

## Where Faculty Mental Health Intersects Academic Responsibilities

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### **Presentation Abstract**

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Council of Colleges of Arts & Sciences Conference (San Diego)

**9:00 am – 10:15 am**

**Session P:**

**Panelists: Laura Rothstein, University of Louisville Brandeis School of Law**

This session will attempt to address the difficulties and possibilities in addressing faculty mental health issues on campus. In the academy, our faculty members are our greatest resources. Like every other part of society, some of our faculty will suffer mental health problems, and some may have a mental or emotional illness that interferes with their ability to perform the essential functions of the job. Finding a method to address these issues on behalf of the institution and our faculty members is in everyone's best interest, and the responsibility is shared between the institution and the faculty member. We will explore the myths concerning disabilities in the workplace, and the myths about academic freedom and responsibility as they relate to faculty members with mental and emotional disabilities. Hopefully this will provide a workable roadmap for administrators to negotiate through these thorny paths.

Repeated at 2:00 pm – 3:15 pm same day

The approach of the presentation is to encourage institutions to ensure that their policies, practices, and procedures related to individuals with disabilities provide a balanced approach to what **MUST** be done, what **CAN** be done, and what **SHOULD** be done.

The presentation will

- 1) Provide a general overview of the applicability of major federal statutes and how they have been interpreted by the courts and through regulatory guidance as they relate to faculty members with disabilities involving mental health
- 2) Provide a reference on the sources of legal guidance for addressing these issues
  - Statutes and regulations
  - Agency guidance
  - Regulatory guidance
  - Judicial decisions

- Case settlements
- Organization guidance
- “Best” practices

3) Provide principles and framework for addressing these issues

- Holistic approach – avoiding silos
- Proactive approach
- Individualized and interactive

Presentation Outcomes

- Attendees will identify the framework for what is currently required to address issues of faculty members with mental health issues within the statutes, the regulations, the regulatory guidance, OCR opinion letters, case settlements, and judicial decisions.
- Attendees will understand what are the likely areas of dispute and challenge under current law and why.
- Attendees will learn how to apply this understanding of legal mandates and likely outcomes and areas of dispute in order to educate stakeholders (including faculty, administrators, and policymakers) about these requirements to facilitate a proactive set of practices and procedures in response.
- Attendees will be given an outline of legal requirements
- Attendees will have a sense of which issues should be given priority and how to have a holistic approach to these issues that avoids conflicts and disputes
- Attendees will “practice” applying the principles through the use of scenarios

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## Key Questions and Issues

- Why is this an issue now?
- What are the statutes and policies relevant to faculty?
- What are the relevant disability discrimination laws?
- What should be the policy, practice, and procedure response for higher education planning and response?

## Substantive Issues

### Essential Functions

- What is in the individual's contract (express or implied)
- What bylaws or other documents also apply

Is the individual "disabled" – under the three part test?

Is the individual "otherwise qualified"? Including consideration of "direct threat" issues?

Was adverse action based on "disability" (status) or on "conduct/behavior" or nonperformance? Was claim of misconduct/nonperformance a ruse? Have others been required to perform similarly or been excused for similar conduct/performance issues?

### Accommodation issues

- Did individual make "known" the need for accommodations?
- Are requested accommodations "reasonable"?

## Procedural Issues

What internal documents apply to resolve performance disputes and have they been applied?

Has there been an "interactive" process?

## Practical Considerations

Precedent setting

Privacy and confidentiality

Doing the right thing – not just what you can legally do, but what you should do

Cost of litigation – financial and PR

## Statutory, Regulatory, and Judicial References

### WHO IS PROTECTED

- Must be *substantially* limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment.
- Must be otherwise qualified – able to carry out the essential functions of the program with or without reasonable accommodation. Undue hardship, fundamental alteration, lowering standards – not required.
- Individual must not pose a direct threat to self (not clear whether this applies outside of the employment context), property, or others.
- Individual must make “known” the disability and have appropriate documentation, and must do so in a timely manner in order to demonstrate that program discriminated or failed to provide a reasonable accommodation.

The ADA Amendments Act of 2008 clarifies and amends the definition of “disability”, see 42 U.S.C. § 12102 . The EEOC regulations pursuant to the amendments were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. 1630 and are available through the website at [www.eeoc.gov](http://www.eeoc.gov).

The amendments respond to 1999 and 2002 Supreme Court decisions that had narrowed the definition, and provide for a broad interpretation of the definition of disability under the ADA. Under the revisions, whether an individual is substantially limited is to be determined without reference to mitigating measures, with an exception for ordinary eyeglasses and contact lenses.

42 U.S.C. § 12102(4)(E).

The amendments also add an illustrative list of *major life activities*, and by doing so codify the existing regulatory definitions and add to them.

