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Seventh Circuit finds that Chicago principal was not terminated due to his age

BY PHYLECCIA COLE

The Seventh Circuit Court of Appeals, in the case of *Lionel Bordelon v. Board of Education of the City of Chicago* (No. 14-3240), recently affirmed the Northern District of Illinois grant of summary judgment in favor of the Board of Education in an ADEA claim filed by tenured Principal Lionel Bordelon alleging that his contract was non-renewed based upon his age.

Bordelon, who served as the Principal of Kozminski Community Academy, a K-8 School in the Chicago Public School System, since 1993, alleged that Chief Area Officer Dr. Judith Coates began taking

Continued on next page

Seventh Circuit rejects teacher's challenge to district policy on use of racial epithets in classroom

BY PHIL MILSK

In *Brown v. Chicago Board of Education,* No. 15-1857(7th Cir., 6/2/16), a sixth grade teacher challenged his suspension for violating a Board policy regarding the use of racially offensive words in class. He was suspended after the school principal observed him discussing the use of racially offensive words with his students. The discussion, which was well-intended as a teaching opportunity, took place after Mr. Brown caught his students

Continued on page 3

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Seventh Circuit finds...

CONTINUED FROM PAGE 1

steps to remove him immediately after becoming his supervisor in 2009. A former secretary testified that upon beginning her new job, Coates inherited a list of several "older black principals to be disciplined," who were heading up low performing schools, including Bordelon.

In November 2010, Bordelon was issued a notice of pre-disciplinary hearing based on insubordination - specifically (1) failing to respond to a parent issue raised on November 2; (2) failing to comply with a request from September 20 to set up a parent meeting in October; (3) failing to schedule a meeting requested in an October 25 email regarding the arrest of several Kozminski students; and (4) failing to respond to Coates' email from November 4 regarding resolution of the three aforementioned matters. As a result, Bordelon was issued a five-day suspension without pay, which he appealed and never served. On December 7, 2010 Bordelon was issued an evaluation rating him as "needs improvement", noting that Kozminski was on academic probation for the second year in a row with test scores trending downward.

In December 2010, during a meeting of the Local School Council, Coates suggested that it was time for Bordelon "to give it up." Next, in a letter dated December 29, 2010, Coates suspended Bordelon with pay, pending an investigation into: (1) improperly replacing asbestos-containing tile at the school; (2) purchasing irregularities; and (3) tampering with school computers in a manner that impeded access to school records by the Board. During the suspension, on January 28, 2011, the Council voted not to renew Bordelon's contract, based upon (1) failure to provide adequate principal reports to the Council; (2) not being evaluated as Highly Qualified; (3) not meeting the requirements needed to have an effective and safe school environment; (4) low test scores; (5) disciplinary problems; and (6) parents do not feel you are open and receptive to them. On February 28, 2011, Bordelon submitted his notice of retirement effective June 30, 2011, the end of his non-renewed contract.

Bordelon filed suit against the Board alleging (1) age discrimination in violation of the Age Discrimination in Employment Act; (2) discrimination on the basis of race in violation of Title VII; (3) retaliation in violation of Title VII, the ADEA and Section 1981; (4) constructive discharge; and (5) deprivation of due process. The District Court granted summary judgment in favor of the Board on all claims, then denied Bordelon's motion for reconsideration, and this appeal only on the age discrimination claim followed.

Because Bordelon chose to sue the Board, and not the entity responsible for non-renewing his contract – the Local School Council (which pursuant to statute is a separate legal entity from the Board), he relied on a "cat's paw" theory of liability. Therefore, to withstand summary judgment, Bordelon needed to present evidence upon which a trier of fact could conclude that Coates (1) harbored discriminatory animus based on his age and (2) gave the Council information that influenced its decision not to renew his contract.

The Court ruled that Coates's suggestion that it was time for Bordelon "to give it up," was not an express remark about Bordelon's age as he claimed; nor was it an ambiguous remark sufficient to give rise to an inference that Coates was motivated by age. Likewise, the alleged list containing five or six "older black principals to be disciplined" also did not support an inference of intentional discrimination based on age. Given that fourteen of the sixteen principals in the area were over 40 years of age, and that the three identified principals including Bordelon were in charge of poorly performing schools, the mere fact that they were on the list was not evidence of age discrimination. Finally, the fact that Coates' former secretary felt that Coates wanted to replace her with a younger person, while admitting

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ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Philip C. Milsk

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

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that she was replaced with someone who had more education and could do a better job, did not give rise to an inference of age discrimination.

