Student and Alumni Litigation

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September 17, 2014

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- Experience in criminal prosecutions, investigations, ethics, physical security, strategic planning, governance, and compliance
- Served on crisis action teams as legal advisor and planner for operations around the world.

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- Member of the Pepper/FGIS Education Risk Counseling, Investigations and Litigation Services Team
- Practice focuses on class action litigation, securities and shareholder litigation, media law and higher education law.
- Represents colleges, universities, and other educational institutions in providing counseling, litigation and investigative services for the unique challenges that face institutions of higher learning. Mr. Baughman has provided extensive advice on compliance with the federal Clery Act, the Family Educational Rights and Privacy Act (FERPA) and other federal and state laws that apply to educational institutions.

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- Spent nearly 30 years practicing, writing about, and teaching law
- Has been a faculty member at several institutions and a communication director at an R1 university, and is currently a key administrator at Rider University.
- Also has been a labor lawyer and litigator with a major Philadelphia firm and the general counsel/corporate secretary for the then-largest convenience store chain in New Jersey and for the nation's number one econometric forecasting organization
- Published 18 books, as well as some 50 professional/scholarly articles and book chapters.

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- Member of the Pepper/FGIS Education Risk Counseling, Investigations and Litigation Services Team and a member of the firm's Privacy, Security and Data Protection group, and has counseled health care, financial services and educational institution clients on data privacy issues
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Today's Agenda

- Unionization of Students
- Unpaid Internships and the Fair Labor Standards Act
- Reverse Title IX Litigation
- Other Litigation Matters

Unionization of Students

The New Meaning of “Student Union”

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Overview of Labor Laws and Organized Labor

- 1914: Clayton Antitrust Law
- 1926: Railway Labor Act
- 1935: National Labor Relations Law
- 1959: Wisconsin public-employee bargaining

Unionization of Graduate Students

- 1969: University of Wisconsin-Madison Teaching Assistants Association
- 1999: TA bargaining rights in California and SUNY systems
- 2000: NLRB allows NYU GAs to unionize and bargain
- 2004: NLRB denies Brown U. GAs right to unionize & bargain
- 2010: 1,000 NYU GAs petition NLRB for a union election
- 2014: 98.4 % of NYU GAs vote for union under NYU-UAM 2013 agreement

Photo Credit: LaborNotes.Org

The Northwestern University Case

- Northwestern U. and College Athletes Players Ass'n,
- Case 13-RC-1213959
- March 27,2014
- http://www.nlrb.gov/case/13-RC-121359

What happens next?

- National Labor Relations Board has agreed to review
- Secret Ballot election has been held; ballots impounded
- If NLRB affirms, ballots will be counted
- If union won, bargaining order issues
- Northwestern will refuse to bargain = unfair labor practice charge
- Charge could be litigated, appealed to NLRB, then to U.S. Court of Appeals, perhaps Supreme Court

Unpaid Internships and the Fair Labor Standards Act

Internships

- "An internship is a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent."

  - National Association of Colleges and Employers (NACE), Position Statement: U.S. Internships (July 2011)

Fair Labor Standards Act (FLSA)

- FLSA establishes, among other things, minimum wage and overtime pay requirements (*See* 29 U.S.C. §§ 206-207)
- Broad definition of "employ": to "suffer or permit to work"
- FLSA has no express exception for "interns"; analysis falls within "trainee" exception

  - *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)
    - Group of trainee railroad workers were required to complete weeklong training
    - The Court held trainees not covered employees under the FLSA
    - FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction"

DOL Fact Sheet # 71 (April 2010)

- DOL view:
  - "Internships in the 'for-profit' private sector will most often be viewed as employment, unless the test described below relating to trainees is met."

- Exceptions:
  - Individuals who volunteer with state/local government agencies
  - "[I]ndividuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations."

