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Higher Education Discrimination Law

You Say Academic Freedom, I Say Hostile Environment: Trends and Strategies For Dealing With Faculty Discrimination Issues

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2025: A New Administration

- In just two months, President Trump and multiple federal agencies have rapidly increased tension at the intersection of anti-discrimination, free speech, and academic freedom.

Addressing Anti-Semitism on Campus

- In an Executive Order signed on January 29, 2025, President Trump vowed to combat antisemitism on college campuses, asserting that “Jewish students have faced an unrelenting barrage of discrimination.”
- The Executive Order:
 - instructs the U.S. Attorney General “to employ appropriate civil-rights enforcement authorities”;
 - directs the Secretary of Education to compile an analysis of all Title VI complaints alleging antisemitism; and
 - directs several cabinet officers to recommend courses of action for dealing with non-American student protestors.

Attacks on “DEI”

- January 21, 2025 – Executive Order titled “Ending Illegal Discrimination and Restoring Merit Based Opportunity,” takes aim at Diversity, Equity, and Inclusion (“DEI”) efforts, both in government and the private sector.
- February 14, 2025 - Dear Colleague Letter interpreting the application of *SFFA* outside admissions, asserts that the Department of Education will take appropriate measures to assess compliance beginning on February 28, 2025.
 - The OCR issued Corresponding FAQs on Feb. 28, 2025.

But See ...“Restoring Freedom of Speech and Ending Federal Censorship”

Executive Order 14149 - issued on January 20, 2025:

*“The First Amendment to the United States Constitution, an amendment essential to the success of our Republic, enshrines the right of the American people to speak freely in the public square without Government interference. Over the last 4 years, the previous administration trampled free speech rights by censoring Americans’ speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve. Under the guise of combatting “misinformation,” “disinformation,” and “malinformation,” the Federal Government **infringed on the constitutionally protected speech rights of American citizens across the United States in a manner that advanced the Government’s preferred narrative about significant matters of public debate.** Government censorship of speech is intolerable in a free society.”*

DEI and Academia

- Carve-outs for Academic Freedom?
 - January 21, 2025 - Executive Order contains a Savings Clause which reads as follows: “[t]his order does not prohibit persons teaching at a Federally funded institution of higher education **as part of a larger course of academic instruction** from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.”
 - DOE Response to “Question 9” in the February 28, 2025 FAQ states: “Nothing in Title VI, its implementing regulations, or the Dear Colleague Letter requires or authorizes a school to restrict any rights otherwise protected by the First Amendment” and several federal statutes “prohibit the Department from exercising control over the content of school curricula.”

And Yet ... Deprivation of Federal Funds and Enforcement Actions

- Earlier this month, the Departments of Justice, Health and Human Services, Education, and General Services Administration, announced the unilateral cancellation of more than \$400 million in federal grants/contracts with Columbia University due to Columbia's alleged failure to combat antisemitism on campus in the wake of the October 7, 2023 attacks.
- On March 10, 2025, the administration issued letters to 60 schools currently under investigation, threatening enforcement action for their failures to combat antisemitism: "[federal] support is a privilege."
- On March 14, 2025, the OCR announced investigations of 45 schools for the alleged use of racial preferences and stereotypes.

Preemptive Actions to Dial Back DEI Initiatives

- Many universities/colleges have already begun taking actions in response to the DEI Executive Order and language in the subsequent February 14, 2025 DCL on DEI.
- This includes scrubbing or revising website and programming information.

Visa Cancellation and Deportation

- Visa cancellation of students who support “terrorist organizations” (Hamas) announced as part of the Administration’s efforts to combat antisemitism on college campuses.
 - The State Department has vowed to use Artificial Intelligence (AI) to track social media accounts.
- Arrest and detention of Columbia graduate and permanent resident involved in leading campus protests.
- Brown professor with valid visa denied re-entry to U.S. after returning from Lebanon, allegedly because she attended a Hezbollah leader’s funeral and had “sympathetic photos” of Hezbollah figures on her phone.
- Showing “support” on social media for an organization or cause, whether valiant or horrific, is generally thought of as protected by free speech principles, whether guaranteed by the First Amendment or as-adopted in the private university sector.

