PROFESSOR DEFEND THYSELF: THE FAILURE OF UNIVERSITIES TO DEFEND AND INDEMNIFY THEIR FACULTY

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I. INTRODUCTION

University professors going about their daily activities of teaching, researching, and writing rarely consider the possibility of being sued. To the extent that the concept of potential liability does cross their minds, educational professionals undoubtedly comfort themselves in the realization that since their activities are job-related, the school[1] that employs them is obligated to provide a defense[2] and indemnity[3] in any suit stemming from those activities.

Given the ever-increasing litigious nature of American society, the instances of college faculty members being sued are likely to increase. The American Association of University Professors (AAUP) has recognized this trend:

> There has been in recent years a steady growth in lawsuits filed against faculty members over the discharge of their professional responsibilities. Legal actions have been initiated by colleagues, by rejected applicants for faculty positions, by students, and by persons or entities outside the academic community. Litigation has concerned, among numerous issues, admissions standards, grading practices, denial of degrees, denial of reappointment, denial of tenure, dismissals, and allegations of defamation, slander, or personal injury flowing from a faculty member's participation in institutional decisions or from the substance of a faculty member's research and teaching.[4]

With an increase in suits against faculty members comes the corresponding question of who will ultimately bear the financial burden of attorneys' fees and monetary judgments? The belief that universities will gladly "step up to the plate" in defense of their employees in cases where the allegations against the employees arguably relate to their job duties is belied by the schools' conflicting interests. The interests served by denying a defense and indemnity to their faculty members include universities (1) insulating themselves from the cost and potential liability of university employees' actions and (2) avoiding involvement in controversial issues. The conflict between the interest of the faculty employee and the interest of the university employer highlights the need for clarification of the legal duties a university owes its faculty members. The difficulties faculty members often encounter when

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al institutions.

ion or duty to provide a defense is often seen in liability insurance policies that obligate the vide a defense" to the insured in a third-party suit against the insured. The part of the ligation to retain counsel to protect the insured is known as a "duty to defend clause," which ce provision obligating the insurer to take over the defense of any lawsuit brought by a third m that falls within the policy's coverage." B

LACK'S LAW DICTIONARY 523 (7th ed. 1999).

3. Indemnity is defined as:

> 1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

BLACK'S LAW DICTIONARY 772 (7th ed. 1999).

4. AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 130 (9th ed. 2001).

requesting a defense and indemnity from their university employer raises the question: What factors affect whether a college or university has a duty to provide a defense and indemnity to its faculty members?

This Article, in Part II, reviews various sources that may create a duty of defense and indemnity running from colleges to their professors,[5] including contractual indemnity provisions, state indemnity laws, the indemnification policy suggested by the AAUP, and academic freedom. This Article, in Part II-C, also suggests the need, in documents governing the terms of a professor's employment, for a more detailed definition of the university professor's scope of employment. Such a definition could be examined by both faculty and university administrators in determining whether a defense and indemnity should be provided in individual cases, and if necessary, could be used by courts in deciding disputes over the existence and scope of defense and indemnity obligations to faculty members. Finally, in Part III, this Article suggests a fundamental change in the way universities handle defense and indemnity requests by university faculty members. Because defense and indemnity provisions in teaching contracts, collective bargaining agreements, university bylaws, or state indemnity laws all function in a manner similar to liability insurance[6] for faculty members, a presumption should exist, as with coverage provided under liability insurance policies,[7] in favor of colleges providing a defense and indemnity to professors in the event they are sued for words or deeds that arguably relate to their job obligations. The burden of demonstrating that an employee's actions fall outside the scope of employment also should rest with the university. In addition, each university should establish a committee, comprised of both faculty and administration officials, to conduct a hearing on a professor's defense and indemnity request and make a written recommendation as to whether the university should accept or deny such a request.

Without the safeguards of (1) a presumption in favor of providing a defense and indemnity to professors, (2) the burden of proof being placed on the university, (3) a committee empowered to issue a recommendation, and (4) a more detailed definition of the scope of employment of a university professor, faculty members who are sued for actions or omissions they believe are within the scope of their employment, and subsequently are denied a defense and indemnity by their university employers, are left with unappealing

between the two groups.[8] Suits by professors against universities would also involve courts in university policies, an area in which courts are often reluctant to impose their views.[9] Another option would be to require that the professors bear the costs of defense and any judgment personally; this option imposes the financial burdens solely on the faculty members and could lead to feelings of hostility toward university employers.

An example of a university denying a faculty member's request for a defense and indemnity request in a lawsuit arguably arising out of the faculty member's job responsibilities is the dispute between Professor James J. Fyfe[10] and his employer Temple University.[11] Fyfe, a Criminal Justice Professor at Temple, was served with a libel complaint in April 2001. The suit, brought against Fyfe by the Philadelphia police officer's union, the Fraternal Order of Police (FOP), was based on an op-ed piece written by Fyfe and published in the *Philadelphia Inquirer* regarding the disciplinary procedures of the Philadelphia Police Department.[12]

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8. Commentators have argued that parties involved in collective bargaining are best served by establishing a relationship of trust rather than trying to manipulate each other.

> A relationship of trust in collective bargaining allows negotiators and contract administrators more easily to share information, to explore ideas with each other and to enjoy positive interdependence. It takes less time to negotiate agreements when parties trust each other. In the absence of trust between negotiators and contract administrators, there exists an invisible wall of resistance. In distrust there is a tendency to ignore or misperceive facts and to be unconscious of or ignore feelings that might increase vulnerability. The level of trust achieved by the parties, on the other hand, provides a useful predictor of group accomplishment. Moreover, the level of trust attained by parties is a significant factor in predicting the degree of satis

The alleged libel was Fyfe's suggestion in the op-ed piece that a member of the FOP had the motivation to leak a confidential report to the press.[13] The op-ed piece concerned

City of Philadelphia. Fyfe wrote the piece in response to the media's and public's perception that the twenty-day suspension given the officers was too lax.[14]

When served with the complaint, Fyfe believed that Temple University was obligated to defend and indemnify him in the libel suit. This belief was quickly dispelled when the University Counsel's office declined his request for a defense and indemnity because in writing the op-ed piece Fyfe had acted in his "private capacity," without Temple's authority or permission.[15]

Professor Fyfe's experience in seeking a defense and indemnity from Temple is used throughout this Article to exemplify the difficult issues involved in deciding when a university professor acts within the scope of employment for purposes of being provided a defense and indemnity by a university employer.

14. The complaint filed by the FOP states that, according to published reports, a Philadelphia Police captain and lieutenant, both FOP members, were involved in an off-duty automobile accident in February 1998. Fraternal Order of Police Lodge No. 5 v. Fyfe, No. 002365, at ¶ 10 (Phila. Ct. C.P. Apr. 19, 2001). The reports stated that the captain was driving a vehicle that was involved in an accident and that when the lieutenant was called to the scene, he directed the vehicle be moved "to another location to make it appear the accident had occurred at that second location." *Id.* at ¶ 10. The complaint states that an investigation by the Philadelphia Police Department Internal Affairs Division revealed the facts of the incident, which, along with the recommendations of the investigating officers, were included in a confidential investigative file. *Id.* at ¶ 11. It was this confidential file, the "Brady file," that Fyfe referred to in his op-ed piece. The FOP