DOL 6-Factor Test for Unpaid Interns

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

DOL 6-Factor Test for Unpaid Interns

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

DOL 6-Factor Test for Unpaid Interns

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Case Law on DOL 6-Factor Test

- No uniform interpretation of DOL's 6-factor test among appellate courts

- Citing DOL test with approval (5th Circuit)
  - *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982)

- "Primary beneficiary" test (4th/6th Circuits)
  - *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989);
  - *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011)

- "Totality of the circumstances" test (10th Circuit)
  - *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993)

Recent FLSA Unpaid Internship Class Action Litigation

- Mostly out of 2d Circuit – "totality of circumstances" approach

- *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013)
  - Certified class of unpaid interns under FLSA and NY Labor Law

- *Wang v. The Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. May 8, 2013)
  - Denied summary judgment for plaintiff on status as "employee" and declined to certify proposed class under FLSA and NY Labor Law

- Both on appeal to 2d Circuit

Practical Advice for Colleges and Universities

- Unpaid internships should be an extension of the classroom
  - Provide academic credit
  - Ensure the internship involves applying knowledge learned from the classroom
  - Develop clear educational objectives/goals related to the professional goals of the student's academic work
  - Require internship-related assignments for credit (e.g., reports, papers, presentations)
  - Partnerships with internship providers: internships for set, defined periods; ample supervision and feedback for intern; no expectation of employment after internship; written agreements

Reverse Title IX Litigation

Reverse Title IX Litigation

- "Many young men who feel unfairly accused recognize that campus sexual assault is a serious issue, and that some students are truly responsible. But in the current climate, they say, the gender-equality law known as Title IX is allowing women to allege rape after alcohol-fueled sexual encounters in which the facts are often murky. An increasing number of undergraduate men are now fighting back – with the help of parents, lawyers, and a new national advocacy group."
  - Chronicle of Higher Education, Sept. 5, 2004

Reverse Title IX Litigation

- Typical claims:
  - Breach of Contract
  - Due Process Violation (State Schools Only)
  - Defamation
  - Title IX

Reverse Title IX Litigation

- *Gebser v. Lago Vista Independent School*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
  - Intentional Gender Discrimination
- Title IX Theories Available to Respondents:
  - Erroneous Outcome
  - Selective Enforcement
  - Deliberate Indifference
    - *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994)
- All require Intentional Gender Discrimination

Reverse Title IX Litigation

- *Wells v. Xavier University*, 2014 US. Dist. LEXIS 31936 (S.D. Ohio Mar. 12, 2014)
  - Ongoing OCR Investigation; Plaintiff alleged he was "scapegoat"
  - Title IX Claim survives:
    - "His Complaint . . . recounts Defendants having rushed to judgment, having failed to train UCB members, having ignored the Prosecutor, having denied Plaintiff counsel, and having denied Plaintiff witnesses."

Reverse Title IX Litigation

- *Harris v. Saint Joseph's University*, 2014 U.S. Dist. LEXIS 65452 (May 13, 2014)
  - Title IX Claim fails for failure to plead "particular circumstances suggesting that gender bias was a motivating factor behind" the University's actions.
  - Breach of Contract dismissed without prejudice.
  - Libel claims and Deceptive Trade Practices Claims could proceed.

Reverse Title IX Litigation

- *King v. DePauw University*, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014)
  - Role of Alcohol
  - Incapacitation: Respondent knows or should know the complainant is "incapable of recognizing what is going on around him/her. An incapacitated person is not able to recognize the sexual nature or extent of the situation she/he is in."

Reverse Title IX Litigation

- *King v. DePauw University*, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014)
  - Title IX Claims Insufficient to Show Right to Injunctive Relief
  - Likelihood of success on contract claims:
    - Not unreasonable for Board to conclude that Complainant was Incapacitated; Arbitrary for Board to Conclude Respondent Knew or Should Have Known This

Other Litigation Matters

Law School Class Actions

- Class actions against law schools alleging violations of consumer fraud statutes, fraud and negligent misrepresentation, associated with employment rates and starting salaries

Law School Class Actions

- Some of Schools Sued:
  - Albany Law School
  - Brooklyn Law School
  - California Western School of Law
  - Chicago-Kent College of Law
  - DePaul University College of Law
  - Florida Coastal School of Law
  - Golden Gate University School of Law
  - Hofstra Law School
  - John Marshall School of Law (Chicago)
  - Southwestern Law School
  - University of San Francisco School of Law
  - Widener University School of Law
  - Thomas M. Cooley School of Law

Law School Class Actions

- Lawsuits allege that many schools falsely inflated graduate employment rates by employing their own graduates in temporary jobs and counting graduates working in non-legal-related jobs and part-time and temporary jobs as ‘employed’ even though such jobs either do not require a law degree or do not pay enough to service the massive debt taken on to finance the degree.
- The representative plaintiffs further allege that many schools reported ‘average’ salaries based on a small sample of high earning graduates.

