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# MITIGATE OR ELSE LITIGATE: AVOIDING COMMON PITFALLS ON CSU CAMPUSES

*Systemwide Risk Management's  
Fitting The Pieces Together Conference  
November 6-7, 2019  
San Francisco, CA*

*Presenters:*

**CSU Office of General Counsel**

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Associate Vice Chancellor & Deputy General Counsel*

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# OVERVIEW OF TOPICS

- Litigation Overview
- Lessons Learned
  - MPP (“at will”) employees (evaluation, disciplinary action, termination)
  - Athletics Coaches and Administrators (evaluation, termination)
  - Complaints against UPD Employees (POBR protections)
  - Recent Legal Developments (Fair Pay Act, employment practices, student tort cases)
- Questions encouraged after each topic



## LITIGATION OVERVIEW

### Litigation Data – 24 month period

- 40% employment
- 30% student
- 18% personal injury
- 12% other (e.g., construction, environmental, stop notice, contracts)



# LESSONS LEARNED – TROUBLES WITH MPP EMPLOYEES

## California Code of Regulations, Title 5 § 42723

(a) A Management Personnel Plan employee serves at the pleasure of the campus President or the Chancellor, as appropriate. A Management Personnel Plan employee shall not serve a probationary period and shall not receive permanent status.

(b) Athletic personnel who are appointed to positions in the Management Personnel Plan may be given appointments for a definite term. Any such appointment must be in writing and contain the initial date of appointment, the date on which the appointment expires, and a statement that the appointment may be terminated by the appointing authority at any time on terms set forth in the appointment document.





# LESSONS LEARNED – TROUBLES WITH MPP EMPLOYEES (CONTINUED)

## California Code of Regulations, Title 5 § 42723

(e) Except in the case of layoff, the President or Chancellor, as appropriate, shall give a Management Personnel Plan employee, with the exception of athletic personnel appointed to definite terms under (b) above, notice of termination at least three months prior to the employee's separation date or shall give a Management Personnel Plan employee, with the exception of athletic personnel appointed to definite terms under (b) above, corresponding salary in lieu of notice.



# LESSONS LEARNED – TROUBLES WITH MPP EMPLOYEES (CONTINUED)

- Notice of termination = non-retention
- What is “at will” employment?
  - Employee can be dismissed by employer for any reason (“no cause”), as long as it is not an illegal reason.
  - Reason for dismissal is relevant to establish that the dismissal was not for an illegal reason.
- Good employment practices:
  - are fair to employees (helps them be successful);
  - further a healthy and productive working environment; and *also*
  - minimize litigation exposure
- Disciplinary action is antithetical to at will employment, however, principles of “progressive discipline” should inform all employment practices – even in connection with at will employees.



# LESSONS LEARNED – TROUBLES WITH MPP EMPLOYEES (CONTINUED)

## Key Principles

- Give prompt (real time) feedback to all employees (positive *and* constructive)
- Documentation
  - In writing
  - Why is it important?
  - Document in notes to self or communications to employee?
- Risks of no documentation
  - “word against word” about what actually happened
  - Makes it harder to defend against claims of discrimination, retaliation



# LESSONS LEARNED – TROUBLES WITH MPP EMPLOYEES (CONTINUED)

- **Retaliation – what is it?**

Federal and state antidiscrimination laws and CSU policies make it **unlawful for a campus to retaliate – take “Adverse Action” – against an employee because the employee engaged in Protected Activity.** “Protected Activity” includes reporting or otherwise opposing discrimination, harassment or other violation of CSU policy, or participating in a policy-related investigation or proceeding.

- **Adverse Action – what is it?**

CSU policy defines an **Adverse Action** as “an action that has a substantial and material adverse effect on the **Complainant's employment** or ability to participate in a University program or activity free from Discrimination, Harassment or Retaliation. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.” (CSU Antidiscrimination Policy (EO 1096) PolicyStat Id# 674399.)



