
Stanley T. Wang

Discussion Items

1. Litigation Report No. 10, *Information*

BRIEF

Information Item

Agenda Item 1
September 14-15, 1999

COMMITTEE OF THE WHOLE

Litigation Report No. 10

Presentation By

Christine Helwick
General Counsel

Summary

This is the biannual 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) brought by or against another public agency; or (3) 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 263 active litigation files currently pending that involve the CSU.

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Agenda Item 1

September 14-15, 1999

COMMITTEE OF THE WHOLE

Litigation Report No. 10

New Cases

Board of Trustees v. Bello's Sporting Goods – San Luis Obispo 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. On April 29, 1999, the court denied CSU's request for a preliminary injunction.

Hernandez v. Brotherton, et al. – United States District Court – Los Angeles

Phyllis Hernandez, a former graduate at CSU San Bernardino, claims to have been targeted and driven out of the psychology and counseling program because she is an outspoken woman of color. She is represented by the same lawyer who is representing the plaintiff in Bailey-Shimizu v. Brotherton, et al., described (under Student Cases) below. This case is in the early pleading stage.

Losco v. CSU – Fullerton, et al. – Orange County Superior Court

Melsheimer v. CSU-Fullerton, et al. – Orange County Superior Court

Pamela Losco, an Administrative Service Manager in the Student Health and Counseling Center at CSU Fullerton, claims to have been sexually harassed by her supervisor, Dr. Charles Darke, the former Director of the Center, and then retaliated against for complaining of the harassment. Debbie Melsheimer, who is Losco's secretary, also claims to have been sexually harassed, and retaliated against, by Dr. Darke. Dr. Darke has been transferred out of his position as Director of the Student Health Center. He is being provided a defense under a reservation of rights. Both cases are in the discovery phase. An early mediation is contemplated. No trial date has been set.

Smallen v. Sacramento State, et al. – Sacramento Superior Court

Darren Smallen, who is white, claims that he was denied admission to the graduate program in Social Work at CSU, Sacramento, in violation of Prop. 209 and federal law, because the university secretly considered race in its admission decisions. The case is in the discovery phase.

Previously Unreported Case

McNeir v. CSU – San Francisco Superior Court & United States District Court – San Francisco
Plaintiff is a Lecturer in the Accounting and Management Departments who claimed reverse discrimination because he was not interviewed for a tenure-track position in the Hospitality Management Department. He filed in both state and federal courts. After a three-week trial in the state court, the jury awarded plaintiff \$2.75 million for discrimination and \$2.3 million for retaliation. By agreement of the parties, only the larger award was entered. It was subsequently reduced by the court to \$1.9 million. Plaintiff was also awarded \$315,000 in attorneys' fees. The university has appealed. The federal action is still pending and has been set for a scheduling conference on August 27, 1999.

Employment Cases

Ali v. California State University, Northridge, et al.- United States District Court - Los Angeles & Los Angeles County Superior Court

Amir Ali, a former campus architect with responsibility to oversee earthquake repairs at CSUN, filed two lawsuits claiming that the campus misused FEMA funds. His federal action alleges violation of the False Claims Act. The case is in the discovery phase. His state court action was dismissed for failure to exhaust administrative remedies.

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. 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. Plaintiffs in both lawsuits are represented by the same attorney. Shell resigned his employment at CSU Fresno before either 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. Brown was settled in December, 1998. *Discovery in Horsford is nearing completion. CSU recently filed motions for summary judgment against all six plaintiffs. Three were granted. A fourth was granted in part, leaving significant issues for trial. The two remaining motions will be heard in mid-September 1999. Trial in Horsford is set for January 18, 2000.*

California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO v. Public Employment Relations Board - California Court of Appeal, 2d Appellate District

CSEA, the exclusive bargaining representative for units 2, 5, 7, and 9 of the California State University, filed a petition for writ of review requesting the California Court of Appeal to overturn a decision of the Public Employment Relations Board (PERB). The challenged decision determined that CSU had not committed an unfair labor practice when it suspended Merit Salary Adjustments in 1992 before completion of PERB-administered impasse procedures. On December 17, 1996, the Court of Appeal reversed the PERB decision, ruling that it was improper for the CSU unilaterally to change the terms of the collective bargaining agreement before any impasse was declared, and that the CSU had no special statutory protection which permitted it to do so. The court returned the case to PERB for an order that restores the salary adjustments, with interest, to all affected employees from the date of contract expiration until the successor agreement was negotiated (a one-year period). Payments to employees have been made. The only remaining issue is the eligibility of CSUN interpreters for payment under their unique compensation plan. The hearing on this issue has been recessed while the parties explore a negotiated settlement.

