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Are You Personally Liable? What Student Affairs Professionals Should Know

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Legal liability: is defined as “the responsibility that one party has for a wrong done to another, when a court or administrative agency has found that the wrong constitutes a violation of law” (Kaplin & Lee, 2007, p. 674). Although most institutions have indemnification policies for staff of the institution, institutional staff still may be faced with personal liability suits (Kaplin & Lee). Understanding an institution’s policies and laws of the state where the institution is located, student affairs professionals can better protect themselves against personal liability. The purpose of this chapter is to provide a description of potential sources of liability, background on immunity and relevant cases, and suggestions on how institutional employees may protect themselves from personal liability suits.

Description of Potential Sources of Liability

Employees of higher education institutions may encounter legal liability while employed with an institution. The type of legal liability an employee may face is dependent on what responsibilities the institution and its agents – faculty, staff, and others – are viewed as failing to provide or meet. There are three sources of law that can potentially create liability. These are the federal and state constitutions: federal, state, and local statutes; and state common law (Kaplin & Lee, 2007). Under these three, two potential sources of liability surface: criminal and civil liability.

Criminal liability, although rare in student affairs, would be a crime in which an employee had criminal intent (Hammond, 1977). An example of criminal liability would be if an employee takes extra tickets for an event they do not intend to pay for. *Civil liability* covers a broader amount of liability than criminal liability (Hammond). Civil law comes from a basic principle, if a professional’s action harms another in some way or if s/he fails to perform a

required duty then the professional should be held liable for the damages caused by the failed action(s) (Hammond). Additionally, under civil liability there are three sub areas – *contract*, *tort*, and *fiduciary*.

Contract liability refers to a party seeking monetary damages, generally, due to the failure of all duties being completed under the contract creating a loss for that party (Hammond, 1977). Employees generally sign contracts on behalf of their institutions and as such are generally protected if they are acting as state agents. If an employee signs a contract and is not considered as having the authority to do so by the institution then the individual signing may be held personally liable. The extent of personal liability depends on whether the institution authorized the employee to enter into a contract on behalf of the institution (Kaplin & Lee, 2007). Additionally, an employee may be found liable if the employee was the cause of the institution being unable to fulfill its contractual obligations (Hammond). Even when no written contract exists but a promise or offer is given out to a second party the agent who gave the offer could be held liable under the “doctrine of promissory estoppel” (Kaplin & Lee, 2007). In *Bicknese v. Sultana* (2001), Bicknese claimed that the department chair, Sultana, had offered her a faculty position at the University of Wisconsin that lead Bicknese to resign from her faculty position at SUNY-Stony Brook. However, a committee rejected Sultana’s recommendation to hire Bicknese. Bicknese sued, under the doctrine of promissory estoppel, Sultana individually and a jury ruled in her favor. Sultana appealed claiming she acted within her role and scope and was immune from being held liable and the court agreed (Kaplin & Lee). Even though in this case the employee was ultimately found not liable it is important administrators are careful not to imply authority to enter into a contact(s) unless it is with in their role and scope.

Tort liability is when a civil wrong has occurred intentionally, such as an assault or unintentionally, as in the case of negligence (Hammond, 1977). More often than not institutions are sued under tort liability claims. In order for an employee to be considered personally liable for a tortious act while conducting the institutions affairs, they must have participated or directed the tortious act. If an employee commits a tortious act while acting outside of their role and scope they may be personally liable but the institution may not. However, if an employee commits a tortious act within their role and scope on behalf of the institution both the employee and the institution may be held liable. Regarding the issue of negligence, employees may be found personally liable if their failure to act or negligent act contributed to the plaintiff's injuries or damages (Kaplin & Lee, 2007). For example, in *Defoor v. Evesque* (1997), Evesque, an employee at a public institution, was found liable for a slip-and-fall claim. Evesque was hired to administer tests for a college where hydraulic fluid was used in the testing area. Usually Evesque made sure to clean the excess hydraulic fluid but on the day Defoor took his test the hydraulic fluid had not been completely cleaned by Evesque; making him liable for Defoor's injuries from the fall. The court did not find the college liable but did find Evesque liable because the court viewed Evesque's duty to clean the spill as ministerial (Kaplin & Lee). Additionally, employees may be faced with claims of negligent hiring, supervision, and retention of other employees (Kaplin & Lee).