The Court further ruled that because Coates and the Board were not the decision makers, Bordelon needed to show that Coates bore a discriminatory animus that influenced the Council – a burden that Bordelon did not meet. He did not present sufficient evidence that Coates actually harbored discriminatory animus, and furthermore, there was substantial evidence that the Council had independent reasons for choosing not to renew Bordelon's contract.

While in the present case the statements said to have been made by Coates were not sufficient evidence of age discrimination, employers and their agents should be mindful of the things that they say, and must take care not to make statements that could be misconstrued or interpreted as evidence of bias. ■

Phyleccia Cole is Senior Associate General Counsel at Southern Illinois University-Edwardsville and a member of the ISBA Education Law Section Council.

Seventh Circuit rejects teacher's challenge

CONTINUED FROM PAGE 1

passing a note in class containing, among other things, music lyrics including the word "nigger." Mr. Brown was suspended under a policy of the Board forbidding teachers from using racially offensive words in front of students regardless of the purpose.

Brown sued, claiming (1) that his suspension violated his First Amendment rights and (2) that the policy was so vague that the suspension violated his substantive due process rights under the Fourteenth Amendment. The District Court granted summary judgment in favor of the Board and Brown appealed.

As to Brown's First Amendment claim, the Court applied the special First Amendment rules governing public employees as set forth in *Garcetti v. Ceballos,* 547 U.S. 410(2006) and *Pickering v. Board of Education,* 391 U.S. 563(1968). Under *Garcetti and Pickering,* the public employee speaker is protected under the First Amendment if he or she is speaking as a citizen on a matter of public concern, rather than as an employee. In this case, Brown was speaking as a teacher when the policy violation occurred. However, he raised the issue, unanswered by the Supreme Court in *Garcetti,* of whether the teacher is protected by the First Amendment if the case involves speech related to scholarship or teaching.

Citing *Mayer v. Monroe County Community Sch. Corp.,* 474 F.3d 477(7th Cir. 2007), which held that the teacher's in-classroom speech is not the speech of a "citizen" for First Amendment purposes, the Court found that Brown gave his impromptu lesson in the course of his regular instruction to his sixth grade class. Therefore, his speech was pursuant to his official duties, and it did not matter that he deviated from the official course curriculum. The Court further noted that maintaining classroom order is also one of the teacher's official duties, and his discussion of racially offensive language in the note the students were passing around was in part an attempt to "quell student misbehavior."

Brown urged the Court to disregard *Mayer* and follow a Ninth Circuit case, *Demers v. Austin*, 746 F.3d 402(9th Cir. 2014). However, the Court noted that *Demers* addressed speech in a higher education setting, and recognized that academic freedom in a university is of special concern because of "the university's unique role in participating in and fostering a marketplace of ideas." The Court also pointed out that the Ninth Circuit has followed *Mayer's* approach in the elementary and high school context. (Citations omitted). The Court therefore concluded that Brown's speech was made as a teacher, not as a citizen, and his suspension was not a violation of his First Amendment rights.

Turning to the issue of whether Brown's due process rights were violated by the implementation of the Board's policy, the Court first noted that Brown was suspended by the Board for misconduct under two sections of Board policy. The first policy prohibits verbally abusive language to or in front of students. The second prohibits the violation of Board policies or rules that result in behaviors that disrupt the orderly educational process. Brown asserted that these policies, taken together, are so vague that they cannot be applied consistent with the Due Process clause of the Fourteenth Amendment.

Brown argued that the term "racial epithet" is too vague to provide fair notice that his language was prohibited. The Court rejected his argument, stating that the word "nigger" is "one of the most reviled in American English." Further, the Court noted that Brown's own actions demonstrated that he knew this to be the case because he interrupted his planned lesson to lead a discussion on the inappropriateness of the word. The Court also rejected the notion that to survive a vagueness challenge a policy must define every term or provide a list of banned words. The Court concluded that the policy gave Brown adequate notice that the use of the word "nigger" was prohibited.