The new definition of major life activities specifically includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and operating major bodily functions (which are further defined). Many of the conditions found not to be disabilities may prospectively be determined to fall within the definition, so long as the condition substantially limits one or more of those major life activities.

The Amendments specifically provide that concentrating, thinking, and communicating are major life activities. This amendment may make it more likely that an individual with a learning disability or with certain mental impairments will fall under the definition.

The Amendments clarified that major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2). [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth,

digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2).

To meet the requirement of “being regarded as having such an impairment” the individual must establish “that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3).

The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less. 42 U.S.C. § 12102(4)(D).

The 2008 amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. 42 U.S.C. § 12102(4)(E).

The Amendments also provide that “Nothing in this Act alters the provision..., specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved.” 42 U.S.C. § 12201(f).

The ADA Amendments of 2008 (42 U.S.C. § 12103(1)) codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

The Amendments state that the definitions are also to be applied to the Rehabilitation Act. 29 U.S.C. § 705(9)(B), incorporating 42 U.S.C. § 12102.

Major regulatory changes for Title II and Title III were issued by the Department of Justice in 2010, and there are several significant aspects of those changes that affect higher education. These include stadiums and swimming pools. There is also change defining housing on campus.

<http://www.ada.gov/regs2010/ADAREgs2010.htm>

## **Otherwise Qualified and Direct Threat**

### **Direct threat –**

Title II regulations provide the following regarding direct threat:

*Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139. 28 C.F.R. §35.104 (definitions). The determination of direct threat is to be based on an individualized assessment “based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.” 28 C.F.R. §35.139(b).*

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of the individual or others in the workplace. See 29 §§1630.2(4) &1630.15(b)(2).

The statutory language of the ADA does not define direct threat. While the EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review.

Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

## **Accommodations: Modification of Policies, Practices, and Procedures**

### **Assistance and Emotional Support Animals**

DOJ regulations for Title II and Title III only require inclusion of dogs (and miniature horses) but only allow for minimal documentation – asking two questions:

Is the dog a service animal required of a disability?

What work or task has the dog been trained to perform?

Cannot ask for official “documentation” or require animal to wear a special coat

Animal must be under control

In July 2015, the Department of Justice released an 8 page guide about service animals.

Full Document: United States Department of Justice, Frequently Asked Questions About Service Animals and the ADA, Civil Rights Division, Jul. 20, 2015, available at

[http://www.ada.gov/regs2010/service\\_animal\\_qa.pdf](http://www.ada.gov/regs2010/service_animal_qa.pdf).

## **Mental Health Issues**

Raises issues of “otherwise qualified” and “direct threat” and “threat to self”.

Also raises issues of FERPA and duty to inform balanced with privacy rights.

And raises issues of providing mental health services on campus.

## *Overview of the Issue*

This section is adapted and updated from Laura Rothstein, *Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Heading*, 63 Maryland Law Review 101, 107, 122 (2004) (footnote references omitted).

“The elimination of mandatory retirement, the difficulty of measuring performance for higher education faculty, and a shaky economy have combined to create an increasing number of challenges by faculty members claiming discrimination on the basis of disability. Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions. Although this development is part of a larger societal issue, the uniqueness of employment in an academic setting has required institutions and the courts to address these issues in an unusual context.

[Factors requiring attention] include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies. Uncertainties about the economy and whether retirement benefits will be sufficient have caused more people to delay retirement. The higher education setting gives aging faculty members the opportunity to remain connected to a community of colleagues. This opportunity is particularly compelling considering the benefits of having an office and access to support services, such as long distance telecommunications, clerical support, technology support, computer upgrades, and even travel funding.

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability.<sup>1</sup> These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have implemented detailed systems of post-tenure review and other improved faculty evaluation procedures and practices, those that have not may find themselves in messy and lengthy disputes.”

It is not only faculty members reaching retirement who raise disability issues. The faculty member who becomes depressed, develops substance abuse problems, has cancer, or has some other condition that either affects (or is perceived to potentially affect) performance may raise concerns regardless of the seniority of the individual.

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<sup>1</sup> Amy Gajda, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009) (discussing the trends that courts are no longer as deferential to institutional decision making than has been the case previously).

## ***Who Is “Disabled”***

To be protected under disability discrimination law the individual must be substantially limited in one or more major life activities, have a record of such a limitation or be regarded as such. The ADA Amendments Act of 2008 and the 2011 EEOC Regulations make it clear that the definition of who is covered is to be broadly interpreted. The result is that in most cases, a dispute about discriminatory treatment should not focus on whether the faculty member meets the definition of “disability.” Instead, the focus should be on whether the institution has established the essential requirements of the program and whether the faculty member is otherwise qualified to carry those out. This assessment should take into account reasonable accommodations and should involve an interactive process.

