newsletter

Staying Ahead
with Saul Ewing

October 2008

Higher Education

A Newsletter by the Saul Ewing Higher Education Practice Group

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Feedback? Topics you'd like us to address in future newsletters?

Please send Comments to the Saul Ewing Higher Education Practice Group c/o jkeller@saul.com

Visit the Saul Ewing website at www.saul.com

Update from the Higher Education Practice Group

By James A. Keller

We want to take this opportunity to update you on what has been a busy year for Saul Ewing LLP's Higher Education Practice Group.

We continue to add attorneys with diverse professional backgrounds to our ranks. Amy Foerster joined us in April after serving as counsel for the Pennsylvania Department of Education's Office of Postsecondary and Higher Education from 2002-2006 and, thereafter, representing member universities of the Pennsylvania State System of Higher Education as a Senior Deputy Attorney General with the Pennsylvania Office of Attorney General.

We have also had the pleasure of spending time with many of you throughout the year at a variety of conferences.

- The year started with presentations on January 15, 2008 at the **Higher Education Seminar: Exploring Today's Risks** at the University of Maryland. Rob Duston, a Partner in our Labor, Employment and Employee Benefits Practice Group, spoke about data protection, data loss, and identity theft on campus; Jim Keller, Partner and Chair of the Higher Education Practice Group, spoke about Facebook, MySpace, and related online communities and related legal risks.
- Jim Keller also spoke about online communities at the **Delaware Valley Student Affairs Conference** in February.
- In June, Jim Keller, along with Partners Ira Shepard and Rob Duston, both from the Washington, DC office, Amy Foerster, an Associate in the Harrisburg office and Allison Newhart, an Associate in the Philadelphia office, hosted a reception at the **48th Annual Conference of the National Association of College and University Attorneys** in New York City.
- In July, Rob Duston gave a presentation on "Identity Theft and the Electronic Workplace" at the annual meeting of the **National Association of College and**

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University Business Officers in Chicago.

- In September, Jim Keller and Ed Levin, a Partner in the Washington, DC office, spoke at two separate conferences in Washington, D.C. Jim presented, "Second Life: Virtual Campuses, Real World Risks," at the **39th Annual Conference of the University Risk Management and Insurance Association**. Ed covered, "Hot Topics in Employment Law for Nonprofits," for the American Society of Association Executives.
- October promises to be an equally busy month. Jim Keller, Amy Foerster and Catherine Walters, a Partner in the Harrisburg office, will speak to the **Pennsylvania Association of College and University Attorneys** at its annual meeting in Harrisburg. Later in the month, Ira Shepard, joined by Amy Foerster, will host a Roundtable for Community College Lawyers at the **Annual Congress of the Association of Community College Trustees** in New York City.

We also have written several articles addressing a variety of topics relevant to institutions of higher education.

Following the attacks at Virginia Tech, Jim Keller and Audrey Daly, who works out of the Harrisburg office, along with Brett A. Sokolow, President at The National Center for Higher Education Risk Management, and W. Scott Lewis, Associate Vice-Provost at the University of South Carolina, authored "College and University Liability for Violent Campus Attacks." The article was published in *The Journal of College and University Law, Volume 34, No. 2 (2008).*

Recently, Christine Pickel and Barbara Lovelace, both from the Philadelphia office, have learned that their article, "Take the Investigation Into Your Own Hands—Identifying and Minimizing Conflict of Interest Issues at Colleges and Universities," will be published in the 2008-2009 *URMIA Journal.* Jim Keller's article, "Second Life: Virtual Campuses, Real World Risks," will also be published in the *URMIA Journal.*

If you would like to discuss any of these issues in more detail—or have a topic that you would like to see us address—please do not hesitate to contact any member of Saul Ewing's Higher Education Practice Group.

This update was written by James A. Keller, a Partner and Chair of the Higher Education Practice Group. Jim can be reached at 215.972.1964 or jkeller@saul.com.

DeJohn v. Temple University:
The Third Circuit Emphasizes the Importance of Free Speech on University Campuses

By Amy Foerster

Just in time for the new academic year, the Third Circuit has issued a detailed analysis of the constitutionality of sexual harassment policies in DeJohn v. Temple University.[1] The related lesson of the Court's August 4, 2008 decision, however, bears on an institution's attempts to remedy policy problems brought to its attention through litigation. In DeJohn, the Court indicated that even if a college or university changes the allegedly offending policy in response to issues raised in litigation, that alone will not absolve the institution of liability.

Christian DeJohn was a Temple University graduate student pursuing a master's degree in Military and American History while serving as a member of the Pennsylvania National Guard. When DeJohn enrolled at Temple in January 2002, the University's Code of Conduct as it related to sexual harassment read, in relevant part:

> *all forms of sexual harassment are prohibited, including ... expressive, visual or physical conduct of a sexual or gender-motivated nature, when ... (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.*

DeJohn claimed that as a student, he found himself engaged in conversations arguably within the prohibited ambit of the policy, particularly when expressing

[1] DeJohn v. Temple University, et al., —F.3d —, 2008 WL 2952777 (3d Cir. August 4, 2008).

his opinions concerning women in the military, and his related social and cultural views. DeJohn sued Temple University, its former president, and two of his former graduate school professors, alleging that his concern that his opinions may be sanctionable by the University under the policy had a chilling effect on his ability to exercise his right to freedom of speech and expression.