Brown also argued that the Board had a policy of non-enforcement when the word was used in an educational context and, therefore, he lacked sufficient notice that the Board would enforce the policy against him. He pointed out several instances where students heard the word in an educational setting with the school's tacit approval (e.g., when he taught *The Adventures of Huckleberry Finn* at another

Chicago Public School), and cited the principal's admission that he might have used the word when asking students what occurred in Brown's classroom on the day of the incident in question. Brown cited an FCC case involving Fox Television Stations in which the U.S. Supreme Court agreed with the network's argument that it had not been given fair notice of a change in which the FCC's policy of allowing isolated or fleeting expletives or nudity was changed unannounced to fining networks for brief nudity and swearing. The Court distinguished Brown's case from the FCC matter because, unlike the instant case, the FCC case involved a written non-enforcement policy that was suddenly changed without notice.

In conclusion, the summary judgment of the District Court was affirmed. The Court understood Brown's frustration that a racially offensive word used by a teacher for constructive educational purposes was not protected by the First Amendment. The Court described the challenged suspension in this case with a phrase from the late Justice Scalia: "Stupid but constitutional." This decision may give additional guidance to school administrators, teachers and counsel with respect to the protections afforded teachers under the First Amendment, and the specificity with which school board policies prohibiting certain employee conduct must be written. ■

Phil Milsk is a the immediate past chair of the ISBA Education Law Section Council and co-editor of the Newsletter.

Transgender issues in schools and the workplace: Personal records

BY EDWARD DRUCK, JENNIFER SMITH, AND BRIANNE DUNN

The rights of transgender individuals and the application of those rights in the absence of specific laws leave schools and employers in unfamiliar territory on myriad issues. This article looks at just one: the management of records with sensitive information regarding an individual's gender transition.

The School Dilemma

Schools generate and maintain many records that could identify a student as transgender, such as birth certificates, rosters for activities separated by gender (for example, sports teams), enrollment forms, and even gender support plans. As a starting place, it is important for attorneys practicing in this area to understand what information contained in records may be sensitive. The term "transgender" encompasses multiple concepts, but has been broadly defined as an individual who "has a gender identity (one's internal sense of gender) that is different from the individual's assigned sex (i.e. the gender designation listed on one's original birth certificate)."[1] Transition is known as "the process through which transgender people begin to live as the gender with which they identify, rather than the one typically associated with their sex assigned at birth."[2] "A gender transition often includes a 'social transition,' during which an individual begins to live and identify as the sex consistent with the individual's gender identity, with or without certain medical treatments or procedures."[3] Accordingly, records that include any identification of an individual's gender, a name change, or other indications of a social transition are important in this context.

Consider 12-year-old Samantha: Samantha's birth certificate identifies her as female, and Samantha identifies as a male. Samantha wants to transition as a male and meets with the school social worker to talk about the transition process. She shares her plans to transition and has several requests for her transition: Samantha wishes to be referred to with male pronouns and to be addressed as "Sam" by classmates and faculty. Sam does not want his former name to appear in his classroom or elsewhere in school. Sam has not told his parents of his transition and does not want to tell them.

Sam is essentially requesting that the school change his student records to reflect his gender identity. This request implicates laws including the Family Educational Rights and Privacy Act ("FERPA") and the Illinois School Student Records Act ("ISSRA"). Sam's conversation itself with the social worker may be considered confidential as Section 5 of ISSRA provides that "[n]othing contained in this Act shall be construed to impair or limit the confidentiality of communications otherwise protected by law as privileged or confidential, including but not limited to, information communicated in confidence to…a school social worker or school counselor…"[4] However, Sam's transition plan in school, specifically his requests to be referred to as Sam, to have his name changed on school documents, and to be referred to using male pronouns raise the issue of whether the school needs the consent of Sam's parents to make the requested changes.

Parental involvement maybe required because Sam's request involves a change to his school records. ISSRA gives parents the right to both access and challenge their child's student records: "Parents shall have the right to challenge the accuracy, relevance, or propriety of any entry in the

school student records …"[5] ISSRA broadly defines student records as, "Any writing or other recorded information concerning a student and by and which a student may be individually identified, maintained by a school or at its discretion or by an employee of a school, *regardless of how or where the information is stored.*[6] *(Emphasis added).* Accordingly, any documentation of Sam's requested name and pronoun change or document reflecting the name and pronoun change are records that may be accessed and challenged by Sam's parents.

Gender Identification through School Records

Consider a second situation: Sam starts at a new middle school *already having transitioned*. His family has not informed the new school of the gender transition, instead enrolling him using the identified male gender and his preferred name, Sam. The family is reluctant to give the school a copy of Sam's birth certificate. Sam will be known only as Sam at this new school, and if the birth certificate (which identifies Sam as female) is shared or exposed, they fear backlash and potential violence against Sam. Sam's parents contest giving the original birth certificate.

