Presidential Leadership Intensive Week

Working With A Legal Team

Faculty Aging And Retirement Legal Issues

Thomas R. Johnson
ATS Treasurer
K&LNG
tjohnson@klng.com

© Kirkpatrick & Lockhart Nicholson Graham LLP
I. WORKING WITH A LEGAL TEAM

A. How To Recognize When You Need A Lawyer
   1. Governance (Bylaws, charter, etc.)
   2. Litigation
   3. Employment issues
      a. manuals
      b. policies (i.e. harassment)
      c. retirement (ADEA)
      d. faculty termination and discipline
      e. FMLA
      f. ERISA
      g. employment agreements
President Leadership Intensive Week

4. Tax status 501(c)(3)
5. Real estate and construction
6. Intellectual Property
7. Immigration
8. Homeland security/Patriot Act; subpoenae
9. Important specialized contracts
   a. IT/helpdesk outsourcing
   b. Food service
   c. Transportation
10. Board lawyer advice
B. Finding And Choosing A Good Lawyer And Firm

1. Expertise; lawyer v. firm

2. Geography

3. Engagement partner
   a. wisdom
   b. standing in firm
   c. responsiveness/availability
   d. familiarity with higher education
   e. issues
   f. billing flexibility
4. Independence
5. Who should be contact?

C. Working With Counsel
   1. Involve early; prevention v. crisis
   2. Ask re: expertise and prior experience
   3. Provide all facts; update
   4. Attorney-Client privilege
   5. Make sure there is a clear understanding of who is the client
6. Lawyer independence
7. Seek estimate or commitment on cost; ask if research necessary
8. Ask questions
9. Request advice in writing?
10. Email communications
11. Request least expensive qualified lawyer?
12. Benefit of experience and wisdom
13. Conclude engagement
D. Lawyer Charges & Billing

1. Hourly rates, based on experience, market


3. Not to exceed fees

4. Fixed fee

5. Contingent fee

6. Success fee
7. Value billing
8. Discounts
9. Regular (monthly) billing
10. Challenge if unfair, too much or contrary to understanding
11. Retainer arrangements
12. Final bill
F. Long-Term Relationship

1. Familiarity with school, policies, personnel, issues etc.
2. Institutional memory
3. Specialists for unique issues
II. FACULTY AGING AND RETIREMENT: LEGAL ISSUES

A. The Problem (both a blessing and a curse)

1. Since 1986, ADEA amendments prohibit any mandatory retirement age

2. Many defined benefit pension plans reward faculty for working long so they do

3. Better health/longer life expectancy
II. Faculty Aging And Retirement (cont d.)

4. Aging faculty
   a. strained budgets (senior profs=higher comp)
   b. performance issues
   c. lack of new blood
   d. bigger generation gap
   e. diminishing vitality of faculty
   f. inability to diversify
II. Faculty Aging And Retirement (cont d.)

B. The Law

1. To establish a *prima facie* case of age discrimination, one must show
   a. in protected aged group: 40 and over
   b. suffered adverse employment action
   c. qualified for the position
   d. replaced by or treated differently than a younger person
II. Faculty Aging And Retirement (cont d.)

2. Then, employer bears burden of showing legitimate, non-discriminatory reason for action taken

3. Then, employee tries to show that employer’s reason is merely a pretext for age discrimination
II. Faculty Aging And Retirement (cont d.)

4. What is Adverse Action?
   a. a material change in terms and conditions of employment
      i. termination
      ii. demotion
      iii. salary reduction
      iv. substantial modification to responsibilities and duties
      v. tenure denial
II. Faculty Aging And Retirement (cont d.)

b. adverse action cases
   i. removing a phone: No
   ii. changing or reducing office space: No
   iii. change in department name due to reorganization: No
   iv. reduction in course load: No
   v. denial of teaching preferences: No
   vi. removal as Ph.D. mentor: No.
   vii. supervision by less experienced department chair: No
II. Faculty Aging And Retirement (cont d.)

C. Seminaries May Make Legitimate Business or Pedagogical Decisions Regarding Senior Faculty

1. failure to ask to teach in continuing education programs due to poor lecturing: OK

2. deny tenure due to lack of scholarly publication: OK

3. removal/reduction of research space or assistants due to lack of grant revenue to support: OK
II. Faculty Aging And Retirement (*Legitimate Decisions*)
(cont d.)

