



Legal Issues Impacting Community Colleges

Recent rulings and guidance involve Title IX regulations, COVID testing, and denial of health coverage.

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THE FOLLOWING RECENT LEGAL DEVELOPMENTS ARE IMPORTANT TO the day-to-day administration of community colleges and the continuing education of community college governing boards.

Long-awaited Title IX proposed regulations issued. The Biden Administration's Department of Education issued its long-anticipated proposed Title IX regulations on June 23, 2022. The proposed regulations consist of a 700-page document published in the Federal Register and are open for public comment for 60 days. Significant highlights include expanding the definition of sex harassment to include prospective claimants who allege discrimination or harassment based on sexual orientation, gender identity, pregnancy, and any situation that creates a "hostile environment."

The proposed regulations throw out the Trump Administration's definition, which required the alleged sex harassment be "so severe and pervasive to be objectively offensive" and returned to the pre-Trump "severe and pervasive" standard, which is considered by most commentators to be a lower bar for future alleged sex harassment victims.

The proposed regulations also expand jurisdiction over alleged sex harassment to include off campus and out-of-country matters, which would include study abroad situations. Finally, the



"The police want to ask you a few questions about where you get such good health insurance at such an affordable rate."

The EEOC also recently issued guidance on July 12, 2022, that before requiring employees to submit to COVID testing, employers should consider whether current pandemic circumstances and individual workplace circumstances justify viral screening of employees.

proposed regulations also eliminate the requirement that investigations include cross examination of victims and in-person hearings. We will follow developments as these regulations ultimately wind their way to finalization.

Transgender sheriff's deputy wins Title VII lawsuit over denial of coverage of sex change surgery but loses ADA claim based on gender dysphoria. A federal district judge in Georgia ruled in favor of a sheriff's deputy who alleged she was improperly denied coverage for a sex change and related genital surgery under the county's health plan. The judge concluded that pursuant to the Supreme Court's 2020 decision in the *Bostock* case, gender identity discrimination is prohibited by Title VII of the Civil Rights Act of 1964. The judge ruled that the exclusion for "sex change surgery" contained in the county's insurance policy is facially discriminatory to transgender plan participants (*Lang v. Houston County*, 2022 BL 191359 M.D. Ga. No. 5:19-cv-00392, 6/2/22).

The judge observed that it is undisputed that mastectomies are covered when they are medically necessary for a cancer treatment but not when they are medically necessary for a sex change procedure. Similarly, hormone replacement therapy is covered when medically necessary to treat menopause but not when medically necessary for a sex change. The judge concluded that this exclusion applies only to transgender participants and therefore violates Title VII.

However, the judge dismissed the plaintiff's claims under the Americans with Disabilities Act (ADA), ruling that the ADA exclusion of "gender identity disorders" from coverage under the statute applies to plaintiff's medical condition of "gender dysphoria."

College subject to gender-based discrimination claim by professor/applicant for position that was never filled. The Court of Appeals for the Sixth Circuit recently overturned a trial court's dismissal of a Title IX gender discrimination lawsuit filed by the top-ranked applicant for a position that was not filled. The plaintiff, a male, alleged gender discrimination against him by way of a plot to leave the position he was ranked first for unfilled, and then create two new, separate positions that were filled by female applicants.

While the trial court dismissed the case as "unripe" as the original position was never filled, the appeals court reversed the dismissal, holding that an employer can commit hiring bias a number of ways, including cancelling a job opening in favor of creating a new position in which to hire an employee of a different gender. (*Charlton-Perkins v. University of Cincinnati*, 2022 BL 292328, 6th Cir. No. 21- 13840, 6/3/22). The appeals court concluded that the alleged failure to hire the male plaintiff professor, despite the fact he was the top-ranked applicant, is enough by itself to describe an adverse employment action and state an actionable discrimination claim for relief.

EEOC reaches settlement banning employer collection of family COVID testing results. In a case with potential application to higher education employees, the U.S. Equal Employment Opportunity Commission (EEOC) reached a settlement of a charge it brought against a medical employer. The case alleged that the employer violated the Genetic Information Act of 2008 (GINA) when it collected family COVID testing results from its employees. Title II of GINA bans employers from collecting an employee's genetic testing results and a worker's family medical history. However, the EEOC also issued guidance stating that an employer can still ask its employees if they had contact with anyone who has been diagnosed with COVID or who has had COVID symptoms.

The EEOC also recently issued guidance on July 12, 2022, stating that before requiring employees to submit to COVID testing, employers should consider whether current pandemic circumstances and individual workplace circumstances justify viral screening of employees. Essentially the EEOC's position is that before going forward with workplace COVID screening, the employer must demonstrate a "business necessity" based on general pandemic circumstances and individual workplace circumstances.

Federal court holds that discharge proximity to an employee's filing for extended FMLA leave warrants a jury trial over retaliatory discharge claims. A federal district judge recently ruled that a plaintiff's claim that she was retaliatorily discharged shortly after seeking an extension in leave to deal with mental health problems warrants a jury trial over Family and Medical Leave Act (FMLA) retaliatory discharge allegations.

The plaintiff was a human resources manager who allegedly suffered from depression and anxiety. The plaintiff had requested and received a three month leave of absence based on the recommendation of her physician for mental health reasons. When the three-month leave concluded, the employee requested an additional month, followed by a part time work schedule that progressively added more days to the job.

Her employer argued that it was entitled to summary judgement because the plaintiff was discharged before the employer made a decision on the FMLA extension. However, the court ruled that the employer's explanation of the reasons for discharge warrants a jury fact finding as to the timing and reason for discharge, and dismissed the employer's motion for summary judgement (*Moryn v. G4S Solutions USA, Inc.*, 2022 BL 222775 Dist Minn. No. 0:21-cv-00123, 6/28/22).



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