Some state laws, including two in Illinois, require that parents or guardians enrolling students in a school for the first time provide a certified copy of a student's birth certificate. The Missing Children's Records Act and the Missing Children's Registration Law require parents to provide a certified copy of a birth certificate or "other reliable proof as determined by the Department [of State Police] of the student's identity and age, and an affidavit explaining the inability to produce a copy of the birth certificate."[7]

The purpose of these laws is not to identify students as transgender, but rather to alert law enforcement to the presence of potentially missing children. Nonetheless, the discrepancy between a student's birth certificate and enrollment information will identify the student as transgender in school records. In the scenario described with Sam, the school must require the birth certificate or affidavit.

The challenges of maintaining the confidentiality of a student's gender transition go beyond the birth certificate. ISSRA allow schools to routinely share gender information with the public.[8] Schools may designate student gender as "directory information," meaning the student's gender may be released to the public. Schools may routinely share gender information publically, for example, by posting "girls" and "boys" rosters for activities. Parents or their legal counsel who seek to protect a child's gender identity must affirmatively request that gender information not be released by the school. To honor such requests, schools will need to take steps to broadly consider what public information the school releases that may identify a student's gender.

Student records are not only an issue when the student attends school: a student's name and gender are included on the student's permanent record, which the school district must maintain for 60 years after the student leaves school. Individuals and lawyers assisting them may seek to align all of an individual's official records with a change in gender identity by requesting a change to their permanent school record. Currently, there are no legal standards governing the criteria a school district should use to process such a gender change request.

Records in the Workplace: Navigating through the Evolving Law

Illinois is one of 17 states to explicitly include gender identity under its state anti-discrimination laws.[9] While Illinois law specifically protects transgender individuals from discrimination in the workplace, it is unclear what practical implications this has for record maintenance.

The Workplace Dilemma

The Illinois Human Rights Act ("IHRA") provides "freedom from discrimination against any individual because of his or her race, color, religion, sex, age… sexual orientation…in *connection with employment*, real estate transactions, access to financial credit, and the availability of public transactions."[10] *(Emphasis added).* Sexual orientation, as defined in the IHRA, includes "gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[11]

Consider employee Samantha: Samantha's birth certificate identifies her as female, and Samantha identifies as a male. Samantha wishes to transition at his job. He requests to be referred to as Sam by the employer and employees. He requests to change his personnel records to reflect his changed name and gender and to have his paychecks reflect his new name. Sam has not made any formal changes to his personal identification documents (including his state ID, driver's license, or birth certificate). Sam's employer wants to maintain legally compliant personnel records.

At present, there is no law directly applicable to situations like the one presented by Sam's request. The Illinois Personnel Record Review Act ("IPRRA"), which provides for access, review and production of employee records, does contain a general provision allowing for the correction of personnel records by an employee. IPRRA's Section 6 states, "If the employee disagrees with any information contained in the personnel record, a removal or correction of that information may be mutually agreed upon by the employer and the employee."[12]

The IPRRA does not require an employer to make all requested changes to personnel records. If the employer does not agree with a requested change, then Section 6 of IPRRA provides that the employee may submit a written statement explaining the employee's position and the employer must then attach the employee's statement to the disputed portion of the personnel record. The IPRRA process is not well suited to this dispute, as any statement of disagreement attached to a personnel record would only serve to highlight the individual's transgender status.

However, the IPRRA is not the only legal consideration. Advocates for transgender individuals have successfully argued that current laws provide a right to privacy that applies to an individual's

transgender status. For example, in *Love v. Johnson*, the United States District Court in the Eastern District of Michigan recently found that requiring an individual to disclose her transgender status implicates a constitutional right to privacy.[13] The court based its decision, in part, on its determination that disclosure of one's transgender status "creates a very real threat to Plaintiffs' personal security and bodily integrity."[14] It is unclear whether this logic could support a discrimination claim under the IHRA or other anti-discrimination laws.