- 4. change in department and courses requiring complete change in course syllabi and curriculum: NOT OK

- 5. What about?
  a. termination due to speech inconsistent with denomination’s policy (*i.e.* gay marriage) [academic freedom issues]
  b. failure to appoint to a named chair with greater prestige
II. Faculty Aging And Retirement (cont d.)

D. AVOID!

- 1. ageist comments (too old, over the hill, tired, slowing down, past his prime)
- 2. urging faculty to retire; do not pressure (how to plan?)
- 3. salary reduction, termination, demotion unless well supported by a clearly documented legitimate business reason
II. Faculty Aging And Retirement (cont d.)

E. Good Policy!!

1. regular institution-wide post tenure review, evaluation and feedback
2. involve appropriate faculty committee/members in material change decisions
3. have policies regarding performance standards; apply consistently

See Pgh. Seminary Faculty Handbook, p. 30
II. Faculty Aging And Retirement (*Good Policy*) (cont d.)

4. good written documentation of performance shortfalls

5. implement a graduated system of warning, minor discipline before material adverse action

6. if financial exigency, document well, communicate effectively; apply cuts uniformly without regard to age
II. Faculty Aging And Retirement (cont d.)

F. Due Process Considerations (Jurisdiction Specific-Consult Counsel)

See Princeton Seminary Faculty Manual, p. 51

1. written notice of grounds for adverse action
2. disclosure of supporting evidence
3. right to confront/question witnesses
II. Faculty Aging And Retirement (*Due Process*) (cont d.)

4. opportunity to be heard in person and to present evidence

5. neutral hearing body

6. written statement by fact finders as to evidence relied upon

II. Faculty Aging And Retirement (*Due Process*) (cont d.)
   7. faculty participation
   8. prior warnings and graduated discipline
   9. right to counsel?
   10. keep good records
II. Faculty Aging And Retirement (cont d.)

G. Early Retirement Incentive Programs (Consult Counsel)

1. Seminaries may offer carrots to encourage retirement (1990: Older Workers Benefit Protection Act)

2. Requirements:
   a. bona fide retirement incentive plan
   b. voluntary
   c. consistent with purpose of ADEA
II. Faculty Aging And Retirement (cont d.)

3. bona fide early retirement incentive plan
   a. must relate to benefits, not wages or salary (employer cannot reduce wages to induce retirement)
   b. Seminaries can:
      i. make one-time incentive payments
      ii. create a window where faculty may retire with higher pensions or fringe benefits (i.e. health benefit stipend)
II. Faculty Aging And Retirement (cont d.)

   iii. provide continuing office space, research support etc.

c. seminaries must communicate the terms of incentive plan in writing (complete and accurate information)
II. Faculty Aging And Retirement (*Incentive Plans*) (cont d.)

5. Consistent with purpose of ADEA
   a. base program on legitimate criteria (which can be age-related)
   b. program must **provide** benefits, **not withhold**, benefits to induce retirement
   c. cannot be based on unfounded stereotypes
II. Faculty Aging And Retirement (*Incentive Plans*) (cont d.)

6. Examples

   a. plan provided incentives to faculty who retire between ages 70-75, but not after: violates ADEA because it has effect of withholding benefits from older workers (N.D. Ind. 1997)

   b. plan provided decreasing benefits to faculty who delay retirement: violates ADEA because plan provided diminished benefits as age increases (E.D.N.Y. 2001)
II. Faculty Aging And Retirement (cont d.)

H. Recommendations

1. no age-related comments; warn against ageist comments; discipline if necessary
2. investigate complaints of age discrimination
3. training program and policies against age discrimination
4. no pressure to retire or unnecessary discussions regarding retirement
II. Faculty Aging And Retirement (Recommendations) (cont d.)

5. conduct regular post-tenure evaluations and document performance issues in writing
6. utilize objective performance standards, not assumptions
7. consider early retirement incentives to encourage retirement
8. consult counsel early and often

Thanks to: Stephen J. Hirschfield and Zach P. Hutton of Curiale, Dellaverson, Hirschfield & Kraemer LLP