

## Mitchell's Musings 7-20-15: A Practical University Alternative in Sexual Harassment and Assault Cases

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There has been a succession of stories concerning universities attempting to deal with complaints about sexual harassment and assault. Growing pressure on universities to do something about the issue has led to creation of internal adjudication processes that sometimes take on Orwellian aspects and sometimes simply lack appropriate and basic due process. Legal scholars have been pointing out the problem for some time. But two recent cases have highlighted the issue.

The first involved a professor – Laura Kipnis at Northwestern University - who was accused of writing an op ed about Title IX<sup>1</sup> – a federal requirement related to discrimination on the basis of sex - that made some students uncomfortable (they said). While anyone can file anything, at some point in the investigation, the university authorities began to take the charge seriously and seemed to forget about academic freedom. Prof. Kipnis was writing about a public policy matter. When Prof. Kipnis exposed the proceedings, there was an Internet storm and the charges were dropped.<sup>2</sup>

The second case involved a court decision that went against the University of California, San Diego. In that matter, one student accused another of non-consensual sex. Note that an accused student is likely to have fewer resources than a tenured professor for challenging university procedures (as in the Kipnis matter). Nonetheless, after the accused student was suspended and took his case to court, the judge in the case found that basic due process had been lacking. There was also evidence that a university official had added to the penalty imposed on the accused student in retaliation for his eventual recourse to the judicial system.<sup>3</sup> Whether the university will appeal the verdict is not known at this writing. However, the court decision led to an editorial in the *Los Angeles Times* questioning the ability of universities to provide fair proceedings. The editorial concluded:

*If schools are going to remain in the business of handling allegations of sexual assault, they must be sure victims are treated with respect, that complaints are taken seriously and pursued vigorously, and that the basic rights of the accused are not abridged.*<sup>4</sup>

What seems clear is that universities are not well equipped to handle such cases. If they hire officials whose job it is to prosecute as well as investigate, there is a built-in conflict of interest, as the San Diego case makes clear. As it happens, the University of California's Board of Regents is at present trying to come up with rules and procedures to deal with sexual harassment and assault adjudication. There have been vague assurances from the university's central administration that the eventual machinery to be proposed will be fair to the accused. However, as long as the adjudication process is entirely in-house and run by university officials (sometimes with student panels), the issue of lack of due process will remain.

But there is a potential solution: outsourcing the final step in the process to professional arbitrators. Note that this solution is one which universities that have unionized employees regularly use in the

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<sup>1</sup>[http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)

<sup>2</sup><http://dailynorthwestern.com/2015/06/06/campus/investigators-find-prof-laura-kipnis-not-violate-title-ix/>

<sup>3</sup><http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html>

<sup>4</sup><http://www.latimes.com/opinion/editorials/la-ed-sexual-assault-uc-san-diego-case-20150717-story.html>

labor relations context. If it can work there, why should it not be utilized in the area of sexual harassment and assault?

I am going to put aside the issue of whether university adjudication processes should be used for complaints of conduct that, if it occurred as charged, is criminal. There is an argument to be made that at least some complaints should be referred to local police or – if the university has its own police department – to that agency. Nevertheless, let’s assume, for purposes of this musing, that universities – perhaps because of Title IX or for other reasons – will feel that they need to have an internal mechanism for all complaints.

Because the union sector has declined drastically over the past few decades, its procedures for grievance adjudication may not be well known by top university officials. Even in universities that have collective bargaining for some employees, labor relations may be compartmentalized so that those decision-makers not directly involved in union-management issues may not be fully aware of the workings of systems of grievance and arbitration. So let’s review what a typical system entails.

If an employee has a grievance, there is generally some informal review which may resolve the matter. Absent an informal resolution, there follows a more formal step procedure in which the grievance is taken up by the union on behalf of the employee with management. If a settlement is not reached after the step process is completed, an outside professional arbitrator is selected. The arbitrator then hears the case in a procedure that is less formal than might occur in an outside court, but does involve witnesses, evidence, cross examination, briefs, etc. Both sides are able to present evidence and rebuttal. In the case of an employee who has been subject to discipline, the grievance is framed in the context of “just cause.” Was the discipline imposed for just cause? That question starts with whether the alleged infraction occurred and then whether – given all the circumstances – the discipline imposed was appropriate.

Over many years, the concept of just cause has been developed in arbitration as a kind of common law. Nonetheless, it suggests due process. Relevant would be the thoroughness of the investigation by management, the consideration of available evidence, consistency with past discipline in similar cases, etc. Arbitrators will consider what the union-management contract has to say in terms of procedures that must be followed and about the meaning of just cause. The decision of the arbitrator, which could be a voiding or lessening of the discipline imposed or upholding the discipline, is then binding on the parties. Note that managers who have the authority to impose discipline know that it is always possible that their judgments might be tested in the grievance process and could ultimately be reviewed by an outside neutral arbitrator.

Of course, it is possible to try and reverse labor-management arbitration decisions in the external courts. But courts tend to “defer” to arbitration decisions. There is a practical component to such deferrals. Court caseloads are crowded. If there is an alternative process that incorporates due process, second guessing professional arbitrators is not something that courts would want to do on a regular basis.

There is a difference, of course, between a labor relations grievance and a complaint of sexual harassment or assault. There is no direct analogy to a labor-management contract in the latter situation. Neither the person making a complaint nor the accused has the equivalent of a union to be a representative in the process. But the key point is the potential – known to all involved – that if the

matter is not settled informally or through the step process, there will be an outside neutral reviewer and arbitrator who will make a final decision.

The fact that there are differences between an employment-related grievance in the union-management context and a complaint of sexual harassment or assault is not a barrier to using an outside arbitrator. In place of the contract and general rules of the workplace are university policies regarding sexual harassment and assault. The process can include permitting both the person making the complaint and the accused to have a representative present as an advisor at every point in the procedure. (Indeed, the university could offer to provide such a representative.) In short, there is nothing that prevents an outside neutral professional from being used as the final decision-maker. Indeed, not using a neutral outsider invites external review of the type universities don't like – either an Internet fury as in the Kipnis affair or an adverse court decision as in the San Diego case.