Evolving Issue

Even when looking only at the single issue of records management for transgender individuals, the law is highly complex and evolving. This leaves all parties and their legal representatives to make practical decisions balancing not only the current state of the law, but also where the law may go in the weeks, months and years to come. ■

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Edward N. Druck is a partner in the Labor & Employment and Higher Education Practice Groups at Franczek Radelet P.C. He represents clients in employment and labor law matters and is experienced in all aspects of litigation before federal and state courts and administrative agencies. He also represents clients in hearings before arbitrators. Ed counsels clients on a variety of employment issues including union elections and claims of unfair labor practices and discrimination, I-9 and wage and hour compliance matters, and employment agreements. During his nearly 25-year career, Ed has developed significant experience in non-compete, trade secret and restrictive covenant disputes, and frequently litigates and advises clients on these matters. Ed serves on several diversity committees and has written and presented on issues of diversity and inclusion for a number of years.

Jennifer A. Smith is a partner with Franczek Radelet P.C. Jennifer's practice involves representing education clients on a wide range of issues, including matters related to student rights, athletics, special education, labor and employment law, policy development, TIF counseling, and litigation. She has extensive experience in representing public school districts and higher education institutions in investigations and litigation.

Brianne Dunn is an Education Law Practicum Student for Franczek Radelet P.C.

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3. <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>.
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7. 325 ILCS 55/5.
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13. *Love v. Johnson*, No. 15-11834, 2015 WL 7180471, at *5 (E.D. Mich. Nov. 16, 2015) reconsideration denied, No. 15-11834, 2016 WL 106612 (E.D. Mich. Jan. 10, 2016).
14. *Id.*

Emotional support animals on campus

BY ROBERT L. MILLER

A change is occurring at many university campuses across the country. Over the last few years, students have been requesting, with increasing frequency, permission from campus authorities to bring an emotional support animal to live in their residence hall or university owned apartment. Such requests have included dogs, guinea pigs, iguanas and snakes. For students who have emotional difficulties or anxieties, the benefits of having an assistance animal are real, and so are the challenges for universities.

Many universities have enforced longstanding "no pet" policies in campus housing with the possible exception of tropical fish. Housing officials often have concerns animals may damage rooms and apartments, trigger allergies or phobias of other students, escape and multiply, or bite someone. However, these policies may not be in alignment with the needs of some students to have an emotional support animal in their living space.

There are two important legal questions that universities must consider. The first is whether the Fair Housing Act (FHA) applies to campus housing, and an equally important question is whether the Rehabilitation Act of 1973 provides students the accommodation of having an emotional support animal on campus. If the answer to the first question is yes, then the living space issue is resolved because the Federal Department of Housing and Urban Development has stated that reasonable accommodation requests may include emotional support animals.[1] If the answer to the second question is yes, then entities subject to the Rehabilitation Act may see requests for emotional support animals in the workplace and common areas.

University and college students are able to seek reasonable accommodations for their disability under section 504 of the Rehabilitation Act of 1973 (Rehab Act).[2] The Rehab Act, which prohibits acts of discrimination by programs that receive federal financial assistance, aligns in many ways with a more well-known disability law, the Americans with Disabilities Act (ADA), which prohibits discrimination by a public entity.[3] However, as it pertains to emotional support animals, there appears to be some daylight between these two laws which creates some uncertainty.

The ADA is clear enough in that it requires public entities to immediately accommodate persons who utilize trained service animals.[4] Under the ADA, "*[s]ervice animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition."[5] There are only two exceptions that permit a public entity to refuse to accept a service dog: (1) when the animal is out of control and the handler cannot control it, or (2) the animal is not housebroken.[6]

The ADA expressly excludes all animals other than dogs (and miniature horses) from the definition of service animals. If it did not, society would be left to deal with very serious and complicated questions. For example, if a boa constrictor served as a service animal under the ADA, places of public accommodation—restaurants, theaters, trains, etc.—must permit the animal to accompany its owner. The ADA exceptions may not be useful because some animals do not appear unruly or dangerous at first glance.

Unlike the ADA, the Rehab Act does not define service animal and does not address the possibility that students may need emotional support animals. The Rehab Act does clearly state that students with disabilities cannot be excluded from any program or activity that receives federal financial assistance.[7] The Rehab Act further states that campus housing must be accessible to students and cannot result in discriminatory treatment based on a disability.[8] Accordingly, because a failure to provide reasonable accommodations can support a claim of discriminatory treatment, and because the Rehab Act does not address or exclude emotional support animals, it is possible that a student is entitled to this accommodation assuming the request is reasonable. At least one court has held that a student may be able to state a failure to accommodate claim under the Rehab Act, even though the claim could not be made under the ADA.[9]

If the Rehab Act is broader than the ADA in this instance, students may be able to request the use of an emotional support animal in both their living space and other spaces on campus, including spaces where an ADA defined service animal is permitted. This would include public spaces and the classroom. Each request would be independently assessed so it is unlikely that every classroom would become a menagerie of exotic animals, but with the increasing number of students making such requests, it is timely for state and federal legislators to address the issue of emotional support animals in more detail.