The case of *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) provides guidance about judicial deference. Although the case is in the context of an accommodation for a student, its reasoning is relevant to faculty settings as well. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower standards or require substantial program alteration.

## ***When Will Misconduct or Deficiencies Be In Question?***

For both tenure track and contract faculty members, an annual evaluation process can raise issues of misconduct and deficiencies. These issues can also be raised in granting raises, sabbaticals, research support. Post-tenure review, more common on campuses today, may also highlight concerns. And, of course, promotion and tenure decisions are occasions for evaluation of performance. A termination for cause at any point may result from claimed misconduct or deficiencies.

Deficiencies that may raise concern could include the inability to teach a full load. Student evaluations (even with their limitations) might raise concerns about the faculty member’s performance in class. For example, several students might comment that the faculty member seemed frequently impaired in the classroom – perhaps by a controlled substance or perhaps because of a psychological or health condition. The faculty member may not turn in grades in a timely manner or meet with students according to expected norms. The faculty member may not meet the publication or other scholarship/productivity expectations. Or there may off-the-job conduct, such as drunk driving or inappropriate behavior that reflects on the institution. A faculty member may simply not be able to interact with other colleagues in required committee and other service responsibilities.

Whenever there is a deficiency (or perceived deficiency), one of the questions that must be answered is whether the expectations were clearly stated in terms of employment or whether they are implied. Does the faculty member’s appointment letter state what is

required in terms of teaching, research, and service? If not, what documents are incorporated by reference? What notice did the faculty member have? These questions are important for establishing the “essential functions” of the position. Did the faculty member have reasonable notice of deficiencies?

### ***Reasonable Accommodations***

The reported judicial decisions involving faculty members generally involve fact patterns where the faculty member’s performance was deficient, and the courts rarely discuss whether reasonable accommodations might have been provided. The types of accommodations that should be considered in appropriate cases, however, might include adjustments in teaching times, leaves of absence (paid or unpaid, depending on institutional policy), extending the “tenure clock”, reduction in committee responsibilities for a semester, and other accommodations.

The challenge in finding good guidance on this is that faculty members do not produce widgets, and establishing the exact requirements and expectations and the norms is quite challenging. While institutions have improved in developing consistent policies and expectations, faculty members may have been appointed, tenured, renewed, and promoted under old rules that have been changed later.

### ***What Other Legal Issues Must Be Considered?***

In addition to disability discrimination requirements under the ADA, the Rehabilitation Act, and state law, several other laws must be considered when looking at faculty performance deficiencies that might be related to health or disabling conditions. The Family and Medical Leave Act provides for leave if certain conditions are met. Privacy policies under HIPAA allow faculty members to protect certain information, although the faculty member may need to waive that privacy (at least for limited purposes) in a dispute where the faculty member is claiming discrimination or claiming that the deficiency was related to the disability. And, of course, university internal personnel policies, including post-tenure review, must be followed.

The faculty member who can show that policies were followed inconsistently may have a claim of discrimination. For example, if extended leaves or special teaching accommodations are granted routinely for faculty members who do not have disabilities, but not for those who do, this could be a violation of discrimination laws.

### ***Faculty Termination***

In the context of a faculty termination process where there may be an issue of disability, while it is humane to take into account the potential stigma and privacy issues of a faculty member, it would probably violate the ADA and the Rehabilitation Act to have a mandatory process for termination based on a health or disability issue. While it might be appropriate to provide a faculty member an option of addressing the issue outside of the ordinary termination process, it is problematic to require it.

The increasing number of faculty with disability issues should highlight to institutions the importance of developing consistent and appropriate procedures for termination and for addressing disability issues in other employment decision making.

**Key Cases -- although these relate to student issues, the principles apply to faculty issues as well**

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (establishes the definition of “otherwise qualified”)

*Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991). In cases involving modifications and accommodations, the burden is on the institution to demonstrate that

relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationaly justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

***Recent Cases (alphabetically listed) on Faculty and Mental Health (and related issues)***

*Ball v. Los Rios Community College Dist.*, 34 Nat'l Disability Law Rep. ¶158, 2007 WL 755348 (E.D. Cal. 2007), on reconsideration in part on other grounds, 2007 WL 1791689 (E.D. Cal. 2007) The dismissal of an adjunct professor was based on absenteeism, failure to assign textbook, false statements, misrepresentation, and hostility not medical condition of hepatitis-C.

*Becker v. Gallaudet University*, 66 F. Supp. 2d 1 (D.D.C. 1999) A deaf faculty member did not request accommodations in advance.

*Boss v. Kettering University*, 28 Nat'l Disability Law Rep. ¶244, 2004 WL 1752961 (Mich. Ct. App. 2004) The court found that the following were not adverse employment actions: preventing teacher with hypertension, depression, and mental impairments from teaching favorite class, requiring him to teach specific summer classes, changing location and size of classes, and use of surveillance to document timeliness.