DFEH v. San Francisco State University – San Francisco Superior Court

The Department of Fair Employment and Housing (DFEH) filed this action on behalf of Mark Skowronek, who was not hired to fill a piano-tuner position in the College of Creative Arts at SFSU. The complaint alleged that an unqualified female was hired which constituted sex discrimination. *CSU filed a motion for summary judgment. Thereafter, the case settled for \$16,000 and plaintiff's promise not to apply for any positions at SFSU in the future.*

Rhonda Kuykendall et al. v. San Diego State University et al. – San Diego County Superior Court

Three former employees of the SDSU Foundation claim to have been the victims of sexual harassment, discrimination, and wrongful termination by the Foundation, SDSU, and Prof. Lawrence Alfred, a biology professor and assistant dean. Dr. Alfred has been disciplined for the conduct giving rise to the complaints. He is not being represented by the CSU but has been afforded a defense by the Foundation's insurance carrier.

The case was mediated on May 18, 1999, and a settlement reached. By the terms of the settlement agreement, its terms are confidential.

Rios v. Trustees, et al. – Santa Clara County Superior Court

Bartz v. Trustees – Santa Clara County Superior Court

Lidia La Garda Rios, director of the Office of Equal Opportunity at San Jose State University, was disappointed by a change in her reporting relationship as a result of organizational changes, and her failure to achieve certain high level positions in the department of Human Relations. She claims in this lawsuit to have been the victim of race, national origin and sex discrimination, a hostile work environment, sexual harassment and retaliation. *In August of 1999, the court ordered the case to non-binding arbitration. The parties are considering the possibility of a mediation.*

Steve Bartz, director of Employee Relations at San Jose State University, was also disappointed when he was not appointed associate vice president for Human Resources, one of the positions to which Rios at one time aspired. The position was filled by a male Hispanic candidate, which Bartz claims in his lawsuit to have been reverse discrimination. *This case was mediated, but not successfully. The case is now in the discovery phase.*

Tillinghast v. Humboldt State University, et al. - United States District Court, San Francisco & Sacramento County Superior Court

Professor Tillinghast brought this action in Federal Court after he forfeited an offer for a lectureship in the Religion Department at Humboldt State University because he would not sign the loyalty oath required of all state employees by the California Constitution. He alleged that the oath interfered with his religious beliefs in violation of the Religious Freedom Restoration Act. Professor Tillinghast subsequently filed a separate lawsuit in State court on these same issues.

On June 25, 1997, the United States Supreme Court invalidated the Religious Freedom Restoration Act on constitutional grounds. CSU then filed a motion for summary judgment in the Federal action, which was granted on September 4, 1997. Professor Tillinghast has not continued to press his state court claim.

Personal Injury Cases

Hilson, et al. v. CSU Sacramento, et al. - Sacramento County Superior Court

William Hilson was attending a football game at Hornet Field Stadium when a plank gave way and he fell 20 feet to the ground. He suffered multiple fractured vertebrae and ribs and had to be placed in a full body cast for more than two months. His son, who witnessed the fall, and his wife have joined Hilson in the claim for damages. *The case was settled through an early mediation for a total of \$600,000, of which CSU contributed \$400,000.*

Smith et al. v. State of California – *San Luis Obispo* County Superior Court

Plaintiffs are a former Cal Poly San Luis Obispo student and her mother. The student suffered a massive stroke, and the lawsuit claims that it was a consequence of her use of birth control pills prescribed by the Student Health Center. She is now mentally and physically incapacitated. Plaintiffs claim professional malpractice. *The case has been transferred from San Diego to San Luis Obispo County and is in the discovery phase.*

Student Cases

Bailey-Shimizu v. Brotherton, et al. – United States District Court, Los Angeles

Pamelalee Bailey-Shimizu, a disabled Native American student at CSU San Bernardino, filed this action alleging various civil rights violations because negative comments were made about her attire, which included various symbols of her political and religious affiliation, at a mock counseling session. She earlier pursued an unsuccessful student grievance of this claim and now is suing several university employees, including the President. *Trial is scheduled for March 31, 2000.*