Hypothetically Speaking

- In recent years, we have seen several real world examples of free speech, academic freedom, and antidiscrimination efforts colliding on college campuses nationwide.
- We plan to discuss some prominent examples, while also looking at hypothetical scenarios, to highlight different approaches to managing these issues on your campuses.

Hypothetical One

- Professor Albus Snape teaches a political journalism course at the University of the Wizarding World, a private university. On his syllabus, Professor Snape requires that all students enrolled in his course read Palestine: Peace Not Apartheid by former President Jimmy Carter.
- Professor Snape lists the book as a “great example of persuasive writing and narrative non-fiction.”
- Two Jewish students in the class file complaints with UWW’s new Equity and Belonging Coordinator, arguing that the book is antisemitic and specifically contrary to the IHRA’s definition of antisemitism, which extends to “claiming that the existence of the State of Israel is a racist endeavor.”
- When contacted by the Coordinator, Dr. Snape claims academic freedom and asserts that he will not change his syllabus nor the requirement to read this book.

Questions for Discussion

- Is Dr. Snape correct?
- Is that the end of the matter?
- Are there other things the Equity and Belonging Coordinator or UWW should be doing?
- What if the students request to be relieved of the obligation to read this otherwise required book?

Adding to Hypothetical One

- While the students are reading Jimmy Carter's book in class, Professor Snape comments on the Israel-Palestine conflict on his X account, writing:
 - *"Peace can only come to the Middle East if Israel, rightly, backs down" and*
 - *"When I see the Israeli flags flying on campus, to mark the lives of each of the hostages, I can't help but feel angry. Why are we glorifying Israeli lives and ignoring the plight of Palestinians???"*
- Professor Snape's X account identifies him as a professor at the University of the Wizarding World. He has 1500 followers, including fellow faculty and students.
- One student who is in Dr. Snape's class has re-tweeted Dr. Snape's post, adding a solidarity "fist" emoji. The student can be identified from their bio.
- Another faculty member also has re-posted Dr. Snape's comments, but with a note directed to Rep. Elise Stefanik's X handle: "Yo, @RepStefanik, will you and your committee be looking into this virulent antisemitism at UWW?"

Questions for Discussion

- Can Professor Snape be disciplined for his X posts?
- Do his X posts impact the academic freedom attendant to his syllabus choices?
- Should the students who initially filed complaints be contacted again, proactively?
- What if those students file new complaints, having learned of the X posts?
- What if a classmate complains about their fellow student's re-post of Dr. Snape's comments?
- What action, if any, should be taken regarding the faculty colleague who called out Dr. Snape's post?
- Would your thoughts on the hypothetical change if Professor Snape also attended Pro-Palestinian protests on campus? What if he attended off campus protests? What if Professor Snape's X biography did not note his affiliation with the University of the Wizarding World?

Hypothetical Two

- Professor Harriet Hufflepuff is a black transgender woman who also works as a Sociology Professor at the University of the Wizarding World.
- On one of her daily walks past the Student Union Building, she noticed a sign promoting inclusivity.
- However, someone had spray painted the word “Don’t” before “We Believe.”
- It is not clear who authored the derogatory spray paint.



Questions Regarding Hypothetical Two

- Can Professor Hufflepuff initiate an internal complaint? What claims could she raise?
- If Professor Hufflepuff files a complaint, what should the University do?
- Should the University condemn the spray paint?
- What if this was a public university – is the content of the spray paint protected by the First Amendment?
- Does it matter who “authored” the spray paint?

Changing the Hypothetical

- Would any of your responses/thoughts on the prior hypothetical change if:
 - The crossed out sign was posted on Professor Hufflepuff's office door in the middle of the night, not in a random window in the Student Union Building?
 - The University's John Birch Society chapter amplified the spray paint on their social media pages? Could the University ask the chapter to take the post down? Could the University threaten not to recognize the organization/deprive it of funds if the Society failed to heed their request to take the post down?
 - Someone also added the words: "Trans Professors Not Welcome Here"?