*Carter v. Chicago State University*, 50 Nat'l Disability L. Rep. ¶ 103 (7<sup>th</sup> Cir. 2015) The denial of acting chair position was not an FMLA retaliation. There was an insufficient claim of temporal proximity of action and the failure to demonstrate evidence that selected candidate was less qualified. (updating)

*Carter v. Chicago State University*; 2013 WL 3975009 (N.D. Ill. 2013) There were issues of retaliation raised in not promoting faculty member to chair position because of exercise of FMLA rights.

Lower court -- *Carter v. Chicago State University*, 2011 WL 3796886 (N.D. Ill. 2011) An accounting professor with sleep apnea which was found not to be a disability under the 1990 ADA. Reasonable accommodations of scheduling had been provided in any case. It is possible that under ADAAA of 2008, the sleep apnea would be a disability, but that the faculty member would still not be found to be otherwise qualified.

*Carter v. Chicago State University*, 50 Nat'l Disability L. Rep. ¶ 103 (7<sup>th</sup> Cir. 2015) Denial of acting chair position was not FMLA retaliation. There was insufficient claim of temporal proximity of action and complainant failed to demonstrate that selected candidate was less qualified.

*Caruth v. Texas A&M University-Commerce*, 2013 WL 991336 (N.D. Tx. 2013) Court granted summary judgment to university in denial of tenure case based on publication guidelines.

*Craig v. Columbia College Chicago*, 2012 WL 540095 (N.D. Ill. 2012) A college instructor with a hearing impairment was not denied a tenure track position based on his disability. The nonrenewal was based on offensive blog entries and email correspondence to supervisor.

*Coursey v. University of Maryland Eastern Shore*, 2013 WL 1833019 (D. Md. 2013) A professor required to undergo fitness for duty after aberrant behavior was not regarded as having a disability and issues of student safety were job-related.

*Curtis v. University of Houston*, 940 F. Supp. 1070 (S.D. Tex. 1996), *aff'd*, 127 F.3d 35 (5<sup>th</sup> Cir. 1997) A professor's denial of promotion was not based on alcoholism and finding that a history of nonperformance related to drinking problems can be considered in decision.

*Dansby-Giles v. Jackson State University*, 2010 WL 780531, 46 Nat'l Disability L. Rep. ¶ 65 (S.D. Miss. 2012) The court allowed the case regarding professor claiming denial of coordinator position and issues of interactive process in accommodation process to go forward.

*Davis v. Thomas Jefferson University*, 26 F. Supp. 3d 1035, 1 Nat'l Disability L. Rep. ¶ 108 (E.D. Pa. 2015) The university employer is not required to compromise collective bargaining agreement with terms about maximum medical leave by providing accommodations to an employee had been injured and could not return to work that extended the leave.

*Ellis v. San Francisco State Univ.*, 53 NDLR 127 (N.D. CaL. 2016) The court allowed the case to proceed because of triable issues about fitness for duty evaluation for faculty member whose behavior raised concerns. The conduct in question included failure to provide timely feedback and outbursts and volatile interactions. The issue involved what the director of HR knew at time the evaluation was requested and the relationship of the evaluation to business necessity and fitness for the job.

*Fuoco v. Lehigh University*, 981 F. Supp. 2d 352 (E.D. Pa. 2013) A coordinator with ADD and depression who claimed discrimination did not establish that he had a disability or that employer had notice of a disability. She had not made known any request for accommodations and legitimate reasons for termination were several errors in performance.

*Gardiner v. Nova Southeastern University, Inc.*, 2006 WL 3804704 (S.D. Fla. 2006) The court denied summary judgment in a case where it was decided that a determination of whether participation on dissertation committee was essential depended on factors of job description, time spent on task, experience of those who perform the job, and whether position exists to perform function.

*Gardner v. Western Kentucky University*, 2015 WL 5299451, 51 Nat'l Disability L. Rep. ¶ 162 (W.D. Ky. 2015) The court granted summary judgment for the university. The professor did not show sufficient evidence of failure to accommodate and retaliation claims. The faculty member with autoimmune disorder requested to attend large department meetings remotely using

interactive technology. A speakerphone had been provided. The court held that the employee has burden of proposing reasonable accommodations.

*Gascard v. Franklin Pierce University*, 2015 WL 1097485, 50 Nat'l Disability L. Rep. ¶ 140 (D.N.H. 2015) Court denied the motion to dismiss ADA claim by an art history professor. The issue was reasonable accommodation for situational stress in claim of bullying and differential treatment claimed for other faculty members who were allowed to leave meetings.

