



Legal Issues on Campus

The General Counsel
as a Resource



Today We Will Discuss...

- The General Counsel's role in protecting the College and assisting its managers.
- How to obtain legal services.
- Managers' legal responsibilities regarding:
 - Employee Discipline
 - Documenting poor performance and other employee concerns
 - Disruptive Individuals
 - Safe Working Conditions
 - Sexual Harassment



General Counsel Functions

- Provides a full range of legal services for the entire campus community.
- Responds to inquiries from the Board of Trustees, the President, managers and staff.
- Works with all departments on campus.
- Seeks to protect College and its assets, including its intellectual property.



General Counsel Functions

- Provides advice if a third-party is in default under an agreement or if there is a concern about a possible default.
- Reviews matters that may give rise to claims and liability.
- Assists in policy development and amendment.
 - The Policy Project.
- Engages outside counsel on behalf of the College when necessary and coordinates work with outside counsel.



Contracts/Agreements

- Reviews contracts, proposals and other legal documents.
- Drafts agreements.
- Determines the best structure for relationships with third parties/vendors.
- Helps in developing “must haves” and “prefer to haves” (provisions the College wants/needs in particular agreements) before negotiations begin or proposals are sought.



How Are Legal Services Obtained?

- Submit a **Request for Legal Services** and (please!!) include relevant documents and detail.
- “Advance” consultations ensure that matters having legal implications can be administered promptly and at lowest cost.
 - You can pay me now or pay me later!
- Short consultations and “Issue Spotting” can save managers time, money and later hassles and mitigate the College’s exposure and liability.



Accessing General Counsel Services

- Open Door Policy
- Any manager can call or stop-by at any time to discuss legal issues or concerns *affecting the College.*
- Personal Legal Issues
- The “Day Before,” “Friday at 5:15,” “Negotiations Have Been Ongoing for Three Months” and “We Already Signed the Letter of Intent” Rules



Employee Discipline: The Manager's Role

- The manager's role in employee discipline is critical from a legal perspective .
- Managers must communicate dissatisfaction with employee performance in a clear and consistent manner.
- Documentation: “This has been going on for months”; “I want to terminate “X””; “Where is the proof?”



Employee Discipline: The Manager's Role

- Communications regarding performance **cannot** be limited to once a year evaluations.
- Good or bad, employees want and need to know where they stand.
- Absence of performance feedback is one of the most frequently cited employee complaints.
- From a legal perspective, it also weakens the College's ability to discipline and terminate.



Employee Discipline: The Manager's Role

- Major issue in litigation or agency proceedings with former employees regarding their termination or imposition of discipline is the absence of prior warnings or the lack of clear warnings.
- The absence of **clear prior** warnings often gets in the way of or delays discipline or a termination that would otherwise be easy to effectuate.



Documenting Poor Performance

In wrongful termination suits, employees often argue that they were never given fair warning of any problems with their performance and that there was no indication that they might be fired.

In discrimination cases, the employee who is fired, or otherwise treated adversely, will claim that the manager's "performance-based reason" for the employment action was merely a pretext (i.e., a cover-up) for discrimination.



Employee Discipline: The Manager's Role

- ***Avoiding and Defending Litigation:*** A record of poor performance evaluations, performance counseling, and corrective discipline can make or break litigation or an administrative proceeding, if someone who is fired decides to sue for discrimination, wrongful termination, or the like.
- ***A record creates powerful, contemporaneous evidence that a discharge was valid or discipline was warranted.***



Documenting Poor Performance

A record defeats the claim that the employee's termination was unreasonable and not foreseeable.

A record conveys a sense of fairness to a jury or administrative agency.

- A reasonable investigation should be conducted and documentation collected prior to disciplining or terminating an employee.




Documenting Poor Performance: Creating a record

***How to document poor performance/violations of
College policies/insubordination/other concerns.***

- *What is a “record”?*
- What must a “record “ contain and what form must it follow?
- *“It all depends” and “no one format” rule.*
- *The more serious issue, the more formal the record should be.*
- The employee’s written confirmation that he/she received the communication and acknowledges its validity.



Documenting Poor Performance

- ***The importance of consistency among employees and consistency of method.***
- ***The value of contemporaneous records.***
- ***Escalation***  ***Reasonableness***
- ***Seeking assistance from HR or the General Counsel when documenting poor performance or in special cases.***



Methods for Documenting Poor Performance

Some examples:

- An e-mail to the employee summarizing the nature of the inadequate performance; prior discussions during which the employee was advised about the same issue, expectations for improvement ;and possible consequences if improvement over a defined period is not shown.
- A memorandum to the employee summarizing the same type of information
- A letter summarizing a discussions in which both employee, manager and a representative of HR was present.
- No substitute for face-to-face contact.



