Some Legal Issues for Department Chairs/Heads

When you, as a department head/chair, take an action as part of your job, <u>you act as an agent of the university</u> rather than merely as an individual.

Whether you intend it or not, your actions may commit the university and may have consequences that generate legal actions.

Your failure to take actions or to take them in a timely fashion may also generate legal risks for your institution.

"Litigation Happens"

Preventing legal actions is clearly desirable, but not a good reason to avoid taking necessary actions or to act against your own principles.

When legal actions (and threats of actions) do arise, handling them well is important in creating/ maintaining a healthy department with a good work environment. This doesn't mean buckling to threats, but does mean carefully assessing your options.

When legal threats or actions arise, specific federal or state laws will come into play. In addition the faculty handbook, offer letters, or collective bargaining agreements may be regarded as contractual.

University lawyers can help you navigate the law; work closely with them as soon as a legal problem arises.

Do not rely on lawyers to identify the best course of action in a given situation. But do get advice from them on the course of action you intend to take.

The university's lawyers are there to protect the university's interests, which may not always coincide with your interests or those of your department. So take that into account as you consider their advice.

General guidelines for avoiding legal problems:

1. Know (and follow) the policies at your university.
   Faculty handbook
   HR policies for non-faculty staff
   Academic policies

2. Know where to go for help finding and interpreting policies.
   Provost's Office
   Human Resources
   Office of Equal Opportunity
   General Council's office
   Student Affairs
   Vice President for Research/Research Integrity Officer

General guidelines for avoiding legal problems

3. Alert appropriate administrators (dean, legal, OEO, etc.) when problems arise. Don't try to fix everything on your own.

4. Know the university's internal resources for resolving problems, including the grievance process and tools for conflict resolution.

5. Make sure the members of your department know the policies governing discrimination, hiring, firing, sexual harassment, and confidentiality of records to which they have access. Make sure this information gets to temporary instructors and to teaching assistants.

General guidelines for avoiding legal problems

6. **Document!** Don't just document the problem cases. Also document positive cases so that there is a clear record of what merited a positive evaluation, tenure, promotion, a raise, or any other "reward". (But also be aware that anything you put in writing may be "discoverable".)

7. Don't make promises you can't keep. Make sure you know the limits of your authority. Because you are an agent of the university, the courts may interpret your promises as legally binding. Statements you make, even casual comments, may be viewed as contractual commitments made on behalf of the institution.

8. Be cautious about casual comments that could be misconstrued as evidence of discrimination.

Your Liability

Find out what protection your employer provides you. Most universities indemnify faculty with regard to legal consequences that arise either from actions you take or actions you failed to take.

Conditions of indemnification:

The actions were taken as part of your job, not outside of the job.

You were acting in good faith.

You are not found by a court to have engaged in misconduct or to have committed negligence.

Communication about issues that may generate legal actions:

Written communication, your notes, e-mails, etc. may be discoverable.

So be careful about what you put in writing. Do, however, take thorough notes on all relevant conversations or meetings with the person who is the source of the problem.

When discussing problem cases with university administrators or lawyers, consider using the telephone or meeting face-to-face rather than communicating by e-mail.

But, if you are acting on the instruction or advice of university administrators or lawyers, get the instruction/advice in writing.

Personnel decisions are the biggest source of legal actions

Department heads/chairs are agents of the University when participating in hiring, firing, tenuring, promoting, setting salaries, determining raises, assigning workloads, disciplining, and allocating resources.

Any of these can be contested. You are on the frontline and will be involved in any legal action arising in your department.

Make sure your decisions are not only fair and consistent, but that there is not even the appearance that race, gender, or age were factors. Think about how your decisions could be misconstrued and what you might do to avoid that.

From the AAUP website:

Generally, courts are deferential to colleges and universities. They are uninterested in "second guessing" academic decision-making or becoming "super-tenure committees." Nevertheless, courts will examine cases in which institutions fail to follow their own policies and procedures, or where a colorable claim of discrimination is alleged.

DOCUMENT!

Document welcome decisions as carefully as the unwelcome. In a legal case, you will to need to produce documentation that shows what “successful” performances look like.

Think about how your words (or lack of words) could look if you find yourself on the witness stand.

Avoid surprising people.

Warn people if you see problems developing.

Communicate in advance with the Dean.

Once you think there will be trouble, communicate with other university offices that are likely to become involved (e.g. Office of Equal Opportunity).

Be civil and respectful even when others are not.