Lastly under civil torts is *fiduciary duty*. A breach of fiduciary, Hammond states (1977), is best described as the duty or responsibility incumbent on administrators to act in the best interest of their institutions and not on behalf of themselves or others when a possible conflict of interest arises. One of the key decisions in fiduciary duty was decided in 1974 in *Stern v. Lucy Webb Hayes National Training School for Deacons and Missionaries*. The two main contentions

were that the defendant trustees conspired to enrich themselves in certain financial institutions, which they were affiliated with; by favoring those institutions in the handling of hospital finances and that they breached their fiduciary duties in the management of hospital funds (Hammond). The court, while setting out parameters on when an administrator may be found in breach of their fiduciary duty, agreed with the plaintiffs in stating that the defendant and the trustees indeed breached their fiduciary duty to supervise and manage the hospital investments.

Background on Immunity and Relevant Cases

Concerning all the aforementioned potential types of personal liability an employee may face, there is defense available under certain institutional immunities. Although immunity may sound as if an employee may be free from personal liability, this is not the case. Under some types of immunity, institutional employees may not be covered under the same immunity defense as the institution. As an institutional employee it is vital these immunities are understood. The types of immunity most common in institutions are governmental immunity also known as sovereign immunity, and official immunity also known as qualified immunity (Kaplin & Lee, 2007). Some institutions have in place an indemnification policy for employees that will be discussed later.

Under sovereign immunity, higher education institutions enjoyed immunity in lawsuits alleging negligence and other torts. This protection arose from the governmental immunity doctrine that shielded public institutions from legal liability for their sovereign acts (Kaplin & Lee, 2007). A comparable immunity for private institutions was achieved under the charitable immunity doctrine that shielded charitable organizations from legal liability (Kaplin & Lee). In *White v. United States of America Track and Field, Inc.* (2005) a coach, James Barber, at Southern Connecticut State University (SCSU) and SCSU were sued for alleged negligence and

recklessness claims. White claimed he suffered injuries during a warm up for the pole vault event at the United States Track and Field Junior Olympic Championships being held at SCSU.

However, the court decided SCSU and the coach were protected under sovereign immunity and dismissed White's negligence and recklessness claims. The court came to this decision by the following reasoning; the coach was a state official since he was employed by SCSU, the coach was representing the state during the championships, and the coach was only sued in his official capacity making the state of Connecticut the real party White was seeking relief from. Similarly, in *Autry v. Western Kentucky University* (2007), the university, its employees, and the Student Life Foundation were sued by the Autry estate seeking damages for wrongful death which occurred in a residence hall on campus. Specifically, the Autry estate sued university employees in their official and individual capacity. The courts ruled however, under governmental immunity the employees acting in their official capacities were afforded the same governmental immunity as their employer Western Kentucky University.

Under qualified immunity, governmental officers and employees may be protected from certain types of lawsuits and legal claims, particularly in a defense against damages under the federal civil rights statute known as "Section 1983" which governs the enforcement of constitutional rights (Kaplin & Lee, 2007). In state law, qualified immunity may also be called official immunity. Under qualified immunity employees of public institutions may use this defense if an employee's act was within the role and scope of their position and must have been a discretionary act as opposed to a ministerial duty (Kaplin & Lee). In *Rom v. Fairfield University et al* (2006), Rom was suspended for alleged violations of Fairfield's community standards. Rom claimed the Director of Judicial Affairs and a resident assistant provided false information which led to his suspension. The defendants claimed that the judicial hearing held qualified as a quasi-

judicial proceeding which entitled them to absolute immunity. The court rejected the defendants' claim of absolute immunity but did state the defendants were entitled to qualified immunity for the statements made about Rom before and during the judicial hearing.

There is no definitive ruling as to when a university and/or employee will be held liable for its actions and universities are continually defending themselves against suits brought against them (Spaziano, 1994). However, an institution is not always named in a lawsuit and most institutions have an indemnification policy in place. Indemnification policies provide resources for the institutional employee who is sued for acts occurring while performing their job duties. Since institution employees may still not be covered from personal liability, it is important that employees take a proactive approach to protecting themselves against personal liabilities.