Employee Discipline: Documenting Poor Performance/Other Concerns

Example 1 : “You need to make certain that you calendar meetings such as the one you missed on November 3rd. As a result of your failure to attend, ...”

Method 1 – Oral warning could be :

- (i) memorialized in a file note that the manager maintains,
- (ii) in a “self-e-mail” or
- (iii) in an e-mail to the employee.



Employee Discipline: Documenting Poor Performance/Other Concerns

Example 2: An employee is late on an ongoing basis.

TO: Memorandum

CC:

FROM:

This will confirm our discussions on _____, _____ and _____, in which I advised you that your continued lateness is unacceptable. Should it continue.....

Method 2 – After using Method 1, a more formal written warning can be utilized. HR or department head can be copied.



Employee Discipline: Documenting Poor Performance/Other Concerns

Example 3: An unreliable employee is late in preparing a portion of an accreditation report and the entire submission is delayed as a result.

Method 3 - **Interim communications**—oral and written--asking for its status and reminding the employee of his/her obligations and the consequences of his/her actions. Document employee's interim responses that it would be completed on time and failure to perform.



Employee Discipline: The Manager's Role

- ***Proof***: Terminations are effectuated only when there is sufficient evidence of misconduct or poor performance. This includes documentation of prior warnings or problems.
- ***Termination without warning***: Termination without prior warning or discipline for especially egregious and obvious violations such as stealing or making threats.



Employee Discipline: Documenting Poor Performance/Other Concerns

Team Exercise



Sexual Harassment

The Manager's Role

- Overview of Legal Issues
- Exercise, if we have time



Sexual Harassment- Quid pro quo

- Sexual harassment is based on sexual conduct in the workplace, such as comments, jokes, or pictures.
- There are generally two kinds of harassment recognized by law:
- Quid pro quo ("this for that") harassment can result when a supervisor or manager explicitly or implicitly makes an employment decision (i.e., a raise, a promotion, better hours) contingent upon receipt of sexual favors from an employee.



Sexual Harassment- Quid pro quo

- The College can be "strictly liable" for this type of conduct.
- **A manager can be personally liable as well.**
- The same rules also apply for harassment based on race, religion, national origin, age, disability, sexual orientation, gender, or any other category deemed protected by federal, state or local law.



Sexual Harassment-Hostile Work Environment

- A "hostile work environment" can be created if there is conduct, such as comments, jokes, or pictures with sexual content in the workplace, and the conduct is unwelcome, and either severe (e.g., sexual touching) or pervasive.
- It may be found if the conduct materially interferes with an employee's ability to do his or her job.
- It can also be created by conduct such as repeated requests for dates, or discussions of sexual activities whether communicated in person, or by voice- mail or e-mail.



When is the College “on Notice?”

- May be deemed to be on notice of potentially unlawful conduct when a supervisor or manager knows or should know about the conduct.
- For example, when a manager sees or hears inappropriate conduct or is made aware of it by an employee.
- Once on notice, "prompt, effective action" must be taken.
- Managers can and should not keep this information confidential or "do nothing" even at the complainant's request.
- Managers who are on notice should **immediately** consult with Human Resources about the appropriate action to take.



What is “Prompt, Effective Action?”

- What constitutes prompt, effective action depends in part on the type of conduct alleged to have occurred.
- Usually, it is an immediate investigation into the allegations, with corrective action designed to end any inappropriate conduct.
- Movement of harasser or harassee.



What is my responsibility as a supervisor or manager if someone comes to me with a complaint?

You must contact Human Resources so that an investigation or other appropriate action can be initiated as soon as possible.

- You may then be asked by Human Resources to be a participant in the investigation.
- **You must also take steps to prevent any retaliation against the complainant.**
- Complaints for retaliation.



What if no one complains, but I am aware of some conduct that may be sexual harassment?

- Even if no one complains, if you are aware of inappropriate conduct, you must promptly contact Human Resources and discuss the situation.
- Exercise



Dealing with Disruptive Individuals

- If you feel threatened or endangered (or others do), **immediately** call Public Safety! x-5555
- What is disruptive behavior?
- Behavior that places anyone in fear or which interferes with other students, faculty or staff and their access to an appropriate educational or work environment is considered disruptive behavior.