Law School Class Actions

- *MacDonald v. Thomas M. Cooley Law School, 724 F.3d 654 (6th Cir. 2013)*
  - Plaintiffs main claims - a claim under the Michigan Consumer Protection Act (MCPA) and a common law claim of fraudulent misrepresentation - focused on two statistics provided by Cooley in its "Employment Report and Salary Survey"
    1. The "percentage of graduates employed" was seventy-six percent, and
    2. The "average starting salary for all graduates" was $ 54,796.
  - Plaintiffs sought to certify a class of students enrolled at Cooley at any time since August 11, 2005 and sought $ 300 million in damages to compensate them and their putative class members.

Law School Class Actions

- *MacDonald v. Thomas M. Cooley Law School, 724 F.3d 654 (6th Cir. 2013) cont.*
  - Western District of Michigan granted Cooley's motion to dismiss the complaint.
    - Court held that state consumer protection laws do not apply because students purchased education for a business/commercial, not personal, reason.
    - Plaintiff's fraud and negligent misrepresentation claims failed because Cooley's "percentage of graduates employed" statistic is not objectively false (the statistic does not differentiate between part-time, full-time, legal, or non-legal jobs).
    - Plaintiffs' reliance on Cooley's "average starting salary" statistic is unreasonable because Plaintiffs knew that Cooley did not know "all" graduates' information; and Cooley does not have a duty to disclose important information related to the statistics.
  - Sixth Circuit Affirms: Plaintiffs treated like businesspeople who made poor investment decision
    - Plaintiffs did not attend law school "for dilettantish reasons"

Law School Class Actions

- *Harnish v. Widener University School of Law,* 931 F. Supp. 2d 641(D.N.J., March 20, 2013)
  - Allowed to proceed to discovery
  - Alumni sufficiently pled an unlawful affirmative act under the New Jersey Consumer Fraud Act (NJCFA)
  - Alumni sufficiently pled a knowing omission under the NJCFA; and
  - Alumni sufficiently pled a causal nexus.
  - Discovery may uncover the factors Widener's used to set tuition prices, which may aid in calculating Plaintiffs' loss.
  - Widener has not established that calculating the loss is impossible, and denying Plaintiffs the opportunity for additional discovery at this stage would unduly prejudice Plaintiffs.
  - Widener failed to establish an immediate appeal will materially advance the ultimate termination of this litigation

Loss of Accreditation and University Closure

- *In re: MOUNTAIN STATE UNIVERSITY LITIGATION*, Master Case No. 12-C-9000 (Cir. Court of W.Va. 2014)
  - Mountain State University (W. Virginia) lost its accreditation and subsequently closed after concerns rose about the nature of the education and the educational background of faculty members.
  - Approximately 360 lawsuits were filed by nursing students, claiming that MSU's accreditation loss caused them financial and career-related harms.
  - Non-nursing students filed similar claims through a putative class action complaint.
  - Each putative class representative seeks to hold the University liable for damages resulting from its loss of relevant accreditations, alleged failure to deliver services, and subsequent program closures.
  - Plaintiffs filed a motion with West Virginia state court seeking preliminary certification of a limited fund class and class settlement approval.
  - The proposed settlement would "establish a pool of funds and other assets out of which compensation can be made to former MSU students. Additionally, fifteen percent of the proceeds from property sales and twenty-three percent of any Department of Education funds received would be allocated to a separate sub-fund to satisfy the University of Charleston's potential claims." MSU entered into an agreement with the University of Charleston to provide a "teach-out" to currently enrolled students.