*Hamilton v. Oklahoma City University*, 911 F. Supp. 2d 1199 (W.D. Okla. 2012) Judgment aff'd, (10th Cir. 2014) The court upheld the grant of judgment against professor with vertigo who claimed discrimination in selection for position. Two members of the selection committee not aware of condition.

*Holmes v. Texas A&M University*, 138 F.3d 168 (5th Cir. 1998) The opinion was withdrawn and superseded, 145 F.3d 681 (5th Cir. 1998) The court held that the statute of limitations began on the date of the initial written notice of termination in a claim of tenured professor who experienced stroke that dismissal violated ADA.

*Hoppe v. Lewis University*, 2012 WL 37647171 (7<sup>th</sup> Cir. 2012) A faculty member with clinically-diagnosed adjustment disorder had been provided interactive process to provide office locations and there were no ADA violation.

*Horton v. Board of Trustees of Community College Dist. No. 508*, 107 F.3d 873 (7<sup>th</sup> Cr. 1997) Community college professor who was terminated because of excessive absences was not otherwise qualified.

*Housel v. Rochester Institute of Technology*, 6 F. Supp. 3d 294 (W.D. N.Y. 2014) A lecturer was terminated based on poor performance and insubordination. The reasons were not a pretext for action when claim was his FMLA request resulted in termination.

*Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) The court held that it was not inherently discriminatory to deny extended sick leave to professor who could not work.

*Kortyna v. Lafayette College*, 47 F. Supp. 3d 225 (E.D. Pa. 2014) A college professor requested as an accommodation that his personal attorney be present during disciplinary proceedings related to sexual harassment complaints; disability of Adjustment Disorder (debilitating anxiety and depression). The court found no violation of Title I or Section 504 in denying the request. Other accommodations at hearing had been provided using good faith interactive process. There is no entitlement to requested or preferred accommodation; only reasonable accommodation. Professor had requested as an accommodation that his personal attorney be present during disciplinary proceedings related to sexual harassment complaints, claiming a disability of Adjustment Disorder (debilitating anxiety and depression).

*Lamvermeyer v. Denison University*, 114 F.3d 1187 (6th Cir. 1997) It was not an ADA violation to fire a professor who submitted fraudulent vouchers while under the influence of medication for anxiety.

*Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314 (3d Cir. 2014) The case involved a procedural issue regarding receipt of notice of FMLA rights for an instructor with depression.

*Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995) (abrogated by, *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 26 A.D. Cas. (BNA) 389 (6th Cir. 2012) The *Maddox* decision involved adverse employment action against a coach who claimed his actions were caused by his alcoholism. The court found that the actions were based on conduct, not status.

*Marshall v. Keene State College*, 147 N.H. 215, 785 A.2d 418 (2001) A professor with depression did not show that the institution's mental health benefits plan with lifetime cap on benefits violated the ADA.

*McCracken v. Carleton College*, 969 F. Supp. 2d 1118 (D. Minn. 2013) The court recognized that a prima facie case of disability discrimination by university buildings and grounds employee had been made and held that the burden of demonstrating his mental health and other conditions made him regarded as disabled.

*Moore v. University of Kansas*, 124 F. Supp. 3d 1159 (D. Kan. 2015) The court addressed the issue of immunity in a case by a faculty researcher claiming hostile work environment and whistleblower retaliation. The individual had been terminated for disruptive and unprofessional behavior.

*Motzkin v. Trustees of Boston University*, 938 F. Supp. 983 (D. Mass. 1996) The court held that psychological problems did not excuse performance problems that resulted in termination.

*Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998) A photography professor was dismissed because of work performance and lack of collegiality, not because he was perceived as disabled because of his obsessive-compulsive disorder.

*Paststrump v. Southern Utah University*, 50 Nat'l Disability L. Rep. ¶109 (D. Utah 2015) A professor with lupus, fibromyalgia, and chronic anemia was suspended based on performance deficiencies (failure to turn in document on time). The court found that accommodations to the teaching schedule had been provided.

*Redlich v. Albany Law School of Union University*, 899 F. Supp. 100 (N.D. N.Y. 1995) A law school professor who suffered stroke and lost use of left hand was not impaired within the Rehabilitation Act definition. This case was decided before the 2008 amendments to the definition, and might be decided differently today.

*Silk v. Board of Trustees, Moraine Valley Community College, Dist. No. 524*, 795 F.3d 698 (7th Cir. 2015) An adjunct professor with a heart condition requiring triple bypass surgery was terminated because of his work, including problems with syllabi, using wrong textbook, poor attendance in courses and non-participatory classroom environment with students playing video games and talking on the phone.

*Tse v. New York University*, 2013 WL 5288848 (S.D. N.Y. 2013) The court denied the university's motion for summary judgment, finding that there were triable issues on reasonable accommodation. The professor had lost status as a program director. The court held that the employer was not required to provide preferred accommodation to faculty member with severe arthritis and lupus, but questions remained about whether university engaged sufficiently in the interactive process.