Examples of Disruptive Behavior

- Yelling or screaming
- Persistent and unreasonable demands for time and attention
- Words or actions that have the effect of intimidating or harassing another
- Words or actions that cause another to fear for his or her personal safety
- Threats of physical assault



Dealing With a Disruptive Person

- Disruptive behavior should not be ignored. Remain calm.
- Remind yourself that it is not about you; it is about the situation.
- Tell the individual that such behavior is inappropriate.
- Inform the individual that there are consequences for failing to improve or discontinue the disruptive behavior.



Dealing With a Disruptive Person

- Many disruptive situations involve anger.
- Recognize that the period of peak anger usually lasts 20-30 seconds.
- Although this may feel like an eternity in the throes of the situation, **often** it is best to “wait it out” before progressing.
- **Do not hesitate to ask for help and do not delay in doing so.**



Dealing With a Disruptive Person

- **USE YOUR GUT!**
- Remember to keep your supervisor or department chair appraised of the circumstances.
- ***Documentation***
- Disruptive behavior should be documented. Write a factual, detailed account of what occurred. Use concrete, behavioral terms.



Dealing With a Disruptive Person

- ***The “Do’s”***
- DO listen through the anger. Use active listening.
- DO acknowledge the feelings of the individual.
- DO allow the person to vent and tell you what is upsetting him or her. Use silence to allow the person to talk it out.



Dealing With a Disruptive Person

- DO set limits. Explain clearly and directly what behaviors are acceptable. “I will be willing to speak with you as soon as you lower your voice.”
- DO be firm, steady, consistent and honest.
- DO focus on what you can do to help resolve the situation.
- DO make personal referrals. Give a name of an individual, when possible, and call ahead to brief the person.



Dealing With a Disruptive Person

- DO report the behavior to Public Safety and/or Human Resources or the General Counsel.
- DO remove yourself from the room and summon help.



- ***The “Don’ts”***
- DON’T interrupt, particularly during the first 20-30 seconds of peak anger.
- DON’T minimize the situation.
- DON’T get into an argument or shouting match.
- DON’T blame, ridicule or use sarcasm.
- DON’T touch.
- DON’T ignore warning signs that the person is about to explode.
- DON’T ignore your limitations.



Dealing With a Disruptive Person

- Avoidance is a legitimate approach to dealing with potentially dangerous situations. Leave the area and remove yourself from the behavior.
- **ALWAYS THINK IN ADVANCE WHETHER YOU MIGHT BE COMING INTO CONTACT WITH A PERSON WHO MIGHT BECOME DISRUPTIVE OR VIOLENT AND PLAN ACCORDINGLY (e.g., place and timing of meeting, need for security, etc.).**



Dealing With a Disruptive Person

- ***Resources***
- Public Safety x5555
- Human Resources x4128
- General Counsel x4022



Safe Working Environment

- **If you know of an unsafe working environment or condition, remove employees from the area and make a prompt report.**
- The “general duty clause” is not a specific standard, but has been applied by OSHA (the U.S. Occupation Safety and Health Administration) as a catchall regulation to require employers to assure that workplaces are free of recognized hazards, and to require employees to comply with standards, rules, regulations and orders issued by OSHA.



OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

- The ADA is intended to allow qualified individuals with disabilities to enjoy the same employment opportunities available to individuals without disabilities.
- It requires employers to provide equal access to the hiring process and to provide reasonable accommodations in the workplace **for qualified individuals** with **disabilities who are able to perform the essential functions of a job**, unless providing a reasonable accommodation would cause an **undue hardship**.



Key Provisions of the ADA:

An employee may be covered by the ADA if he or she:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of a substantially limiting impairment; or
- is regarded as having a substantially limiting impairment.



Key Provisions of the ADA:

"Major life activities" include but are not limited to:

- walking,
- hearing,
- speaking,
- learning,
- breathing,
- caring for oneself,
- performing manual tasks, and
- working



Definitions Under the ADA

- Physical or mental conditions that may be considered "disabilities" include: epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment.
- Temporary conditions that have little or no long-term impact are not considered disabilities under the ADA.
- A broken leg that heals normally within a few months would not be a disability under the ADA.
- Likewise, common colds and the flu are not covered.