Suggestion for Protection against Personal Liability

First and foremost employees should exercise awareness. Employees must be aware of and have an in depth understanding of their role and scope as it relates to their position at their institution. As Kaplin & Lee (2007) stated, officers and administrators of postsecondary institutions, public or private, may take only those actions and make only those decisions that they have the authority to make or take. It is when employees are not aware of their role and scope and/or authority that personal liability arises including acting in ignorance of the constitutional rights of students (Miles, 1987). Some of the ways employees may protect themselves from personal liability is through being organized in their work, knowing institutional policies, being current on legal issues related to student affairs, consulting with general counsel and or a risk management team as needed, working towards preventative law, and considering obtaining professional liability insurance.

In order to maintain organization at work, it is vital that each employee knows what is required of them in regard to policies and documentation. Employees should consult with their leadership team in order to find out which files, reports, or postings are required or strongly encouraged in their department to maintain (Bliss, 2000). Lastly, each employee should have a professional handbook that relates to their position to understand institutional operations. This could be provided by Human Resources or the individual's department to understand institutional operations. The idea that an employee was unaware of a published policy or law will often not hold up in a court case. Personnel of public universities are charged with the responsibility for knowing "clearly established law" unless "extraordinary circumstances" prevent the individual from gaining the knowledge (Kaplin & Lee, 2007). Additionally, the disregard of clearly established law is considered unreasonable and not protected under immunity (Kaplin & Lee).

It is vital for employees to develop good record-keeping skills and maintain accurate documents in regard to compliance issues, personnel issues, performance issues, records, and forms. Having documentation that is detailed is important if ever facing a question of judgment or why certain steps were decided. In this documentation, specific times and dates should be recorded, the process used should be described, reasons given, expectations or outcomes provided, any reactions from the decision should be recorded, and copies of correspondence, if necessary, should be maintained (Bliss, 2000). Courts do not necessarily focus on the actual decision but on the manner of the performance or how the decision was made (Steinbach & Pelesh, 1999).

In order to prevent personal liability suits employees should also take an active role in being informed on current legal issues in the field of student affairs. Employees should pay close

attention to current events and issues that are receiving increased attention to help anticipate emerging issues in their specific field and in student affairs as a whole (Janosik, 2004).

Developing a way to manage all the important information in regards to legal issues is critical.

Some suggestions on how to keep current in legal issues would be to invest in high quality periodicals, create a list of hot legal topics related to your campus and research them, involve your staff in maintaining current topics, follow local, state, and federal officials, use personal networks, and follow special interest groups that may have an impact on your campus (Janosik) in addition to consulting with general counsel on current legal issues.

Employees should look to general counsel or a risk management team for information that would pertain to their role and scope. If employees are working within student activities and desire to take a trip out of state they should look into discussing possible liabilities with general counsel and/or the risk management team. Another relationship the employee should have with their department and/or general counsel is one of preventative law as a means to identify possible liability concerns and to minimize those concerns. As a final protection, employees should consider personal professional liability insurance through an insurance company.

Occasionally higher education institutions will have a liability policy or indemnification policy that may cover employees. This, however, is not always the case. Employees should determine if they are protected and, if not, consider purchasing their own policy in the event they are sued in a personal capacity. Two major national associations in student affairs, the American College Personnel Association (ACPA) and the National Association of Student Personnel Administrators (NASPA), offer its members the opportunity to obtain professional liability insurance through Forrest T. Jones & Company, Inc. (Educator's Professional Liability). The professional liability insurance offered by Forrest T. Jones & Company, Inc. provides protection

against a broad range of exposures including, but not limited to, injuries to students under their supervision, defamation, failure to educate, violation of student civil rights, and improper placement of students. These policies typically include additional features such as paying 90% of attorney's fees, after a one hundred dollar deductible, if you are accused of sexual abuse, provided you are found not guilty or the charges are dismissed, criminal charges arising out of corporal punishment and a suit demanding non-monetary relief (Educator's Professional Liability). Additional supplementary policies for counselors in the higher education field are also available along with coverage amounts of one or two million dollars per claim in protection.

Conclusion

While maintaining detailed records and immunity may not always protect employees from personal liability, it is important that employees understand the different types of liabilities that may arise from their position at their institution and be aware of ways to protect themselves. Although it would not be recommended or feasible for employees to avoid all activities or events where liability may exist, careful planning is recommended to ensure the employee and institutions have given reasonable care. Finally, it would be beneficial to use the general counsel or risk assessment team at the institution to identify possible personal liability issues.

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