Search Process

The process should prevent discrimination and the appearance of discrimination.

Carefully follow institutional procedures.

To the extent practical in your department, appoint a diverse search committee.

The position needs to be advertised for at least 30 days.

The job description needs to clearly state criteria and those criteria need to be job-related.

Efforts targeted at bringing diverse candidates into the applicant pool are legal, although hiring quotas are not.

Search Process

Know what you cannot ask (e.g. about marital status, spouses, or children) and remind faculty.

You can ask whether they have any particular concerns that might affect whether they would accept the position. Once they bring up a topic, it's alright to talk about it.

You can ask whether they are available to teach in the evening or on the weekend, assuming it's relevant to the position, but you must ask all candidates the same question.

Search Process

Check references. Use a standard set of questions as a starting point for reference checks.

There may be legal liability if someone is hired based on false credentials and reference checks were not made.

Search Process and Inside Applicants

Be careful and be humane when in-house adjuncts are potential candidates for tenure-line positions.

Make sure they know the position is opening up and that they know how to apply.

If they are qualified and have performed well as adjuncts, they should be given full consideration and not treated as second-class.

The Offer

Be sure you know who has the authority to make a formal offer. It's usually not the department chair/head, but if you make an offer the courts may treat it as having been made by an agent of the university.

If you contact the candidate by phone to tell them a formal offer is in the works, be careful about what you say. Be clear that you anticipate the offer and when you anticipate it, but that you are not empowered to make the offer.

If you negotiate the details of salary, start-up, start date, etc. prior to the issuance of the written offer, be explicit about your lack of authority.

The Offer

Appointment letters are considered contracts. If those letters reference the institution's faculty handbook, it may also be considered part of the contract. In some states the faculty handbook may be regarded as contractual even if it is not referenced in the appointment letter.

If you help craft the offer letter, be careful about specifics:

Salary, rank, initial workload distribution, start date, and startup funding are standard.

But be cautious about putting commitments about space, specific teaching assignments, or tenure into the offer letter.

Pre-tenure Performance Reviews

Accuracy matters.

A glowing review in the 3rd or 4th year followed by a tenure denial is hard to justify in court. Even a bland review that gives few specifics followed by a denial could be trouble.

Clearly document problems.

Be thorough and specific.

Annual reviews of pre-tenure faculty are also important. Failure to communicate that there is a problem with an individual's performance, followed by tenure-denial, can result in lawsuits. Accurate annual evaluations become important if someone denied tenure asserts they were not informed of deficiencies.

Clear and timely communication about deficiencies is also humane.

Pre-tenure Performance Issues

Additional documentation of particularly serious problems or recurrent problems should be created as the problems come up.

Don't just talk to the faculty member the 2nd or 3rd time they use abusive language with a student. Put your concerns in writing to the faculty member and copied to their personnel file.

Consult with appropriate offices (the dean, central administration, or university attorneys).

Tenure and Promotion Criteria and Procedures

Be sure tenure-line faculty are given complete and accurate information about T and P procedures and about any particular standards that are in place.

Be sensitive to how rigidly constructed tenure criteria may affect some candidates. Minority candidates and, where in male-dominated disciplines, female candidates often carry unusually heavy service and mentoring loads.

Interdisciplinary collaborations may be undervalued if criteria are rigidly set. (But overly vague criteria can also cause problems.)

Tenure and Promotion Evaluation Process

Do not introduce uninvestigated claims of misconduct into deliberations.

Be diligent in keeping the procedures constant from one candidate to another.

Tenure/promotion

Follow institutional guidelines for solicitation of external letters.

Two cases noted on AAUP website:

Kansas State was found to have illegally departed from its procedures in a case where tenured faculty voted without seeing external letters first. (El-Ghori v. Grimes, 1998)

University of Minnesota was found to have discriminated against a female faculty member by soliciting an unusually large number of letters (more than 40) (Ganguli v. University of Minnesota, 1996)

Collegiality Issues in Tenure/Promotion Evaluation

"*The current tendency to isolate collegiality as a distinct dimension . . . poses several dangers. Historically, collegiality has not infrequently been associated with ensuring homogeneity, adherence with practices that exclude persons on the basis of their difference from a perceived norm. The invocation of collegiality may also threaten academic freedom. . . . A fundamental absence of collegiality will no doubt manifest itself in the dimensions of scholarship, teaching, or, most probably, service. . . . [Accordingly,] an absence of collegiality ought never, by itself, constitute a basis for nonrenewal, denial of tenure, or dismissal for cause. . . .*"
AAUP, "On Collegiality As a Criterion for Faculty Evaluation," Academe (September-October 1999.)