Reasonable accommodation under the ADA

- Employees covered by the ADA are entitled to reasonable accommodation if it would enable them to perform the essential functions of the job.
- Reasonable accommodation may include such things as equipment modification or adjustments to job or the work environment that will allow a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions.
- An employer is only required to accommodate a known disability of a qualified applicant or employee.



The ADA and the Hiring Process

- During the hiring process, an employer may not ask whether he or she has a disability or about an applicant's workers' compensation history.
- An employer may inquire about the applicant's ability to perform the essential functions of the job.



The ADA and the Hiring process

An employer may condition an offer to an applicant on the results of a medical examination or inquiry so long as the employer imposes the same requirements on all prospective employees for the same job category.

- If the examination reveals a disability, the employer may refuse to hire the applicant only if the employer can show that the reason for not hiring the applicant is job-related and a business necessity, and that either no reasonable accommodation is possible or reasonable accommodation would cause undue hardship.



OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

- The FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons.
- The FMLA is intended to allow employees to balance their work and family life by taking unpaid leave for medical reasons, birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.



Key Provisions of the FMLA:

Eligible employees have up to 12 weeks job guaranteed, unpaid leave, during any 12 month period, for the following situations:

- the birth or adoption of a child or the placement of a foster child with the employee;
- to care for the employee's spouse, parent, or child with a serious health condition; or
- where the employee suffers from a "serious health condition" and is unable to perform the functions of the position.



Key Provisions of the FMLA:

- At the expiration of a leave, the employer must restore the employee to the position held at the time the leave commenced or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.
- Employers may require an employee requesting leave for his or her serious health condition or for a covered family members' serious health condition to provide medical certification justifying the need for a leave.
- Employers may require such certification by a health care provider prior to the granting of such leave and also may require continuing re-certification, at intervals of not less than 30 days, stating that the leave continues to be medically necessary.



Key Provisions of the FMLA:

- An employee may be entitled to intermittent leave or a reduced leave schedule. Intermittent leave is taken in separate blocks of time due to a single qualifying event.
- A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per work week or hours per work day.
- For leave that is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees.
- An employee intending to take leave under the FMLA must provide his or her employer with a minimum 30 days notice, **or as much notice as is practical.**



Hiring: What is an illegal Question?

- Illegal interview questions refer to those questions asked during an interview that may be used to **discriminate** against an interviewee. It is important to be aware of what questions are illegal before you start an interview.
- In most cases, personal questions **not related** to job performance can be illegal interview questions, as they can be used to discriminate on the basis of a person's age, place of origin, birth place, etc.



Hiring: What is an illegal Question?

- Personal Questions
- Relatives Marital Status

Examples:

- **Unlawful Inquiries:** Whether the applicant is married, divorced, separated, engaged, widowed, etc. "What is your marital status?", if over 18 "What is the name of relative/spouse/children?", "With whom do you reside?", "Do you live with your parents?", "How old are your children?"
- **Lawful Inquiries:** "What are the names of relatives already employed by the company or a competitor?", other than that specific question, NONE.



Hiring: What is an illegal Question?

- **Pregnancy**

Example:

- **Unlawful Inquiries:** All questions relating to pregnancy and medical history concerning pregnancy. "Do you plan on having more children?"
- **Lawful Inquiries:** Inquiries to a duration of stay on a job or anticipated absences which are made to males and females alike. "Do you foresee any long term absences in the future?"

- **Residence**

Example:

- **Unlawful Inquiries:** Names or relationship of persons with whom applicant resides. Whether applicant owns or rents a home. "Do you live in town?"
- **Lawful Inquiries:** Inquiries about address to the extent needed to facilitate contacting the applicant. (A post office box is a valid address.) "Will you have problems getting to work at 9am?" is also legal.



Hiring: What is an illegal Question?

- **Physical Health**

Example:

- **Unlawful Inquiries:** Over general questions ("Do you have any handicaps?") which would tend to divulge handicaps or health conditions which do not relate reasonably to fitness to perform the job. "What caused your handicap?", "What is the prognosis of your handicap?", "Have you ever had any serious illness?", "Do you have any physical disabilities?"
- **Lawful Inquiries:** "Can you lift 40 lbs?", "Do you need any special accommodations to perform the job you've applied for?", "How many days did you miss from work (or school) in the past year?" The questions have to relate to the job.



Hiring: What is an illegal Question?