California National Organization for Women, et al. v. Board of Trustees -San Francisco County Superior Court

Plaintiffs in this case claimed that CSU was in violation of the law because proportionally fewer female students were participating in NCAA sports than male students. In 1993, a Consent Decree was signed which requires each campus within the CSU to achieve gender equity in athletics by the 1998-99 academic year. According to the fourth report prepared to monitor progress on the requirements of the Consent Decree, 56 percent of the NCAA-eligible undergraduates in the CSU are women and 44 percent are men; 48 percent of the intercollegiate athletic participants are women and 52 percent are men. This reflects an additional 4 percent increase in the overall participation rate for women since the date of the last report and an 11 percent total increase since these reports began. The ratios vary from campus to campus. Five campuses (Pomona, Humboldt, Hayward, Los Angeles, and Sonoma) have achieved the compliance that will be required of all CSU campuses with intercollegiate sports programs by next year. *The final report is due in the Fall of 1999.*

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.

The case is in discovery stage. 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 has been certified. Trial is set for *November 1, 1999. The parties are working with a mediator in an effort to resolve the dispute.*

Doe, et al. v. Regents, et al. - San Francisco County Superior Court

This is a class action challenging the legal validity of the higher education components of Proposition 187. The case was filed against CSU, the University of California and the California Community Colleges. A preliminary injunction was entered on February 8, 1995, barring implementation of the new law before trial. On November 21, 1997, the court issued a tentative decision dismissing this lawsuit because of the unconstitutionality ruling in the companion federal court action described below, which rendered moot any need to reach the issues in the state court suit. *With the entry of a final judgment barring enforcement of the law in the companion federal action, it is likely this case will be dismissed as moot.*

Gregorio T., et al. v. Wilson, et al. - United States District Court, Los Angeles

This is one of several class actions filed in the Los Angeles Federal District Court challenging Proposition 187. The cases were consolidated before Judge Mariana Pfaelzer, who ruled in November of 1995, among other things, that the reporting requirements of the higher education components of Proposition 187 are unconstitutional. On November 14, 1997, Judge Pfaelzer ruled the balance of the claims were preempted by the Personal Responsibility and Work Opportunity (Welfare Reform) Act. Final judgment was entered in March of 1998. The state (not including the CSU or UC) filed an appeal. *Following a mediation at the direction of the governor, the parties participating in this appeal agreed on July 29, 1999, to dismiss the appeal and allow the lower court ruling to stand (with some minor modifications). The plaintiffs' entitlement to attorneys' fees has yet to be resolved by the lower court.*

Hollander v Munitz, et al. - Sonoma County Superior Court

Lynne Hollander, the widow of 1960s Free Speech activist Mario Savio, sought unsuccessfully in this lawsuit to halt a Sonoma State campus referendum on a proposed student fee increase. The complaint alleged unfair election practices and noncompliance with Trustee policy. A limited temporary restraining order was entered before the election; the court refused to halt the election but stayed implementation of the results pending a subsequent hearing. The referendum was thereafter defeated. Hence, a fee increase is not currently planned for the Sonoma campus, and the parties stipulated that the issue in the subsequently scheduled hearing had become moot. The plaintiff's counsel has nonetheless refused to dismiss this case and indicated his intent to amend the complaint to challenge fee election procedures systemwide.

Landers v. Board of Trustees - Los Angeles County Superior Court

J. Christopher Landers, a fine arts student at California State University Northridge, filed this lawsuit after the campus blocked access to his webpage on the CSUN computer because it denounced State Senator Cathie Wright and advocated the candidacy of John Birke. The campus concluded that this constituted an impermissible use of state resources for a partisan political purpose.

Landers' application for a temporary restraining order to prohibit the campus from interfering with his freedom of expression was denied. The campus policy on computer use was thereafter amended to clarify that computer use is restricted to university business, including uses associated with the academic programs of the university. Before a different judge, Landers was nonetheless successful in gaining a preliminary injunction against any campus policy that limits the use of the computer for political purposes. The court reasoned that having once created a limited public forum, campus policy cannot thereafter restrict political use.

