# Legal Issues Impacting Community Colleges

**Courts rule faculty may sue college board on First Amendment basis, plus recent decisions on age and sex, hiring undocumented workers, and more.**

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THE FOLLOWING RECENT LEGAL DEVELOPMENTS ARE IMPORTANT TO THE day-to-day administration of community colleges.

**Court of Appeals rules that a professor's First Amendment-based lawsuit against the University of North Texas Board of Regents may proceed.** A music professor lost his position as editor in chief of a university music journal because of alleged "racial statements" he had written in an article published prior to a 2020 symposium sponsored by the journal. The professor sued the university's board of regents on the basis of First Amendment rights. The board of regents filed a motion to dismiss the lawsuit on the basis of sovereign immunity, which protects governments from being sued without their consent. The U.S. Court of Appeals for the Fifth Circuit rejected the board's motion to dismiss the lawsuit, holding that sovereign immunity does not apply to board members *(Jackson v. Wright*, 5th Cir., No. 22-40059, 9/15/23).

*"You'll work nights and the pay is garbage."*

**Labor union files petition to represent Dartmouth College men's basketball team as a bargaining unit.** SEIU Local 560 has brought a petition to the National Labor Relations Board asking to represent the college's men's basketball team in a collective bargaining negotiation, nearly a decade after the NLRB denied jurisdiction over student athletes in a case involving Northwestern University. The filing follows the 2021 Supreme Court *NCAA v. Alston* decision striking down the NCAA's ban on the compensation of student athletes for name image and likeness (NIL). While the Supreme Court did not address the labor organizing question under the National Labor Relations Act for student athletes, it certainly took the first step in recognizing the group as employees.

The Dartmouth case brings an added mechanism for the NLRB to decide whether student athletes are protected under the NLRA and able to organize into labor unions. The NLRB General Counsel raised the issue in May 2023 in a case brought against the University of Southern California, the Pac-12, and the NCAA in which they are alleged to have violated the NLRA in failing to recognize student athletes as employees under the NLRA.

As of publication, Dartmouth took the position on the first day of the NLRB hearing that the athletes involved are students who do not meet any of the common law attributes of employees and therefore not union eligible employees under the NLRA. If the SEIU is successful, it would be the first case involving potential unionization of college athletes.

**Preeminent law professor, 78, sues Northwestern University for age-based salary discrimination.** The tenured professor, who taught at the university for 42 years, claims he has been consistently paid substantially less than "significantly younger, less-experienced, and less-tenured" peers.

The professor claims to be a "preeminent scholar" in the field of tax law. He founded his law school's lucrative LLM Tax specialty program, which he claims has been the law school's "highest-ranked specialty department" for 17 of the last 19 years. He alleges that he has been awarded lower base salary increases than his younger counterparts. He further alleges that for the 2022-23 academic year, his salary was $7,000 less than the 50th percentile and $55,000 less than the 75th percentile of his peers, even though those percentiles equated to 20 and 32 years of total legal academia teaching, respectively, while he has completed 49 years of total legal academia teaching. The lawsuit was filed in federal court alleging the violation of the Federal Age Discrimination in Employment Act (ADEA) and the Illinois Human Rights Act (*Postlewaite v. Northwestern University*, N.D. III. No l:23-cv-15729, Comp filed 11/7/23).

**The University of California may be the first to test whether the federal ban on hiring undocumented workers is enforceable against state entities, including public colleges and universities.** On November 20, 2023, the university postponed its plans to go forward with a self-imposed deadline of November 30 to initiate a plan to hire undocumented workers. The university has decided to study the issue further before deciding on a specific course of action.

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**Private class-action lawsuits have begun to proliferate under state-based job-advertisement pay transparency and salary-range laws.** A series of 40 or so class actions filed against major employers in Washington state, including Adidas, Home Depot, and Marriott, will test the reach of a new Washington state pay transparency law. The law, along with similar statutes in California, Colorado, and New York, require employers to provide pay ranges and benefits information in job listings. The laws are aimed at providing greater pay equity to women and employees of color by being transparent about the range of salary options and benefits that come with each job. The Washington and California laws provide plaintiff applicants with a private right to sue. The Washington statute also provides incentives for plaintiffs to sue, granting plaintiffs an award of actual damages proven or $5,000, whichever is greater, upon proving a pay transparency violation, plus attorney fees.

**Former basketball coach loses sex-discrimination lawsuit on basis of "same-actor" doctrine.** The former head women's basketball coach at the University of Montana has lost the sex-discrimination lawsuit she filed following her termination. She was terminated with a decision not to renew her contract as a result of a poor win-loss record, serious cultural complaints made by parents and players, as well as several players threatening to leave the university if the coach remained employed.

The previous coach had a compiled 38-year performance of winning 75% of her games, while the plaintiff had only one winning season in the four years she served as head coach. The court rejected the plaintiff's attempt to compare herself to a men's basketball coach who had lost team players to transfer, citing multiple federal cases that have rejected arguments that disparate treatment between men's and women's sports teams creates an inference of discriminatory animus under Title VII.

The court granted a positive inference to the university's stated rationale for termination under the "same-actor" doctrine, given that the same athletic director who hired the plaintiff was the person who decided to fire the plaintiff (*Schweyen v. Univ of Montana – Missoula*, 2023 BL 390525, D. Mont. 9.21-CV-00138, 10/31/23).

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