Hypothetical Three

- Professor Ronald Weasley is a cisgender, heterosexual, white man. Professor Weasley has been teaching at the University of the Wizarding World for twelve (12) years.
- One morning, the entire faculty of the University of the Wizarding World each received an email from Associate Dean Hermione Potter. The email's subject line is as follows: Have You Checked the Mirror for Racism Lately?
- The body of the email outlined "Ten Ways You're Probably Accidentally Oppressing Students." The email also contained a mandatory link to an eight (8) hour training on "microaggressions," "systemic racism," "the necessity of affirmative action," and "the need for educational and actual reparations."
- Professor Weasley accidentally replied all – sending every one of the email's recipients his thoughts. "This is ridiculous. I have taught here for over a decade. Nobody has ever called me a racist. Cry me a river. I won't be watching that Critical Race Theory crap."
- A fellow professor saw the email and reported it to TMZ. The mainstream media picked it up, and the University of the Wizarding World suspended Professor Weasley, without pay, "until such time as the Professor completes the requisite trainings and takes a course on cultural competency and sensitivity."

Questions on Hypothetical Three

- What problems, if any, do you see with Dean Potter's email?
- What problems, if any, do you see with the University's response?
- Can Professor Weasley file an internal complaint claiming race discrimination? Can he file a complaint with OCR, if there is an OCR?
- What if he comes directly to you, as GC, for guidance?
- What if he goes to the Provost and demands that the Provost send out a "reply all" indicating that folks should feel free to ignore Dean Potter's email if they so choose?
- What if, unhappy with you and the Provost, he writes to the Chair of the Board, copying you, the President, the Provost, and a local conservative state representative?
- Could he file a federal lawsuit? What claims might he state (hostile environment, retaliation, others?) How might that case play out?
- What role, if any, does academic freedom play in this hypothetical?

Changing the Hypothetical

- Assume that instead of responding to Dean Potter's email, Professor Weasley instead posted on X and Facebook about his indignation over the email.
- Also assume Professor Weasley is a Professor of Post Civil War American History.
- In his social media posts, he states "[a]ffirmative action is a relic of a time long passed. Justice Thomas is right. The stigma is worse than the 'remedy.' It is time to treat everyone colorblind."
- If the University of the Wizarding World is a public university, what issues emerge? Is Professor Weasley protected by academic freedom? Has Professor Weasley been subjected to a hostile work environment? Is his speech (even on X) protected by the First Amendment?
- If the University does not respond/or discipline Professor Weasley, could they be accused by minority students of facilitating a hostile work environment?
- If Professor Weasley discussed his feelings on the email during one of his lectures, would this change any of your responses?

Practical Takeaways / Risk Mitigation

- Review and update your social media policies and time/place/manner policies.
- Reach institutional consensus on where you stand on all issues related to Title VI and antisemitism.
 - Is there an OCR Resolution Agreement, the terms of which you can implement proactively, if only in part?
 - Would you/can you adopt the IHRA definition of antisemitism?
- Reach institutional consensus on how you are defining illegal “DEI,” and what constitutes illegal discriminatory activity under Title VI (or state law) vs. free expression.
 - Are there any legal “DEI” initiatives that the institution will continue to permit/support?
- Determine what messages need to be communicated to the community, as well as the best method (or methods) for doing so. FAQs? Message from the President? Town Hall meetings? Individual department meetings?
- Clearly delineate and reinforce how and where faculty or students can make a complaint – mitigate “forum shopping”.

Practical Takeaways / Risk Mitigation

- Reinforce, strongly, your institutional commitments to both academic freedom and non-discrimination. Emphasize that the two are not, and never have been, mutually exclusive.
- Having said that ... perform an objective, thorough assessment of which courses, content, faculty members, etc. are most likely to be “on the radar” of the current administration, so that you and your leadership team can plan accordingly and try to mitigate any surprises.
- Conduct documented reviews of any issues/complaints raised, and be sure to show the steps taken as part of the review, as well as any remediation undertaken.
- Demonstrate your commitment to proactivity by publicizing how issues have been addressed to eliminate a hostile environment on campus.
- Foster an open dialogue on campus: publish messages from campus leaders; conduct open seminars on academic freedom and civil discourse; send students/faculty climate surveys, etc.

The background of the slide features a series of overlapping, stylized silhouettes of people's heads and shoulders in profile, facing right. The silhouettes are rendered in a variety of muted colors including olive green, terracotta, and deep red. The word "Questions?" is superimposed in the center of the image in a large, white, sans-serif font.

Questions?

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