Both parties filed motions for summary judgment. The CSU's motion was granted. The case was appealed. *On July 29, 1999, the Court of Appeal affirmed the ruling in favor of CSU and denied Landers' request for an award of attorneys' fees. The Court ruled that the earlier CSUN policy did not ban political speech and the current policy is not ripe for review. Landers filed a petition for rehearing, which was denied. It is anticipated that he will file a further petition in the California Supreme Court.*

Muenzberg v. Barnes, et al. - United States District Court, Sacramento

Darrin Muenzberg, a former California Maritime Academy student, claims various civil rights violations because he was allegedly "singled out" and retaliated against for supporting a fellow student who filed a race discrimination complaint against then-Vice President for Student Services, Stephen Barnes. (Barnes has since left the academy and filed his own lawsuit against the CSU.) The retaliation included, among other things, being subjected to an unauthorized drug test. Barnes is being provided a separate defense at CSU expense pursuant to a reservation of the right to disclaim responsibility for his conduct.

The case is in the discovery stage. *Trial is set for February 14, 2000.*

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 described above. The plaintiffs argue 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 acknowledges its inconsistency with five federal appellate opinions that have considered this same issue. It follows instead a lone Louisiana district court opinion. The court has not foreclosed the CSU from justifying its actions with respect to the Bakersfield wrestling team, but has determined that achieving proportionality is not, by itself, a sufficient justification.

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 has appealed this decision, and the matter is now pending in the Ninth Circuit Court of Appeals. Discovery has been stayed pending the outcome of this appeal.

Other Cases

Board of Trustees v. TCI Cablevision of California, Inc. - Alameda County Superior Court

CSU Hayward has a lease agreement with TCI, a cable television company, whereby TCI agrees to pay a monthly rent and to provide dedicated channels for the campus' educational programming in exchange for TCI's placing a broadcast satellite dish on a campus rooftop. Despite attempted negotiations over many months, TCI refused to provide the agreed television coverage or suggest any other solution for this dispute. This lawsuit sought a court order for the agreed television coverage or alternatively an award of damages. *After the judge indicated preliminary agreement with the university's position, this case settled on terms favorable to the campus, including increased television coverage and a contract of longer duration.*

Casmalia Resources Site Steering Committee v. State of California, et al. - Los Angeles County Superior Court

Plaintiff, Casmalia Resources Site Steering Committee, is an association of large corporations and other affiliates which have disposed of toxic substances at a now-inactive waste treatment, storage and disposal facility in northern Santa Barbara County. Pursuant to a Consent Decree entered into with the Environmental Protection Agency, Casmalia has paid considerable sums to clean up that site and is now seeking reimbursement from the state on the theory that the state had a duty under a number of statutes to monitor the site, and to pay for the clean-up of wastes it contributed to the site. The CSU is named as a defendant in this lawsuit along with 30 other agencies of the State that purportedly disposed of toxic wastes at this facility. The attorney general is representing the CSU in this litigation without charge and has determined that there is no insurance that covers these claims. This case was suspended in January 1999 by a demand from the EPA to approximately 800 entities that used this site, including the state. Reaching agreement with the EPA would resolve this case.

The EPA's demand is under consideration. There are no state funds to cover any exposure, and each CSU campus would be required to contribute in proportion to the extent it used the site. Trial is set for October 16, 2000.

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September 14-15, 1999

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. *The matter has been briefed. Court supervised settlement discussions are underway*

Native American Heritage Commission, et al. v. Board of Trustees - Los Angeles County Superior Court

In this action the Native American Heritage Commission and 29 individuals claimed that a 22-acre site on the CSU Long Beach campus should not be developed because it is the location of the ancient Native American village of Puvungna and the only public land suitable as a customary place of worship for certain Native American religions. In April 1995, the CSU's motion for summary judgment was granted. Plaintiffs appealed. In December 1996, the California Court of Appeal overturned the trial court opinion, ruling that because it is a part of the state, the CSU lacks standing to challenge the constitutionality of the statute which permitted the plaintiffs to file this suit. The CSU's petition to the California Supreme Court was denied. The parties are engaged in settlement discussions. Plaintiffs' counsel has not responded to a CSU proposal for many months. The trial court has not resumed its jurisdiction over the remaining claim.