

The article below summarizes a presentation made by Mona Koppel Mitnick, Esq., APPIC Board Public Member; with Nadine Kaslow, Ph.D., Emory University and Past Chair, APPIC; and Jeff Baker, Ph.D., University of Texas Medical Branch at Galveston and APPIC Board Member, on August 21, 2002, at the APPIC meeting held in conjunction with the 2002 American Psychological Association meetings in Chicago.

LEGAL ISSUES IN MANAGING PROBLEM STUDENTS AND DEVELOPING EFFECTIVE INTERVENTIONS FOR PROBLEM SITUATIONS IN PSYCHOLOGY TRAINING*

As a former program counsel to managers and the Human Resources and EEO offices in a federal agency and a recovering litigator, I dealt with many different kinds of problems and disgruntled employees.

In these situations, I tried to ensure that management had given an employee all the due process to which he/she was entitled, both to ensure fairness and to comply with the relevant laws. I also tried to protect program officials and programs against legal liability, and to ensure that third parties—such as a court or administrative tribunal—upheld the management action. At the same time, I also tried to ensure that, when management took a performance or conduct action against an employee, they did not do so for impermissible reasons, e.g., most relevant for our purposes, discrimination because of disability or sex (including discrimination because of pregnancy), which I will discuss later.

I first would like to give you some general guidelines, both on due process and some of the types of problems that commonly arise. This guidance is applicable both to interns and post-docs.

DUE PROCESS PROCEDURES

As mentioned above, such procedures are intended both to protect trainees from unfair or arbitrary actions by supervisors or other training program officials, and to protect those officials and programs from legal liability. To ensure that due process procedures developed by a training program fulfill the intended goals, these procedures should be--

- Simple and easy to understand
- Written and communicated to each intern/trainee/post doc at the time he/she begins the internship or post doc.
- Applied uniformly and in a timely fashion to all such problem or substandard interns/trainees/post docs and to any intern/trainees/post docs complaints about the actions of training program staff.
- Applied to all serious performance, conduct, and ethical problems of interns/trainees.
- Consistent with your institution's due process procedures, if appropriate; or incorporate such institutional policies.

- Developed and implemented in consultation with your institution's Legal, Human Resources, and EEO staff.

Each training program's due process procedures should contain the following general types of provisions:

- Description of the types of problems and behavior covered, and their impacts on your program, and on others (e.g., colleagues, patients, etc.). These procedures should be broad enough to cover all performance, conduct, and ethical deficiencies, as well as any combination of these deficiencies.
- Description of the persons covered, making clear that all interns/trainees/post docs, at whatever stage of training, are covered.
- A clear statement of the time limits at different stages of the process, and whether and for what reason(s) such time limits may or may not be waived.
- Both informal and formal procedures for correcting deficiencies, and appealing any dissatisfaction with the program's compliance with the procedures, the notification of deficiencies and any penalties.
- A clear statement at each stage identifying the decisionmaker, and the contents of the decision.
- A clear statement at each stage of whether and to whom the complainant or training program official may appeal the decision
- A clear statement of when the decision becomes final.

TYPES OF PROBLEMS

Some specific types of problems that arise may include conduct or performance; or, frequently a combination of the two. For example, a trainee who displays performance problems, also may have accompanying conduct problems (e.g., tardiness, excessive absences). Such conduct problems, in turn may have other roots, such as drug or alcohol abuse, or emotional problems. If, as a supervisor, you suspect such problems, you might wish to make a written offer of counseling to the trainee, after consulting your Human Resources staff.

SPECIAL SITUATIONS

Training programs and officials should ensure they do not take adverse action against trainees for impermissible reasons—the obvious ones being age, race, sex, religion, national origin and, in many jurisdictions, sexual orientation. Far more complicated are situations involving disability and pregnancy.

Disability

- Any applicant/intern/postdoc who wishes to be treated as a disabled person under the Rehabilitation and Americans with Disabilities Acts must explicitly claim to be disabled, and must establish that he/she is a qualified disabled person.