Eleven months into the case, and less than three weeks before the deadline for filing dispositive motions, Temple modified its sexual harassment policy. The new policy, which was not challenged by DeJohn, apparently resolved the concerns DeJohn identified under the prior policy.

Upon consideration of dispositive motions, the United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of DeJohn, declaring the former policy facially unconstitutional and enjoining Temple from ever re-implementing it. Following trial, DeJohn was awarded $1.00 in nominal damages, entitling him to recover attorneys' fees. Temple appealed.

Changing the Policy did not Render DeJohn's Claims Moot

Temple argued that DeJohn's claims were mooted by its change in policy, so that the District Court lacked jurisdiction to declare the former policy unconstitutional. The Third Circuit disagreed, articulating its view of the mootness doctrine where policy changes are involved.

The Court noted that voluntary cessation of allegedly illegal conduct generally does not render a case moot, because the offending party can simply revert to its prior behavior at a later date. There are limited circumstances under which a change in policy can render a claim moot, but the bar for doing so is high. Reformed behavior can render a case moot if:

> *(1) it can be said with assurance that "there is no reasonable expectation ..." that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.*

It is the first of these two prongs—an assurance of no reasonable expectation—that lends itself to case-specific interpretation by the courts. After all, if an entity makes a policy change in response to litigation, this subjective test begs the question, "but do you really mean it?"

The Court in DeJohn apparently was not convinced.

Noting that Temple waited one year following the commencement of litigation to change its policy and continued to defend its former policy throughout discovery, the Court concluded that it was "left with no assurance" that Temple would not re-implement its former policy. Emphasizing the formidable burden faced by Temple, the Court noted that "there have been no subsequent events that make it absolutely clear that Temple will not reinstate" its former policy. In fact, the Court determined that there was no evidence that the change was the result of substantial deliberation. In sum, the Court was not convinced that Temple was committed to its new policy.

Temple's Policy was Unconstitutionally Overbroad

Once it determined that DeJohn's claims were not moot, the Third Circuit turned its analysis to the constitutionality of Temple's sexual harassment policy. In doing so, the Court took the overbreadth doctrine to a place where the United States Supreme Court has not yet taken it—the public university campus.

The Court concluded that Temple's former policy—which prohibited speech having the "purpose *or* effect" of intimidation or unreasonable interference—was overbroad, because it focused on the speaker's motive, regardless of the effect of that motive. The Court determined that the policy prohibited speech *intending* to interfere with an individual's work, educational performance, or status, despite the fact that the speech may not have its intended effect. The Court found that this broad prohibition is contrary to the Supreme Court's dictate that speech cannot be prohibited without the tenable threat of disruption.

DeJohn already has many institutions re-examining their harassment and discrimination policies. When doing so, remain cognizant of the line between protecting students from speech that causes a substantial disruption to educational performance, and subjecting students to regulations that impinge on their right to free speech and expression.

This article was written by Amy C. Foerster, an Associate in the Higher Education Practice Group. Amy can be reached at 717.257.7573 or afoerster@saul.com.

In the News...

On October 1, the Internal Revenue Service issued a press release stating that 400 colleges and universities throughout the United States will begin receiving compliance questionnaires (Form 14018) from the IRS in early October. The 33-page form, which is being sent to a cross-section of small, mid-sized and large private and public institutions, will focus on unrelated business income, endowments and executive compensation practices.

The IRS has posted additional information on its website: http://www.irs.gov/charities/article/0,,id=186865,00.html.

The Higher Education Opportunity Act: Better Late than Never?

By Amy Foerster

Congress passed the Higher Education Opportunity Act ("HEOA") on July 31, 2008, completing its reauthorization of the Higher Education Act of 1965, as amended—five years late. President Bush signed the HEOA into law on August 14, 2008.

To date, the United States Department of Education's website does not contain any specific guidance regarding implementation of the HEOA. The Department has indicated, however, that it will issue a letter summarizing each provision. In the meantime, institutions are responsible for taking steps to comply with the provisions of the HEOA in accordance with the Act's effective dates.

The HEOA, which is several hundred pages long, does not lend itself to a quick summary and others have already summarized it at a high level. There are, however, some interesting but lesser-discussed provisions worth noting, including:

- **Distance Education** – Accrediting bodies must require that institutions offering distance education have processes in place to establish that the student who registers for a distance education course is the same student who participates in and receives academic credit for the course.
- **Dual Enrollment** – The HEOA amends the definition of an "institution of higher education" to permit institutions to admit as regular students individuals who will be dually or concurrently enrolled in the institution and a secondary school. This provision, effective July 1, 2010, should resolve some of the confusion previously faced by institutions that have been participating in dual enrollment programs with local secondary schools, but were prohibited from treating those students as regularly enrolled.
- **Unit Record Databases** – The HEOA specifies that states are not prohibited from developing, implementing, and maintaining unit record database systems containing information related to enrollment, attendance, graduation and retention rates, student financial assistance and graduate employment outcomes.
- **Protection of Student Speech and Association Rights** – The HEOA supplements the "Protection of Rights" section set forth in the Higher Education Act by including an enumerated "sense of Congress" provision addressing the facilitation of the free and open exchange of ideas, and related speech issues.

We recommend that institutions confer with counsel to promptly identify those sections of the HEOA requiring immediate compliance and to plan for future mandates.

This article was written by Amy C. Foerster, an Associate in the Higher Education Practice Group. Amy can be reached at 717.257.7573 or afoerster@saul.com.

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