*Vosatka v. Columbia University*, 2005 WL 2044857 (S.D. N.Y. 2005) The court found that a request to undergo a psychological exam was not sufficient to indicate that the employer regarded a faculty member as disabled. The request followed erratic and inappropriate behavior.

*Wallace v. Heartland Community College*, 48 F. Supp. 3d 1151 (C.D. Ill. 2014) The court granted summary judgment to the college in a claim by a tenured biology professor with fibromyalgia and osteoarthritis that she had been constructively discharged and harassed by failure to provide requested accommodations.

*Weigert v. Georgetown University*, 120 F. Supp. 2d 1 (D.D.C. 2000) A university research assistant with neurological disorders and claustrophobia was not disabled under ADA (decided pre 2008 amendments). The dismissal was based on rude and abrasive interactions with other employees.

### ***Articles on Faculty/Staff Issues***

Sarah Brown, *How 4 Professors Built Careers Despite Mental-Health Struggles*, Chronicle of Higher Education, pp. B8-B10 (September 23, 2016)

Lisa Cook, <http://www.academicimpressions.com/news/managing-aging-higher-ed-workforce-how-address-mental-health-issues-and-create-retirement> Managing An Aging Higher Education Workforce: How to Address Mental Health Issues and Create Retirement Possibilities, December 7, 2015

Barbara A. Lee and Judith A. Malone, *As the Professoriate Ages, Will Colleges Face More Legal Landmines?* The Chronicle of Higher Education B6-B8 (November 30, 2007)

Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty*, 32 Journal of Law & Education 1 (2003) (detailed discussion of cases involving faculty members who won their cases)

Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes*, 28 Journal of College & University Law 129 (2001)

Barbara A. Lee and Peter H. Ruger, *Accommodating Faculty and Staff with Psychiatric Disabilities*, NACUA Publication Series (1997)

### **Relevant Scholarship by Laura Rothstein**

*DISABILITIES AND THE LAW* Chapter 3 (Thomson Reuters 4<sup>th</sup> edition 2012) and twice a year cumulative editions (with Julia Irzyk)

*The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J.C. & U.L. 531 (2015) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629306](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629306)

*Impaired Physicians and the ADA*, Viewpoint, June 9, 2015 JAMA, 2015;313(22); 2219-2220, <http://jama.jamanetwork.com/article.aspx?articleid=2319174>

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Appendix C is *Litigation over Dismissal of Faculty with Disabilities* by Laura Rothstein (pages 11-13)

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## Topics to be addressed include:

- I. Faculty and Impairment (overview)
  - A. Why is this an issue now?
  - B. What are the statutes and policies relevant to senior faculty?
  - C. What are the relevant disability discrimination laws?
  - D. What should be the policy, practice, and procedure response for higher education planning and response?
  
- II. Faculty and Impairment – why is this an issue now?
  - A. Baby boomers reaching retirement age – data
  - B. Diminishing capacity for some
  - C. Uncertain economy affecting retirement funds
  - D. Uncertain economy and policies affecting access to health care when most needed  
“Face it, girls. I’m older and I’ve got more insurance.” Evelyn Couch, Fried Green Tomatoes
  
- III. What statutes and policies are relevant to senior faculty in addition to disability discrimination laws?
  - A. Age Discrimination in Employment Act
  - B. Family and Medical Leave Act
  - C. HIPAA
  - D. State laws on privacy, and other matters
  - E. Institutional policies on retention, privacy, etc.
  
- IV. Federal Disability Discrimination Law – Institutions Covered by Rehabilitation Act and ADA
  - A. Section 504 of the Rehabilitation Act of 1973 – recipients of federal financial assistance
  - B. Americans with Disabilities Act – Title I (employment)
  - C. Americans with Disabilities Act – Title II (state and local governmental agencies, including in their employment practices)
  - D. Immunity issue – not applicable for Section 504; may be for state institutions
  
- V. Federal Disability Discrimination Law – Substantive Requirements
  - A. Who is protected – meeting the definition of “disability”  
Issue of “regarded as” impact on faculty with mental health concerns
  - B. Performance expectations
  - C. Reasonable accommodation
  - D. Discrimination and retaliation
  
- VI. Source of Guidance on Interpreting Federal Disability Discrimination Law
  - A. Statutory language for Rehabilitation Act and Americans with Disabilities Act
  - B. Regulations and agency guidelines
  - C. Judicial interpretation
  - D. OCR opinions
  
- VII. Federal Disability Discrimination Law – Who is protected
  - A. Three prong test –  
Substantially limited in one or more major life activities

