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Getting Sued: An Ounce of Prevention and a Pound of Cure

A Recent Case Example

We recently won a major employment lawsuit in both the federal district court and on appeal in the Tenth Circuit Court of Appeals. Several individual administrators, as well as the University itself, were named as defendants. The plaintiff was a former tenured faculty member. She sought \$4.5 million in damages, claiming that she was terminated without due process. The University defendants stated that she was not terminated; rather, she had abandoned her job by failing to report to work and ceasing communications with her supervisor.

This case demonstrates the value of preventive work between University administrators and our office. The department head recognized the potential for legal problems in an employment situation and promptly consulted with other relevant administrators and our office. We worked together to ensure that the faculty member was treated fairly and in accordance with the law and our policies, and that there was proper documentation of those efforts. The courts relied on our documentation in ruling that the faculty member could not claim any violation of her constitutional rights.

The Court of Appeals held that the professor's claims were contradicted by letters to her from her department head. Those letters provided notice that she did not appear to be working over a significant period of time, that she had exhausted her leave time, and that she needed to provide clarification regarding her intent to return to work. They also asked her to communicate with her department head on those matters, and they

let her know that her actions would be treated as a resignation. She failed to respond to the letters or to phone and email messages. The Court concluded: "Under these circumstances, [the professor] has not alleged sufficient facts to show that she did not receive adequate notice and an opportunity to be heard."

Furthermore, we raised defenses that protected the defendants from all forms of discovery, such as depositions, interrogatories, and the production of documents, while we argued the case to its conclusion with motions and legal briefs.

Helpful lessons from this case:

- (1) It is important to carefully and accurately document actions while an employment situation is occurring. Working with our office for advice and assistance during that phase, as the administrators did in this case, will provide invaluable factual and evidentiary support for a defense in the event someone later decides to sue.
- (2) Doing the right thing as a supervisor should not be hampered by concerns about getting sued. If you have followed the rules and documented that you have done so, you will reduce your chance of being sued. And even if you are sued, you will have a solid defense.
- (3) If you are named in a lawsuit based on actions you took within the scope of your job for the University, our office will defend you and stand with you throughout the process, raising every appropriate defense.

The Tenth Circuit's opinion can be read here: <http://www.ca10.uscourts.gov/opinions/11/11-3384.pdf>

Contracting with Private, Public, or "Zero" Dollars

We are often asked whether University contracts that are funded by KSU Foundation accounts or other private dollars, or contracts where no money is changing hands, are subject to University contracting procedures. The answer is mostly yes.

Private dollars do not relieve a unit's obligation to follow the University Contracts procedure (PPM

Chapter 3070). That includes giving the Office of General Counsel an opportunity to review your contract to ensure that it does not create unexpected expenses, liability, or obligations that the University cannot accept. The same is true for "zero dollar" contracts, when no funds are coming into or leaving the University.

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Featured FAQ

Q: How do I obtain services from the Office of General Counsel?

A: University administrators, deans, and department or unit heads are generally the appropriate persons to bring requests for legal opinions forward to our office. When a faculty or staff member has a legal question, often a dean or unit administrator may have the answer if advice from our office has already been sought on the particular matter in question. In addition, generally speaking, deans or unit administrators are in the best position to know when the unit should seek legal counsel.

If you would like to contact our office with a question or to schedule a meeting, please direct inquiries to our office staff at attys@k-state.edu or 785-532-5730. Please provide necessary background information such as the contract, policy, communication, or type of situation about which you are inquiring. This helps us to determine the best and most efficient way to handle your question, including which attorney should be involved, so that we can provide a timely and efficient response and appropriate follow-up. Our support staff are trained in and bound by the same rules of confidentiality as the attorneys. In addition, often they can help you locate the policy, office, document or other resource that can answer your question (although they cannot give legal advice). If you have already discussed the matter with a particular attorney, or if you have a reason for addressing your question to a particular attorney, you may contact that specific attorney through our office staff as described above, or you may contact the attorney directly if you prefer.

For more FAQs, please visit our website at k-state.edu/generalcounsel/faq/

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Our website gives an introduction to the services we provide and addresses frequently asked questions. It also houses a list of resources for easy access to laws and policies applicable to University operations.

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There is only one exception to this requirement – when another entity (such as the KSU Foundation) is going to sign the contract and accept all of the responsibility for meeting its terms. If someone from the University is expected to sign the contract, however, it needs to be reviewed pursuant to PPM 3070.

On the other hand, when 100 percent private dollars are used, University units are not required to go through the Division of Financial Services/ Purchasing Office to make their purchases. Of

course, as a courtesy, the Purchasing Office staff will try to assist units with obtaining the best possible prices and with processing their privately funded contracts. But if any state or grant funds are used together with private funds, the University's purchasing procedures will apply.

You can follow the links from PPM 3070 to access Contractual Provisions Attachment DA-146a (a must for every contract!) and the Office of General Counsel's Contract Review Checklist.

Handling Requests for Documents or Records

Someone from outside the University has sent you a request for documents or records – what should you do?

First, determine whether the request is a court order, a subpoena, or a search warrant. If it is, you should contact the Office of General Counsel immediately and fax or email a copy of the request to our office. You should also avoid having any conversations with anyone (other than our office) about the request. Our office will handle any communications with requestors.

If you receive a records request that is not one of the above, you should refer the requestor to the University's Kansas Open Records Act

policy, PPM Chapter 3060. If the requestor follows the policy, the request will be handled by the University's Open Records Custodians. If the records requested are from your area, the Custodians may ask for your help in assembling the requested records.

Finally, requests sometimes come from media outlets for public relations information about a college, department, or program. In those situations, you should contact the Division of Communications and Marketing (vpcm@k-state.edu) for assistance in handling the request. If you are not sure what to do with a particular request for documents or records, contact the Office of General Counsel. We will be happy to help.

End Notes:

Quote of the Day

"To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box."

— Jerry Seinfeld

On the Lighter Side (from actual court transcripts):

Lawyer: "I show you Exhibit 3 and ask you if you recognize that picture."

Witness: "That's me."

Lawyer: "Were you present when that picture was taken?"

Lawyer: "Doctor, did you say he was shot in the woods?"

Witness: "No, I said he was shot in the lumbar region."

About this Publication:

This newsletter is designed to serve as a practical informational tool, bringing you topics of interest and practical tips. It should not be relied on as a substitute for legal advice. Laws, regulations and policies change frequently, and legal advice requires careful consideration and application of all relevant facts. If you have legal questions or need legal advice concerning any University matter, please contact the Office of General Counsel directly at 785-532-5730 or attys@k-state.edu