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CSU Policy Library:

<https://www2.calstate.edu/policies>



## MPP – IS IT ADVERSE ACTION?

- Termination, dismissal, non-retention or rejection during probation
- Significant reassignment of job duties especially if the reassignment results in loss of pay or benefits
- Suspension without pay (even if the employee is later fully reinstated)
- Demotion
- Negative performance evaluation or review, if it is likely to affect employment in a tangible way
- Excluding employee from meetings that transmit information necessary to do job without making appropriate arrangements for keeping the employee informed
- Denying overtime work assignments that are given to similarly situated employees
- Denial of retreat rights



## MPP – IS IT ADVERSE ACTION?

- Negative performance evaluation or review that doesn't appear to affect employment in a tangible way
- Failing to take action when an employee reports retaliation
- Unfair/unreasonable assignment of job duties as compared to similarly situated employees
- Temporary suspension with pay (administrative leave)



## MPP – IS IT ADVERSE ACTION?

- An isolated offensive utterance (not severe enough to constitute harassment) or mere social slights
- Assignment to a less-preferred position (within the same classification, with no loss of pay or benefits)
- Not allowing an employee to rescind a resignation





## MPP – WHEN IN DOUBT...

- When in doubt about what constitutes “Adverse Action,” consult with your campus counsel.
- Communications with campus counsel under these circumstances would be privileged and confidential attorney-client communications.



# ATHLETICS: PERFORMANCE PROBLEMS WITH COACHES AND ADMINISTRATORS

- Inconsistent assessment of performance for similarly situated coaches
- Failing to follow requirements of the CBA (when applicable)
- Opportunity (and time for) resignation in lieu of termination
- Termination without process, even when “legally” not required for at-will employees
- Contract buy-outs vs. “good cause” terminations
- Termination without dignity
- Termination without anticipation of what’s coming next (legal holds)



# PUBLIC SAFETY OFFICER EMPLOYEES

- Public Safety Officers are protected by the Police Officer Bill of Rights (POBR)
- Government Code §§ 3300-3313
- Why? Because effective law enforcement depends upon the “maintenance of stable employer-employee relations, between public safety employees and their employers.”



# UPD EMPLOYEES – POBR RIGHTS

- Interrogation Rights
- Right to Representation
- Appeals
- Searches
- Polygraphs
- Personnel Records
- Remedies





# WHEN DOES POBR APPLY?

- Sworn Peace Officers
- Investigation leading to “Punitive Action”
- Interrogation
- Other Rights (also under SUPA CBA)



# WHAT IS “PUNITIVE ACTION?”

## *Punitive Action Is...*

- Dismissal
- Demotion
- Suspension
- Reduction in Pay
- Written Reprimand
- Punitive Transfer
- Adverse Finding Sworn Peace Officers
- Investigation leading to “Punitive Action”
- Interrogation
- Other Rights

## *Punitive Action Is Not...*

- Adverse Evaluation
- Worker’s Compensation
- Routine Transfer not involving Loss of Pay
- Routine Counseling



# INVESTIGATIONS LEADING TO “PUNITIVE ACTION” INCLUDE

- Public Citizen complaints
  - Governed by Article 9 of the CBA
  - Affords Public Safety Officer greater rights than under EO 1096
  - Affords complainant less rights than under EO 1096
- Complaints under Executive Order 1096
  - Governed by EO 1096, *but subject to POBR.*



# COMPLAINTS UNDER EO 1096 ARE SUBJECT TO POBR

- Investigation will result in a finding of:
  - sustained
  - not sustained
  - exonerated
  - unfounded
- Agency notifies citizen complainant, but the notification cannot disclose discipline imposed, employee statement, or specific facts in the investigation





# FAIR PAY ACT / EQUAL PAY ACT

- Fair pay protections under both state (since 2016) and federal law
- Gov. Brown signs SB 358 on 10/6/15
  - Amends Labor Code 1197.5
  - Effective 1/1/16
  - Intended to address pay disparity based on gender
- Amended again on 9/30/16 via SB 1063
  - Added race and ethnicity
  - Amendment effective 1/1/17
- CSU Guidance issued 3/23/2017



## FAIR/EQUAL PAY – IN GENERAL

- Prohibits paying employees of different gender, race, or ethnicity less for “substantially similar work”
- Prohibits retaliation against employees for complaining or assisting in complaints based on CFPA Statute of limitations
  - Generally two years
  - Three years if willful
  - Retaliation claims under the CFPA subject to one year statute of limitations

# FAIR/EQUAL PAY – “SUBSTANTIALLY SIMILAR WORK”

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- Work performed under similar working conditions
- Substantially comparable taking all necessary skills, effort and responsibilities into account
- Analysis based on *actual* duties and requirements of position



# FAIR/EQUAL PAY – “SUBSTANTIALLY SIMILAR WORK” KEY CONCEPTS

- Job Descriptions
  - Instructive but not determinative
  - Keep current, descriptive, and accurate
  - What about Faculty job descriptions?
- Titles are important!
- Extra assignments
- Jobs in different departments or divisions can be substantially similar