- Record of such an impairment
  - Regarded as having such an impairment
  - B. Must be otherwise qualified – able to carry out essential requirements of program with or without reasonable accommodation; must not be danger to self or others
  - C. Alcohol and substance use are separately clarified – addiction to them would be a disability, but prohibiting use is still permissible
- VIII. Impact of the ADA Amendments Act of 2008 and Regulations
- A. Broadened definition
    - Mitigating measures no longer considered
    - Major life activities clarified and broadened
    - Regarded as clarified
  - B. EEOC regulations issued in 2011 provided clarification and guidance
  - C. Definitions applicable to both ADA and Rehabilitation Act
- IX. Major Life Activities
- A. Include but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working
  - B. Also includes operation of major bodily functions, including but not limited to functions of immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
  - C. Amendments mean that the following conditions are more likely to be covered – cancer, diabetes, HIV positive status, depression (depending on severity), mental health problems.
  - D. Amendments MAY give more likely coverage to conditions such as back problems, obesity, and respiratory conditions
- X. Otherwise Qualified
- A. What are “essential” performance expectations need not be excused
  - B. Even off the job behavior and conduct may be considered
  - C. What is the source of the performance expectations? Appointment letter, university policies (by reference?), notice, annual reviews, post tenure review policies
  - D. Obligation of faculty member to make “known” the disability before, not after nonperformance
  - E. Challenge of vague performance standards for faculty – teaching, research, service
  - F. Direct threat issue – including threat to self
- XI. Reasonable Accommodation
- A. Need not lower standards or fundamentally alter program
  - B. Deference standard under *Wynne* – relevant officials, considered alternatives, feasibility, cost and effect on program, reaching rationally justifiable conclusion about standards and program alteration officials
  - C. Financial and administrative cost are relevant factors
  - D. Importance of interactive process
- XII. Types of Accommodations to Consider
- A. Physical environment – location of classes; parking issues, etc.

- B. Teaching/scholarship/service reductions
  - C. Leaves of absence
  - D. Class scheduling – time of day, frequency
  - E. Assistance for technical teaching – e.g., demonstrating a surgical procedure
- XIII. What Are the Likely Mental Health Issues for Faculty and Why?
- A. Depression
  - B. Bipolar disorder
  - C. Schizophrenia
  - D. Dementia
  - E. Alcohol and substance abuse
  - F. Anxiety disorders
  - G. PTSD
- XIV. What Are the Judicial Responses in Faculty Cases?
- A. Few cases, but growing body of caselaw
  - B. Guidance from employment cases generally on definition of disability under 2008 amendments
  - C. Otherwise qualified
  - D. Reasonable accommodations
- XV. Incorporating Disability Discrimination Law Into Policy, Practice, and Procedure
- A. Letter of appointment – essential functions
  - B. Annual and other review processes
  - C. HR policies on accommodation requests should be made known
  - D. Ensuring compliance with privacy and confidentiality of information (Challenge in committee review process)
  - E. Interactive process in considering reasonable accommodations
  - F. Internal disciplinary and dismissal procedures
  - G. Ensuring consistency for all similarly situated faculty in providing accommodations for situations other than disabilities
  - H. Notice and due process
  - I. Providing retirement and other human resources counseling and planning
  - J. Training of department chairs re: mental health issues
  - K. Informing colleagues about spotting mental health issues (for faculty, staff and students) – threat assessment process
  - L. Recordkeeping to demonstrate consistency and timing of actions
- XVI. Benefits of Proactive Approach and Final Thoughts
- A. Positive and productive environment
  - B. Avoid use of resources on litigation and internal grievance procedures
  - C. Allows for predictable and humane process
  - D. Improves environment for everyone

**Bio Summary -- Laura Rothstein**  
**Professor of Law and Distinguished University Scholar**  
**University of Louisville, Louis D. Brandeis School of Law**  
**B.A., University of Kansas; J.D., Georgetown University Law Center**

Laura Rothstein was one of the first to write about disability law generally and its application to higher education specifically. Her work in this area began in 1979, at the University of Pittsburgh's Developmental Disability Law Project, where she represented clients with disabilities while a faculty member at the University of Pittsburgh School of Law. This work began her scholarly focus on disability rights issues. She is one of the "founding" scholars in the area, writing some of the first works on these topics. From 1980 to 1986, she served as Faculty Editor of the *Journal of College and University Law*, the law journal published by the National Association of College and University Attorneys.

Since 1980, she has written fifteen books and dozens of book chapters, articles, and other works on disability discrimination, covering a broad range of issues, with an emphasis on disability discrimination in higher education and special education. She has brought her knowledge of legal issues to her leadership and service within higher education and legal education. She has applied her knowledge during her service in administrative positions – Associate Dean for Student Services (University of Houston Law Center from 1986 to 1993), Associate Dean for Graduate Studies (University of Houston Law Center 1999 to 2000), and Dean (University of Louisville Brandeis School of Law 2000 to 2005).

