A Teaching Moment
Public Universities Face New Frontier of First Amendment Challenges
In current academia news, everyone is atwitter about a professor whose job offer was rescinded by the University of Illinois for polarizing tweets about Israel. Professor Steven Salaita was prepared to teach at the university this Fall, leaving a prior tenured teaching job and moving his family from Virginia. Salaita voiced strong opinions about the Israel-Palestine conflict, such as: “If Netanyahu appeared on TV with a necklace made from the teeth of Palestinian children, would anybody be surprised?” and “Let’s cut to the chase: If you are defending Israel right now you’re an awful human being.”

The university then rescinded their offer, sparking protest and commentary on the First Amendment rights of professors. Students on campus have protested the administration. Online commentators have suggested a boycott of the university. Alumni on both sides of the debate have threatened their financial support. Professor Salaita has described his situation as a “teaching moment.” The purpose of this paper is to analyze this case in light of the risk exposure similar matters would pose to public universities, how insurance may or may not respond and other considerations facing a public employer.

A First Amendment overview is necessary to understand the exposures that public universities face. This is a very complicated area of constitutional law and a rather oversimplified explanation follows. The First Amendment ensures the freedom of speech by limiting governmental restrictions on a citizen’s right to expression. There is no free speech protection in the private sector workplace, but governmental employees do enjoy broader First Amendment rights in employment. Since the seminal case of Pickering v. Board of Education, the Supreme Court has held “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”

Supporters of Professor Salaita argue that the rescission of his employment offer is clearly a violation of First Amendment rights. In an open letter, the university’s Chancellor Phyllis Wise states that their employment decisions were “not influenced in any way by his positions on the conflict in the Middle East nor his criticism of Israel.” She goes on to state that the university “cannot and will not tolerate…personal and disrespectful words or actions that demean and abuse either viewpoints themselves or those who express them” suggesting that it was the tone and not the viewpoint itself that served as the basis for their decision.

Regardless of whether the university’s decision was right or wrong, they face a number of issues. Professor Salaita has demanded reinstatement and if not granted, he’ll pursue litigation. Professors from around the world have issued a call to boycott the university until the professor is reinstated. Alumni have threatened to withdraw their financial support. As an academic exercise – no pun intended – we are going to examine some risk management issues and insurance policies that could potentially respond to this situation. Our information is drawn completely from public reporting on this matter as well as our experience in similar situations. We are not purporting to know whether the University of Illinois has presented a claim to its carrier, nor what type of insurance they currently purchase.

Universities often purchase Educators’ Legal Liability (“ELL”) insurance - a combination of Directors’ & Officers’ Liability, Employment Practices Liability and Errors and Omissions/Professional Liability. This is one potential insurance solution to the issue.

The Employment Practices Liability (“EPL”) coverage section of an ELL policy is probably the most applicable insurance product to this scenario. It appears that Professor Salaita has retained counsel; therefore, it is likely that his counsel wrote a formal letter to set forth the alleged wrongful nature of their employment decision and to demand reinstatement on his client’s behalf. Most policies’ definition of Claim includes any written demand for monetary or non-monetary relief from a Wrongful Act. The capitalized terms are typically defined within the policy. Therefore, assuming a letter was presented, at this point in time it may be a formal claim under most policies. In order for coverage to apply, it must allege a covered Wrongful Act. Many EPL policies include coverage for wrongful termination, failure to employ and the violation of an individual’s civil rights in connection to any such wrongful termination or
failure to employ. Accordingly, we would expect that their EPL insurance would likely be triggered.

What costs could be covered under the policy? First, by triggering the insuring agreement, defense costs would be recognized. As a public institution, the University may be represented by the state Attorney General and those costs are typically absorbed by state operations and not considered loss under the policy. If outside counsel is necessary, the policy would likely recognize those expenses.

EPL policies also usually cover the costs of judgments and settlements, including front pay and back pay, plaintiffs’ attorneys’ fees and even punitive damages, subject to law and policy provisions. The professor may sue for breach of contract, and the policy will almost certainly have some form of exclusion for contractual claims. Further, he may demand injunctive relief in the form of a demand to be returned to his position. While claims for non-monetary or injunctive relief are likely covered, the costs associated with such relief are generally not.

Another area of coverage potentially implicated is a Crisis Fund that some ELL carriers offer on their policies. This Crisis Fund typically responds to very specific scenarios; one is likely the withdrawal or return of significant bequests. As the press has reported, many large donors on both sides of the issue have threatened their financial support of the university. If triggered, this coverage could provide the necessary public relations and/or crisis management response expenses.

Lastly, there may be a General Liability (“GL”) policy in place. The Personal Injury section may be relevant to the extent that Salaita can allege that he was defamed. This is far from certain, as most GL policies contain an exclusion for employment related claims. If one is able to trigger the GL in combination with the ELL policy and is written together with the same insurer, at least one insurer offers a seamless retention option so that the lower retention applies to the matter, rather than multiple or the higher of the applicable retentions.

What other considerations could be made? Universities and public employers in general, may maintain a First Amendment handbook to help the administration handle certain issues that arise. The handbook should address free speech in an employment context, but should also include other scenarios such as student speech or public free speech on campus. Internal counsel, outside counsel and/or state Attorneys General may also be available to assist in providing guidance before action is taken.

It’s unclear how this situation will proceed, but it is important for others to take this opportunity as a “teaching moment” and discuss First Amendment within their respective organizations. For risk management, it’s an opportunity to review your Educators Legal Liability policy. As always, the insurance professionals at Arthur J. Gallagher & Co. are happy to assist.

3 Ibid.
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