# FAIR/EQUAL PAY – OTHER KEY TERMS

- **Skills**
  - Includes experience, training, education, ability
  - Must relate to core function of the job
- **Effort**
  - Physical or mental exertion to perform core functions
- **Responsibility**
  - Operate independently or under supervision
  - Extent supervises others
  - Impact on operations and mission of CSU
- **Working Conditions**
  - Amenities, environment, noise level, safety or hazard issues



## FAIR/EQUAL PAY – DISPARITY OK IF...

- Seniority system
- Merit system
- Quantity or quality of work
- Other “bona fide” factor
  - Examples: education, training or experience
  - Job related
  - Consistent with “business necessity”
  - Includes: cost of living, cost of labor, geographic differences, differences in disciplines or fields of study



# FAIR/EQUAL PAY – SENIORITY, MERIT, OR INCENTIVE SYSTEMS

- Cannot be adopted with discriminatory intent
- Established, Pre-determined criteria
- Communicated to employees

*Example: Faculty rank and promotion systems*



# FAIR/EQUAL PAY – ADDITIONAL CONSIDERATIONS

- Justifications must be applied consistently and reasonably
- Justifications must account for entire wage differential
- Justification defeated if other business practice that does not require wage disparity
- Considering job market at time of hire carries risks
- Cannot ask for prior salary history
- Cannot rely on prior salary history
- Consider all forms of compensation:
  - Overtime, pay differentials, stipends, supplemental pay, allowances, quantifiable benefits





# FAIR/EQUAL PAY – PRIOR SALARY IMPACT

- Since 2017, prior salary cannot, by itself, justify any disparity
- AB 168 prohibits asking applicants for salary history information
- Must provide pay scale on reasonable request
- AB 2282 clarifies can ask for salary expectations



# RECENT LEGAL DEVELOPMENTS IN EMPLOYMENT LAW

New California laws prohibit “do not rehire” clause in settlement agreements (AB749 -- CCP §1002.5) ([https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200AB749](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB749))

## CHAPTER 3.6. Agreements Settling Employment Disputes

**1002.5. (a)** An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.



# RECENT LEGAL DEVELOPMENTS IN EMPLOYMENT LAW

b) Nothing in subdivision (a) does any of the following:

(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:

(A) End a current employment relationship.

(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.

(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(c) For purposes of this section:

(1) “Aggrieved person” means a person who has filed a claim against the person’s employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process.

(2) “Sexual assault” means conduct that would constitute a crime under Section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

(3) “Sexual harassment” has the same meaning as in subdivision (j) of Section 12940 of the Government Code.



# RECENT LEGAL DEVELOPMENTS IN EMPLOYMENT LAW

How can we protect the institution in light of the “no rehire” ban in settlement agreements?

- More due diligence pre-hire (not just the references selected by the candidate)
- What are the limits on informal due diligence?





# RECENT LEGAL DEVELOPMENTS IN EMPLOYMENT LAW

- New statute of limitations for FEHA cases (effective 1/1/2020)
- AB 9 expanded SOL from 1 to 3 years
- Aggrieved parties have 3 years from last incident to file administrative complaint with DFEH
- Lawsuit must be filed within 1 year of issuance of “right to sue” letter
- What to expect: more lawsuits; more costly lawsuits; more e-discovery
- What’s needed: proactive evidence management



# STUDENT SAFETY AND TORT CASES

- Cal Supreme Court’s *Rosen* decision in 2018 declared that Universities have “special relationship” with students and must protect them from foreseeable risks of harm, including foreseeable acts of violence, during classroom and curricular activities
- Similar legal obligation to that of protecting employees
- Court didn’t elaborate on what non-classroom activities qualify as being related to the delivery of educational services (still an open question)



# STUDENT SAFETY – PROTECTING AGAINST VIOLENCE

- Student safety has always been a top priority within CSU
- CSU’s conduct will be measured by a standard of reasonableness
- Current tools to protect include:
  - Student Health/Counseling/Wellness Centers, drug and alcohol education, Title IX policies and procedures, BIT/CARE Teams, UPD, “Keep Off/Stay Away Orders,” Restraining Orders (through the OGC/Attorney General), robust student support services, and the student discipline process



# STUDENT SAFETY AND TORT CASES: LESSONS LEARNED

- Goal: Make it safe – but if something goes wrong, reduce liability
- EO 1051: Release and Waiver of Liability Form not being routinely used (protects against all but “gross negligence”)
- Programs not being assessed by anyone other than faculty; need more protective measures at development stage
- Students not closely supervised when engaging in hazardous activities
- Leasing of off-site premises without equivalent security measures and no indemnification obligation on the lessor
- Purchase of furniture from discount manufacturer without standard CSU terms and conditions, including indemnification provision



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# Questions?