In drafting the Rehab Act, Congress likely did not consider emotional support animals as a potential disability accommodation, and new regulations could serve to identify whether such animals are permitted as an accommodation. If a university must accommodate animals in residence halls, it would be helpful to have a list of permitted animals or additional parameters regarding the suitability of a particular animal. Without this help, universities must assess animals that have been prescribed by a physician or counselor on a case by case basis to determine whether to permit the accommodation. Assuming that a university has discretion to permit or deny exotic animals, trying to determine whether an iguana is too big for a small residence hall room can create inconsistent results and unnecessary turmoil and delay for the student. As seen below, under the Fair Housing Act, a housing provider is likely limited in its assessment regarding the suitability of emotional support animals.

Another important piece of this puzzle is the Department of Housing and Urban Development (HUD) and its application of the FHA to university campuses. The FHA applies to dwellings which includes accommodations that are transitory in nature such as migrant farmworker housing, and while the FHA does not specifically include university housing in its definition of a dwelling, at least one court has ruled that campus housing does fall under the purview of HUD and the FHA.[10] In addition, HUD has firmly posited that campus housing is subject to its authority.[11] Consequently, HUD's definition of assistance animal likely determines whether students can have emotional support animals in their residence hall rooms.

When a housing provider is presented with a request for an emotional support animal accommodation, it can consider whether the specific animal, not the breed or variety, is a direct threat to the safety of others, and it can consider whether the specific animal is a threat to cause substantial damage to the property of others.[12] However, the housing provider must base its determination on actual evidence and not speculation.[13] Presumably, this means that bad behavior must occur and be observed before a denial can be made. In addition, it is noteworthy that the HUD notice states that there are no size or weight limits on assistance animals.[14] It is also noteworthy that residence hall rooms are generally not very large.

Consistent with a notice issued to its field offices in 2013, HUD has issued charges of discrimination against universities and against individual employees of those campuses who have refused to permit emotional support animals.[15] The effect of HUD's enforcement activities has had a substantial impact on campus decision-makers tasked with accommodating students with disabilities while they also try to balance the impact of such requests on the campus community.

While requests for emotional support animals on campuses are not new, the frequency and variety of these requests has been growing over the last several years. Universities are generally very welcoming of students with disabilities, and campuses are trying to navigate this complex issue without the benefit of clear legal guidelines. Having more clearly defined rules would also be very helpful for a young student contemplating leaving home for the first time who wonders whether her hamster, cat, or other beloved and helpful animal will be going with her to college or staying home. ■

Robert L. Miller is general counsel at Eastern Illinois University.

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Emotional support animals on campus

CONTINUED FROM PAGE 7

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1. U.S. Department of Housing and Urban Development FHEO Notice: FHEO-2013-1, issued April 25, 2013.
2. 29 U.S.C. §794.
3. *CTL v. Ashland School District*, 743 F.3d 524 (7th Cir. 2014); Americans with Disabilities Act of 1990 as amended 42 U.S.C. 12132.
4. 28 C.F.R. §35.136(a) and (b).
5. 28 C.F.R. §34.104 (emphasis added).
6. *Id.*
7. 34 C.F.R. 104.4(a).
8. 34 C.F.R. 104.45.
9. *Velzen v. Grand Valley State Univ.*, 902 F.Supp.2d 1038, 1047 (W.D. Mich. 2012), plaintiff sought accommodations to the no pet policy so she could live with her prescribed emotional support animal, a guinea pig named Blanca, to assist with her depression.
10. *United States v. Univ. of Neb. at Kearney*, 940 F.Supp.2d 974, 983 (D. Neb. 2013).
11. U.S. Department of Housing and Urban Development FHEO Notice: FHEO-2013-1, issued April 25, 2013.
12. *Id.*
13. *Id.*
14. *Id.*
15. *U.S. Department of Housing and Urban Development v. Kent State Univ. et al.*, FHEO Nos. 05-10-0670-8, 05-10-0669-8 (August 1, 2014). (HUD charged the university and four employees with violations of the FHA due to the university's refusal to permit an emotional support animal in a campus-style apartment. HUD seeks $16,000 from each defendant.)