

Legal Issues Impacting Community Colleges

Recent rulings and guidance involve student athlete compensation, LGBT rights, COVID-19 vaccinations, and student online speech.

By Ira Michael Shepard, ACCT General Counsel

THE FOLLOWING IS A SUMMARY OF recent legal developments important to decisionmakers in the higher education and community college community.

U.S. Supreme Court rules against NCAA in antitrust lawsuit, opening the path to greater compensation for student athletes. On June 21, 2021, the U.S. Supreme Court ruled against the NCAA in a landmark antitrust lawsuit, reversing prior precedent and opening the door for colleges and universities to provide “educational benefits” to athletes which were previously barred or limited by NCAA rules. In a unanimous decision written by Justice Neil Gorsuch, the Supreme Court affirmed the lower court of appeals decision of the Ninth Circuit that the court should apply a “rule of reason” analysis to future disputes brought by student athletes.

The *National Collegiate Athletic Association v. Alston* decision opened the door to payment of educational benefits such as reimbursement for computers, musical instruments, free tutoring, internship stipends, and cash academic achievement awards. While the decision was narrowly focused on educational benefits, commentators have concluded that it could make a difference down the road for student athletes trying to profit off their names, images, and likenesses (NIL). Nearly 20 states have passed laws in the past two years allowing student athletes to earn money from third parties for NIL despite the NCAA's conflicting “amateurism rules.”

U.S. Supreme Court to decide

whether emotional distress damages are compensable to disability plaintiffs under the Americans with Disabilities Act (ADA) and under section 504 of the Rehabilitation Act. The U.S. Supreme Court has agreed to decide whether emotional distress damages are available to discrimination victims under Section 504 of the Rehabilitation Act of 1973

and under the ADA to resolve a split in the Federal Appeals Court Circuits on this issue (*Cummings v. Premier Rehab PLLC*, U.S. No. 20-219 cert granted, 7/2/21). The Fifth Circuit Court of Appeals, covering Texas, Louisiana, and Mississippi, recently ruled that emotional distress damages are not available to disability discrimination victims, reasoning that these damages



“Remind me again—what do I usually promise you so you’ll take on extra work?”

are not available in contract claims, which are akin to discrimination claims under the statutes.

The Fifth Circuit decision is at odds with an Eleventh Circuit decision (covering Alabama, Georgia, and Florida) holding that emotional distress damages are frequently suffered by victims of discrimination and therefore are foreseeable by employers covered by these statutes.

The Supreme Court will address the conflict between the circuits on this issue in its next term. We will follow the Supreme Court's action on this issue in the future and report on the ultimate resolution.

U.S. Equal Employment Opportunity Commission (EEOC) opposes religious class action challenging LGBT rights.

The EEOC has opposed a class action suit filed in federal court in Texas attempting to exempt “all employers” from complying with federal LGBT protections if they have religious or non-religious objections to “homosexual or transgender behavior” (*U.S. Pastor Council v. EEOC*, N.D. Tex., opp. to class certification). The EEOC is arguing that such a case is not suitable for class status as each case is different and must be decided on a case-by-case basis. In its earlier ruling in favor of LGBT protections under Title VII in the *Bostock v. Clayton County* case, the Supreme Court left open whether religion can be used to bypass discrimination laws.

EEOC guidance affirms that employers can offer vaccine incentives to employees. The EEOC issued guidance indicating that employers may offer bonuses and other incentives to encourage employees to get the COVID-19 vaccine. The Commission concluded that “Federal Equal Employment Opportunity (EEO) laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party in the community such as a pharmacy, personal health care provider, or public clinic.” However, employers that administer vaccines to their employees must ensure that the incentives are not coercive, according to the guidance.

The EEOC also pointed out that vaccinations require employees to answer pre-vaccination disability-related screening questions. The EEOC further concluded that a very large incentive could make employees feel pressured to disclose protected medical information. The EEOC emphasized that employers must keep worker vaccination information confidential if they choose to obtain it to comply with the Americans with Disabilities Act.

Supreme Court hears oral arguments in “angry cheerleader” case, with First Amendment ramifications for higher ed. The U. S. Supreme Court recently heard

oral arguments in a pending case over whether a school district may discipline students for social media posts under the First Amendment. Although the case arose in the K-12 school district context, the ruling may have First Amendment application to public community colleges and their ability to restrict student online speech.

The case stems from an incident in which a high school sophomore was disciplined after she shared a picture of herself on the Snapchat social media network with her middle finger raised and the accompanying caption, “F— School, f— softball, f— cheer, f— everything.” The cheerleading coach heard about the post and suspended the student from the junior varsity team for the entire year. The student's parents then filed a First Amendment lawsuit which recently made it to the Supreme Court for argument. We will also follow this case and report on the result.



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