- It is not the responsibility of the internship/program site or any person there to ask if the applicant/intern/postdoc is disabled before that person raises the issue. Indeed, it is extremely unwise, and perhaps illegal, to do so.
- To establish that he/she is a qualified disabled person, the applicant/intern/postdoc must show he/she—(a)has a physical or mental impairment which substantially limits one or more of his/her major life activities; (b)has a record of such impairment; or (c)is regarded as having such an impairment. In order for the person to qualify, the impairment cannot be transitory or temporary; it must be long-term or permanent.
- Even when an applicant/intern/postdoc claims he/she is a qualified disabled person, entitled to protection under the Rehabilitation Act or ADA, the internship/program site has no obligation to do so, unless the applicant/intern/postdoc also shows he/she can perform the essential functions of his/her position, with or without reasonable accommodation.
- The internship/program site is required to reasonably accommodate only those meeting the above definition of a qualified disabled person, and who can perform the essential functions of the job, with or without reasonable accommodation.
- Where the applicant/intern/postdoc has established he/she meets the above definition, the internship/program site is required either to reasonably accommodate the applicant/intern/postdoc; or show the requested accommodation would impose an undue hardship, based on the site's size; and the nature and cost of the accommodation.
- Where a qualified disabled person is not selected as an intern/postdoc, the internship/program site must be able to show, using objective criteria, that it had legitimate, non-discriminatory reasons for the non-selection, unrelated to the applicant's disability (e.g., those selected were better qualified; or the applicant's references were unfavorable, so long as they were unrelated to the disability); and, if applicable, has treated other similarly-situated non-disabled applicants/interns/postdocs in similar fashion .

MARITAL STATUS AND PREGNANCY

Some general principles and authorities are as follows:

Marital Status

Federal law—

- The U. S. Equal Employment Opportunity Commission, which generally is responsible for administering federal anti-discrimination statutes, applicable both to the private and public sectors—

- Has no jurisdiction over claims based on
 - marital status;
 - sexual orientation; or
 - having or not having children.
- Has jurisdiction, in the context of relationships, only over disparate treatment based on sex.
- The Civil Service Reform Act prohibits, for most federal civilian employees, discrimination based on marital status and on conduct. Such discrimination may be considered a prohibited personnel practice, which may be reported to the U.S. Office of Special Counsel.
 - The Office of Personnel Management (OPM) has interpreted the prohibition against discrimination based on conduct as including discrimination based on sexual orientation.
- Executive Order 13087, amending Executive Order 11478 (May 28, 1998) provides a uniform policy for the federal government to prohibit discrimination against civilian federal employees based on sexual orientation. It created no new rights, but encouraged many Cabinet-level agencies to issue policy statements prohibiting such discrimination.
- State law—Frequently tracks or parallels the federal statutes, although many states provide additional protection; e.g., many now explicitly prohibit discrimination based on sexual orientation. You always should check the laws of your own state.

Pregnancy

- Major federal discrimination statute—The Pregnancy Discrimination Act of 1978, amends Title VII (sec. 701) of the Civil Rights Act to make discrimination based on pregnancy a form of sex discrimination.
- Executive Order 13152, amending Executive Order 11478 (May 2, 2000) applies to federal civilian employees, and prohibits discrimination in employment based on an individual’s status as a parent (not limited to biological parents).
- State law—Many states have similar prohibitions against pregnancy discrimination. You should always check the law of your own state.
- Major provisions relevant to internships and post-docs--

- Sites cannot have policy, written or unwritten, that effectively excludes applicants, interns, or post-docs, because of pregnancy, childbirth, or related condition.
- Conversely, sites do not have to treat pregnant applicants, interns, or post-docs more favorably than non-pregnancy employees. Employers must treat pregnant women as well as they treat non-pregnant employees. Conversely, they also may treat pregnant women as badly as they treat non-pregnant employees.
- In analyzing whether someone has a claim of pregnancy discrimination, the comparison is not to those without disabilities, but to those with temporary disabilities. Temporary disabilities, such as pregnancy are **not** covered by the Rehabilitation or the Americans with Disabilities Acts.
 - Applicants, interns, or post-docs, in order to prevail on a claim of pregnancy discrimination, must show pregnancy was the reason for any disparate treatment.
 - A site which has a policy denying parenting leave does not violate the Pregnancy Discrimination Act, so long as the policy applies equally to males and females.
 - The protection of the Privacy Discrimination Act extends both to married and unmarried females.

NOTE: Readers are cautioned that this article merely is informational. It does not provide an exhaustive list of references; it is not intended to be exhaustive or definitive in all situations; or to be relied upon without prior consultation with legal counsel.

*For a more complete discussion of each of these topics, you may consult the APPIC Newsletter, respectively November 2001 for problem trainees; March 2002 for disability; and July 2002 for pregnancy and marital status.