“Collegiality” is sometimes seen as “code” for ensuring homogeneity. Discrimination cases have resulted.

Rather than directly invoking lack of collegiality, <u>keep the focus on the disturbance the person causes</u>. For example, that the person is communicating (or failing to communicate) in a way that is inhibiting other people’s productivity.

Timeliness

You need to know and adhere to time limits for notifying faculty that they are not being reappointed.

Example from the Colorado State University Faculty Manual:

> *d. If the department head does not propose to reappoint a non-tenured faculty member holding a regular full-time or regular part-time appointment, the faculty member shall be informed in writing that the appointment will not be renewed. This must be done by March 1 during the first year of employment, by December 15 during the second year, and at least twelve (12) months before the expiration of the appointment in succeeding years.*

Best practices for avoiding legal fallout from faculty evaluations

- Be consistent about standards and information used.
- Be conscientious. Put in the effort to read what is submitted and ensure that you evaluate everyone using consistent standards.
- Be honest and be specific. If a performance was below expectations, say so and say why. If it exceeded expectations, say why.
- Be timely.
- Properly document all evaluations.

For pre-tenure faculty

- Include realistic assessment of whether their performance is meeting expectations for granting of tenure, but avoid giving assurances about granting of tenure.

Evaluation of non-tenure track faculty

Typically these faculty are not systematically evaluated.

If the institution offers no guidance, departments can adopt their own systematic practices to ensure that all in similar positions are treated similarly.

Ensure that there is a paper trail documenting strengths and weaknesses of all.

These are commonly beginning faculty members who need and deserve mentoring.

Faculty evaluation litigation – Five “recurring themes” compiled by the American Council on Education

1. Evaluators were “arbitrary, inconsistent, or otherwise ill-equipped” to perform the evaluation.

2. Institutional procedures were not followed.

3. Unfair use or weighting of student evaluations.

4. Evaluators considered inappropriate information.

5. Criteria/procedures were arbitrary or were unacceptable to the candidate.

Discrimination

Claiming discrimination in faculty hiring, promotion, and compensation is complicated.

The claim needs to establish that the faculty member was treated differently than similar faculty members; it can be hard to establish who is truly similar.

It can also be difficult to establish who is responsible for the discriminatory act. There are many players in the action (faculty committee, chair/head, dean, provost, etc.)

Discrimination

To be actionable it must be based on the individual's membership in a statutorily protected class:

Race or ethnicity, gender, disability, alien status, age, religion, Vietnam-era veteran status.

Sexual orientation is not covered by federal law, but is by some state laws.

Discrimination on other grounds (for example, a job candidate's lack of publications) is legal.

Actions in someone's favor may be legal. Favoritism toward an individual does not necessarily demonstrate discrimination against others.

Steps in a discrimination case

To claim discrimination, a person must demonstrate that they belong to a protected class and that they were denied something for which they applied and were qualified.

Then: The institution needs to articulate (but not prove) a reason, other than the person's membership in the protected class, for the action that was taken.

Then: The complainant needs to refute the nondiscriminatory reason for the action. This can be either by "direct proof" or by "indirect proof" (circumstantial). Direct proof is rare.

Age Discrimination in Employment Act

Applies to people over 40. Not only is mandatory retirement illegal, you should not ask about retirement plans even in casual conversation. Only talk about retirement after the employee has initiated the conversation.

If you have an older faculty member who is no longer performing the job adequately, you can talk to them about their performance and you can document it in evaluations, but keep the focus on the job performance and don't make reference to age.

Work with the appropriate administrative office to see what remedies might be available (post-tenure review?).

Americans with Disabilities Act

Prohibits discrimination based on disability. Applicants who can perform the essential functions of a job cannot be passed over because of a disability. The employer is required to provide "reasonable accommodation" to enable an employee to do a job, unless the accommodation imposes "undue hardship" on the employer.

Both physical and mental disabilities are covered. You can ask for documentation that a diagnosis was made by a qualified professional and you can ask for a second opinion. There is likely an office on campus (e.g. OEO) that handles assessing documentation of disability and the need for accommodation. Work with them.

Americans with Disabilities Act

Examples of “undue hardship” include requests to work from home, when the job needs performed at the workplace (e.g. a receptionist position), or an open-ended disability leave.