- **Family**

Example:

- **Unlawful Inquiries:** Questions concerning spouse, or spouse's employment, salary, child care, arrangements, or dependents. "How will your husband feel about the amount of time you will be travelling if you get this job?", "What kind of childcare arrangements have you made?"
- **Lawful Inquiries:** Whether applicant can meet specified work schedules or has activities or commitments that may prevent him or her from meeting attendance requirements. "Can you work overtime?", "Is there any reason why you can't be on the job at 7:30 am?"



Hiring: What is an illegal Question?

- **Sex**

Example:

- **Unlawful Inquiries:** Any inquiry. "Do you wish to be addressed as Mr., Mrs., Miss, or Ms.?" or ANY inquiry as to sex such as "Do you have the capacity to reproduce?", "What are your plans to have children in the future?"
- **Lawful Inquiries:** None

- **Education**

Example:

- **Unlawful Inquiries:** Any question asking specifically the nationality, racial or religious affiliation of a school.
- **Lawful Inquiries:** All questions related to academic, vocational or professional education of an applicant, including the names of the schools attended, degrees/diplomas received, dates of graduation and courses of study.



Hiring: What is an illegal Question?

- **Arrests & Convictions**

Example:

- **Unlawful Inquiries:** All inquiries relating to arrests. "Have you ever been arrested?" (Note: Arrests are NOT the same as convictions. An innocent person can be arrested, remember.)
- **Lawful Inquiries:** None relating to arrests. Legal inquiries about convictions are: "Have you ever been convicted of any crime? If so, when, where and disposition of case. "Have you ever been convicted under criminal law within the past five years (excluding minor traffic violations)?" It is permissible to inquire about convictions for acts of dishonesty or breach of trust. These relate to fitness to perform the particular job being applied for, as stipulated by FDIC requirements



Hiring: What is an illegal Question?

- **Birthplace and religion**
- Let's now look at some illegal interview questions. Inquiries into a person's birthplace are illegal. Also asking a person's religious affiliation is illegal, or asking about religious customs and ceremonies.

Example:

- **Unlawful Inquiries:** Any question that directly or INDIRECTLY relates to a religion. "What religious holidays do you observe?", "What is your religious affiliation?"
- **Lawful Inquiries:** None except "Can you work on Saturdays?", and that only if it is relevant to the job.



Hiring: What is an illegal Question?

- **Disability**
- If an individual's disability does not hinder job performance, it is not permissible to dismiss the person for that reason.
- **Age...height or weight**
- It is illegal to ask for age, but it is ok to ask for a confirmation of age after hiring. Illegal interview questions include asking about a person's height or weight. However you can ask if a person is able to lift a certain amount of weight necessary for job performance.

Example:

- **Unlawful Inquiries:** Any questions that tends to identify applicants age 40 or older.
- **Lawful Inquiries:** "Are you 18 years of age?", "If hired, can you furnish proof of age?"



Hiring: What is an illegal Question?

- **Race or color**
- Asking about a person's race or color is also illegal. Exceptions hold for employment records for an equal opportunity employer and for affirmative action status, after hiring.

Example:

- **Unlawful Inquiries:** Any question that directly OR INDIRECTLY relates to a race or color.
- **Lawful Inquiries:** None



Hiring: What is an illegal Question?

- **Citizenship**

Example:

- **Unlawful Inquiries:** Whether an applicant is a citizen. Requiring a birth certificate, naturalization or baptismal certificate. Any inquiry into citizenship would tend to divulge applicant's lineage, descent, etc.
- "Are you a citizen of the US?"
- "Are your parents or spouse citizens of the US?"
- "On what dates did you , your parents or your spouse acquire US Citizenship?"
- "Are you, your parents or your spouse naturalized or native-born US citizens?"
- **Lawful Inquiries:** Whether applicant is prevented from lawfully employed in this country because of visa or immigration requirements. Whether applicant can provide proof of citizenship (passport), visa, alien registration number after hiring. "If you are not a US citizen, do you have the legal right to remain permanently in the US?", "What is your visa status (if no to the previous question.)", Are you able to provide proof of employment eligibility upon hire?"



Hiring: What is an illegal Question?

- **National Origin/Ancestry**

Example:

- **Unlawful Inquiries:** Everything. "What is your nationality?", "How did you acquire the ability to speak, read or write a foreign language?", "How did you acquire familiarity with a foreign country?", "What language is spoken in your home?", "What is your mother tongue?"
- **Lawful Inquiries:** "What languages do you speak, read or write fluently". This is only legal when the inquiry is based on a job requirement.
- **And remember this.....**
- The questions do not necessarily have to be asked in a direct fashion to be illegal interview questions.