She is frequently consulted by advocates, government agencies, university administrators, and university counsel about these issues, and her perspective is one of an "advocate through education." Her goal is to influence policy and practice by increasing awareness and understanding of legal requirements and how they can be implemented before disputes arise.

She has served as founding co-chair of the AALS Section on Disability Law, Chair of the American Bar Association Section of Legal Education Diversity Committee, a member of the LSAC Board of Trustees. She currently serves on the Advisory Board of *Campus Law Considered*, a program of the National Center for Student Life.

She received the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, from the Center for Excellence in Higher Education Law and Policy, Stetson Law School in 2011 (recognizing scholars who have published works on education law that embrace the intersection of law and policy) and an award for Outstanding Research and Creative Activity from the University of Louisville in 2012 and Brandeis School of Law Outstanding Teacher in 2015.

In addition to her work in disability law, she has worked to promote racial and gender diversity within legal education and the legal profession.

DISCUSSION SCENARIOS – Faculty with Mental Impairments  
Laura Rothstein © 2016

1) Faculty member who appears to be disabled

Professor A is popular and has served for 35 years in the political science department. He publishes regularly, has received outstanding student evaluations, and is a good citizen in the department. The Department Chair has recently heard that students have indicated that he is acting “odd” in class lately and sometimes strays into topic unrelated to the material. The administrative staff and colleagues have begun to notice that his normally impeccable appearance is not so impeccable. He is frequently unshaven and has not showered. In the most recent semester, his grades were extremely late. In previous semesters they were always submitted on time.

2) Faculty member who requests accommodations in advance

Professor B is in her first year of a tenure track appointment in the biology department. She would be eligible to apply for tenure in her sixth year of the appointment, but in the interim, she could be terminated at any point through the institution’s annual review process. She has an excellent research record, which is why she was given the appointment. Her student evaluations are less positive for the fall semester in which she taught a class of basic biology to 100 students and a microbiology class to 50 students. She also supervised lab classes for which there is no student evaluation process. After the fall semester evaluations, she makes an appointment with the Department Chair, bringing documentation from her psychologist indicating that she has panic disorder and psychological conditions that make it difficult for her to stand in front of a classroom and teach. She requests an accommodation to her performance requirements that she only be required to teach small lab classes, supervise one on one research, and engage in research. She is willing to serve on departmental committees as long as there are not more than about four or five members on the committee and she has requested that she not have to serve with two colleagues who make her nervous.

3) Faculty member who requests accommodations after performance problems

Professor C is a faculty member in the English department. The tenure track position has an expectation that to be granted tenure (which must be requested no later than the sixth year), the individual must have written and published five works in peer reviewed journals. Professor C’s area of teaching and writing is fiction. She has received average student evaluations in her classes (with no noted deficiencies in attendance or performance) and is generally well liked and thought of by her colleagues. When she applies for tenure in her sixth year, it is denied based on her publication record. Although the quantity is acceptable – three very short stories – these have not been published by highly regarded journals. When she meets with the Department Chair after the denial, she notes that during the last six years, her husband had left her, she had lost both parents in an unusual car accident, and she had been depressed as a result. She provides a letter from to that effect, and also notes that she has recently been diagnosed with bipolar

disorder and that the medication she is taking is having a positive impact. She requests a two year extension of the tenure clock. What if she had requested this in her fourth year instead of the sixth year?

4) Faculty member who justifies performance problems because of impairment

Professor D is a lively and popular professor in the history department. There has been a recent complaint of sexual harassment by a female student and it was handled by the Title IX grievance process. The complaint was based on an office encounter when a student came to review a mid-term exam. The Professor now tells the Department Chair that he has alcoholism and a diagnosed condition of “sexual disinhibition” and requests that only male students be allowed to enroll in his classes. In the alternative, he requests that he not be required to meet with individual students as part of his responsibilities. He asks that this accommodation be granted and that the Department chair verify this adjustment as part of the sexual harassment grievance process. He presents a statement from a mental health professional about his conditions.

**WHAT MUST YOU DO? WHAT CAN YOU DO? WHAT SHOULD YOU DO?**

**LEGAL ISSUES TO RESOLVE IN ADDRESSING THESE SITUATIONS**

Are these conditions covered under ADA, Section 504, state law, FMLA? What documentation can be required?

What are the deficiencies? Have they been documented?

What notice did the faculty member have about “essential requirements”?

What needs to occur with respect to privacy and confidentiality?

**PRACTICAL ISSUES TO RESOLVE IN ADDRESSING THESE SITUATIONS**

What steps should be taken in response to each situation?

What steps might be taken to avoid similar situations in the future?

10/28/16