ADA also applies to students and can come up with regard to field camp or field trips. Work with the office on campus that provides services for disabled students. Make sure faculty know how to handle student requests for accommodation.

Retaliation

"Call me this and call me that and I'll hit you with a baseball bat"

"Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**." www.eeoc.gov/laws/types/facts-retal.cfm

Retaliation

Retaliation covers actions by the employer against any employee who does any of the following:

- makes a charge of discrimination or harassment
- participates (e.g. as a witness) in proceedings about charges
- makes a claim of an unlawful employment practice

This can also include employees exercising other employment rights, e.g. their right to family leave or worker's comp.

Retaliation

Adverse actions can include

- firing
- refusing to hire
- denial of promotion
- unjustified negative evaluations or references
- increased surveillance
- hostile attitudes
- changes in work assignments

Retaliation can be charged regardless of whether the original complaint had any foundation.

Retaliation complaints are easier to win than are discrimination complaints.

Retaliation complaints have been rising. In 2009, 25% of EOOC complaints were for retaliation.

In both discrimination and retaliation cases, the employee bringing the charge has a right to as much confidentiality as possible.

They also have a right to be treated civilly and with respect.

It can be difficult to be publicly silent about the case when departmental chatter is out of hand, but as department head/chair you simply cannot share information about a case.

Stray Remarks and Discrimination/Retaliation Cases

Stray remarks can be dangerous and could come back to haunt you in discrimination cases.

"Have you considered retiring?"

"We need to hire a woman because we need an advisor for the geology club."

"I like hiring women because you don't have to pay them as much."

Comments compiled by ACE (not their full list) that have been used in litigation over tenure denial and other faculty issues. (Made varyingly by chairs, presidents, faculty members; some in written documents, some not.):

"She is able to get her work published because of her relations with her publisher." Comment by faculty member during departmental consideration of tenure.

"Women and blacks don't have any trouble getting jobs." Comment by senior faculty member after vote against promoting female faculty member.

"It will go through because she is a woman." Comment by departmental member of tenure and promotion committee, later used by male denied tenure.

"Your performance wasn't bad for a broad." Comment by chair, used by a different female faculty member who was denied tenure.

"Us white folks have rights too." Comment during departmental consideration of tenure for an African American faculty member.

“I feel we should not have too many Chinese or Indian professors here. With too many foreign-born professors they would not assimilate culturally and therefore would not be good role models for American students.”

“The department made a mistake in bringing in a person of such advanced age to teach classes one after another. The university is trying to renew itself.”

“She had trouble attracting graduate students because she was too feminine, namely too unassuming, unaggressive, unassertive, and not highly motivated for vigorous interpersonal competition.” Comment by faculty member on tenure committee.

“I have trouble working with her because she reminds me of a prison matron.” Faculty member commenting to another about a candidate for department head. Comment used in discrimination lawsuit.

“Because of federal legislation that has eliminated a mandatory retirement age, institutional flexibility would be undesirably constrained and the granting of tenure in this instance is likely to foreclose a more appropriate appointment later.” Letter from president to 60 year old being denied tenure.

Sexual Harassment

Two kinds: Quid pro Quo and hostile environment

A hostile environment claim requires that harassment is pervasive and severe. This can include threats that if acted on would be quid pro quo harassment.

The employer is required to use reasonable care to prevent harassment from occurring. This usual means having a sexual harassment policy. The employer also must promptly act to correct harassment.

"Indifference" to harassing behavior on the part of official empowered to correct the behavior is an issue.

Sexual harassment

You have an obligation to intervene in student-on-student harassment, as well as in faculty-on-student or faculty-on-faculty harassment.

You cannot promise confidentiality. Once you have been told about harassment, you have an obligation to report it right away. If a student or employee asks that you hold confidential something they are about to tell you, be careful. Warn them that there are things you would be obligated to report. You can, however, usually direct someone to an office that is not obligated to report, for example, the Ombuds office or the campus counseling center.

Sexual harassment

You should not try to resolve sexual harassment claims on your own; to do so puts the institution at legal risk. You must take the problem to the appropriate office in your institution (senior administrators, OEO, human resources).

Do take good notes of conversations in which you are informed of possible harassment. Write these notes with possible litigation in mind.

A few sources of additional information:

AAUP "Issues in Higher Education"
www.aaup.org/AAUP/issues
- site includes extensive list of additional resources

http://www.apsanet.org/imgtest/PSApr06ChairsWorkshop.pdf

American Council of Education website:
www.acenet.org