Tuition Charges

- *Berry v. Board of Regents of University of Michigan (May 2014)*
  - Plaintiff claims he was unlawfully denied in-state tuition at the University of Michigan-Dearborn and pursues a class action on behalf of himself and all those similarly situated.
  - The Complaint contains three counts: (i) violation of 42 U.S.C. 1983 and the Equal Protection Clause of the Fourteenth Amendment, (ii) violation of 42 U.S.C. 1983 and the Due Process Clause of the Fourteenth Amendment, and (iii) unjust enrichment.
  - Plaintiff claims Defendants imposed disparate treatment on him and arbitrarily applied residency guidelines because he is an immigrant and his parents still have international ties.
  - Plaintiff sought a refund of tuition, statutory damages, actual damages and attorney's fees resulting from violations of his constitutional rights, Plaintiff also asks the court to direct Defendant to divulge the cases of students who have been reviewed for residency eligibility , and denied in-state tuition.
  - On June 10, 2014, Defendants filed a Motion to Dismiss.

Tuition Charges

- *Berry v. Board of Regents of University of Michigan (May 2014) cont'd.*
  - Defendants argued three main points to dismiss the complaint:
    - The University is a state entity protected by sovereign immunity pursuant to the Eleventh Amendment,
    - Congress did not abrogate state sovereign immunity in 42 U.S.C. 1983, and
    - The Eleventh Amendment bars all claims against the University for money damages, injunctive relief, and pendent claims alleging a violation of state law.
  - Michigan state supreme court held that public universities are included in the definition of "state" for purposes of immunity.
  - The U.S. Supreme Court held that state sovereign immunity applies to section 1983 claims and that "the jurisdictional bar applies regardless of the nature of relief sought."
  - On Sept. 11, 2014, the Eastern District of Michigan granted the motion to dismiss.

Freedom of Speech Litigation

- *Burch v. University of Hawaii (Hilo)*, C.A. No. 1:14-cv-00200 (D. Ha. April 25, 2014)
  - Merritt Burch, president of the UH-Hilo chapter of Young Americans for Liberty (YAL) and a fellow student YAL member were participating in an outdoor event where student groups set up tables to distribute literature. Burch and her friend hand out Constitutions.
  - A UH-Hilo administrator ordered Burch and her friend to stop approaching students and get back behind their table, dismissing Burch's protest about her constitutional rights.
  - Students advise of University rule against passing out literature: Students could only pass out literature in UH-Hilo's "free speech zone.
    - UH-Hilo administrator discussing rule observed, "This isn't really the '60s anymore" and "people can't really protest like that anymore."
  - Lawsuit is challenging UH-Hilo's denial of their right to hand out literature, UH-Hilo's policies regarding literature distribution, and the "free speech zone" policy.

Freedom of Speech Litigation

- *Burch v. University of Hawaii (Hilo)*, C.A. No. 1:14-cv-00200 (D. Ha. April 25, 2014)
  - Free Speech Zone is the only public location on campus where students may express themselves without obtaining University permission in advance.
  - Area is approx. .3 acres and located on the edge of campus with minimal pedestrian traffic.
  - Besides Free Speech Zone, the University designates two other locations as areas where students may engage in free speech, but only with a reservation made at least seven days in advance.
  - University of Hawaii at Hilo suspends restrictive "Free Speech Zone" while lawsuit proceeds.
  - On September 5, 2014, parties informed District Court they are working toward a settlement.

Handling Self-Destructive Behavior

- *W.P . v .Princeton University*, C.A. No. 3:14-cv--1893 (D.N.J. March 26, 2014)
  - The student alleged to have been forced to withdraw from Princeton University following a suicide attempt is suing the University for, among other things, disability discrimination in federal court.
  - Student claims his forced withdrawal violates Fair Housing Act, the Rehabilitation Act, Americans with Disabilities Act, and New Jersey Law Against Discrimination, Intentional Infliction of Emotional Distress, Invasion of Privacy, Breach of Confidential Relationship, Fraud, Breach of Express Contract, Breach of Implied Term of Good Faith and Fair Dealing.
  - Plaintiff claims that he was forced to withdraw from the University; was not provided reasonable accommodations, and was forced to abide by strict readmission guidelines not imposed on other students.
  - At issue is a University's response to self-destructive behavior
    - Title II outlines a defense to an adverse action taken against students who pose a direct threat to the health or safety of others. 28 C.F.R. § 35.139(a).
  - Plaintiff seeks declaratory judgment, injunctive relief, compensatory and punitive damages along with attorney's fees and costs.
  - At the time the complaint was filed, Plaintiff was back attending classes.
  - Defendants have not yet filed an answer to the complaint.

Question and Answers

Thank You

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