



Legal Issues Impacting Community Colleges

Recent rulings and guidance involve affirmative action, access to restrooms, paid-leave benefits, labor rights of student athletes, and social justice advocacy demonstrations.

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THE FOLLOWING CASES AND/OR LEGAL DEVELOPMENTS ARE OF IMPORTANCE to the day-to-day administration of local community college policies and procedures. **Supreme Court hears oral arguments over the continuation of affirmative action in college admissions.** The U.S. Supreme Court heard oral arguments on October 31, 2022, in *Students for Fair Admissions (SFFA) v. Harvard* and *SFFA v. University of North Carolina*.

The first major Supreme Court decision involving affirmative action in college admissions occurred over 40 years ago in 1978, in *University of California v. Bakke*. In *Bakke*, a divided Supreme Court approved the University of California's affirmative action plan, with four justices ruling in favor of the plan and four justices ruling that the affirmative action plan violated the Constitution. The remaining solo opinion of Justice Lewis Powell, coupled with the four votes in favor of affirmative action, became the precedent. Justice Powell concluded that a race-conscious admissions program could theoretically satisfy constitutional strict scrutiny by being narrowly tailored to promote a diverse student body.



"Going into work when everyone is on vacation is my kind of getaway."

In 2003, a majority of the Supreme Court endorsed Justice Powell's solo opinion in *Grutter v. Bollinger*. Justice Sandra Day O'Connor added in the majority opinion that the court expects that such policies will no longer be necessary in 25 years.

Last October, the Supreme Court set aside two hours to hear oral arguments in two lawsuits brought in 2022 by the SFFA, an anti-affirmative action group, against Harvard University and the University of North Carolina. The SFFA wants the Supreme Court to overturn Justice Powell's solo opinion in the *Bakke* case and end consideration of race in college admissions. The group argues, among other things, that current affirmative action policies routinely discriminate against Asian Americans who do not receive racial preferences. Both colleges deny that affirmative action policies discriminate against Asian Americans.

To complicate matters further, both cases were initially coupled for oral argument but then uncoupled and heard separately because the newest justice, Ketanji Brown Jackson, recused herself from hearing the Harvard case because of past work on Harvard's board of overseers.

Sharply divided U.S. court of appeals rules that separating bathrooms by biological sex does not violate the U.S. Constitution or Title IX, rejecting a transgender student's claim of discrimination.

The full 11th Circuit Court of Appeals (covering Florida, Alabama, and Georgia) recently held in a sharply divided decision of seven to four that separating school bathrooms by biological sex is constitutional and does not violate Title IX. The majority decision is subject to multiple different dissents. (*Adams v. School Board of St. Johns County*, Florida; 11th Cir. No. 18-13592, 12/30/22.) The case involved a St. Johns County, Florida, School Board, which restricted bathroom use by biological sex, not allowing students who identified as a sex different from their biological sex to use the bathroom of their choice.

The majority decision rejected the transgender plaintiff's reliance on the Supreme Court decision in *Bostock v. Clayton County*, which held that under federal job-discrimination law, sex discrimination includes bias based on gender identity or sexual orientation. The majority decision pointed out that a school setting "is not the workplace" and that *Bostock* expressly decided not to tackle the issue of sex-segregated locker rooms or bathrooms. The majority concluded that the U.S. has a long history of separating sexes when it comes to the use of public bathrooms and such sex-based classifications have never necessarily violated the equal protection clause of the 14th Amendment. It is likely that other circuits may decide this issue differently, setting up an ultimate decision by the U.S. Supreme Court.

California joins the growing list of states expanding paid leave benefits. California's recent enactment of paid leave protections requiring employers to provide employees with paid leave to care for individuals who are not legal relatives joins the growing list of states regulating this area of employee benefits. So far, 11 states and the District of Columbia have enacted paid leave programs. Five of those states (Colorado, Connecticut, New Jersey, Oregon, and Washington) allow employees to use those benefits to take care of non-relatives designated as "akin to family."

Nationwide, this is leading to a unique patchwork of requirements depending on where an employee is employed. Research should be conducted in your local jurisdiction to guide your institution on the breadth and application of possible city and/or state requirements. In addition, remote work in another state may introduce complications to enforcement,

such as determining what states' laws apply. In these circumstances, counsel should be consulted.

Several colleges file an appeal of a federal court decision to allow student athletes to proceed to trial over whether they are employees under the Fair Labor Standards Act (FLSA). A federal district court trial judge recently ruled that student athletes are employees under FLSA and are therefore entitled to minimum wage and overtime payments. The judge used the same multi-factor approach used in cases involving unpaid interns who have successfully sued and been ruled entitled to pursue a claim of minimum wage and overtime payments. (*Johnson v. NCAA*; E.D. Pa. No. 19-cv-19350, 9/29/21.)

A group of institutions including Cornell, Fordham, Villanova, Lafayette College, and Sacred Heart University have asked the eastern district of Pennsylvania judge to allow an immediate appeal to the U.S. Court of Appeals for the third circuit. They want to ask the third circuit to decide: 1) Are student athletes ever employees of the schools for which they compete? and 2) If so, under what circumstances are student athletes considered employees of their schools? We will continue to monitor developments in this case.

National Labor Relations Board (NLRB) general counsel states that political and social justice advocacy in "Black Lives Matter" demonstrations and demonstrations opposing crackdowns on undocumented workers are protected concerted activity under the National Labor Relations Act (NLRA). The NLRB general counsel stated in a webinar hosted by Cornell University that Black Lives Matter protests and demonstrations against crackdowns on undocumented workers are protected under the NLRA federal labor law as protected concerted activity. The general counsel referred to the case the NLRB brought against Home Depot in Minneapolis because it disciplined workers who refused to cease displaying political messages on their aprons at work, including an employee who was terminated for displaying a "BLM" slogan. The NLRB in that case also accused Home Depot of unlawfully threatening employees with unspecified consequences if they engaged in group activities regarding racial harassment.

Home Depot has denied any violation of the NLRA and in a statement said it does not tolerate workplace harassment, takes these matters seriously, and is committed to diversity and respect. Home Depot takes the position that it has every right to refuse to allow its employees to engage in conduct which will spark conflict and possibly confuse customers. It added it has a right to refrain from allowing its employees to engage in speech in this way while serving customers.

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