

## SEXUAL MISCONDUCT

**Lax handbook wording erodes sexual misconduct finding**

**Case name:** *King v. DePauw University*, No. 2:14-cv-70 (S.D. Ind. 08/22/14).

**Ruling:** The U.S. District Court, Southern District of Indiana ordered DePauw University to allow a student who had sued it to attend classes pending the outcome of the case.

**What it means:** Great care should be taken when drafting a sexual misconduct policy.

**Summary:** In 2013, a female DePauw University student reported she had consumed alcohol at a fraternity party and awakened the next morning unclothed in Benjamin King's room at the fraternity house with no memory of what had occurred.

In an investigation, King stated that: (1) he barely knew her, (2) they were both drunk, (3) she insisted on having sex, and (4) he was too drunk to perform.

In February, DePauw charged him with nonconsensual sexual contact, stating that its student handbook specified that a person incapacitated by alcohol was incapable of consent.

Following a hearing, the board found King guilty, explaining that it should have been apparent that the female student was too intoxicated to consent

to anything. He was suspended for two semesters.

King sued DePauw. He also sought a preliminary injunction ordering it to let him come back to classes. King argued that DePauw breached the "Rights of the Respondent" contained in DePauw's student handbook, which included the right to have complaints responded to properly, investigated appropriately and addressed competently.

The judge said it was reasonable for the board to conclude that the female student was incapacitated.

However, DePauw's handbook had failed to prohibit sexual activity with an intoxicated person, but instead barred sexual relations with someone who was incapable of recognizing what was going on. The judge found that King could not have been aware of what behavior was usual for her because the two were virtual strangers. The judge then concluded there was nothing showing that King was aware that the intoxicated student was actually "incapacitated."

Because the judge ruled that there was some likelihood that King's suit would succeed, he ordered DePauw to allow him to return to class until the case was resolved. ■

## FACULTY

**Failure to tell university about his disability dooms ex-prof's case**

**Case name:** *Kao v. The University of San Francisco et al.*, No. A135750 (Cal. Ct. App. 08/05/14).

**Ruling:** The California Court of Appeal, First Appellate District affirmed a jury verdict in favor of the University of San Francisco.

**What it means:** University officials have a right to demand a professor have a mental and physical examination if faculty and students feel threatened by his behavior.

**Summary:** In 1997, John Kao became a tenured mathematics professor at the University of San Francisco.

In January 2008, Kao met with Professor Paul Zeitz and an associate dean about the university's failure to advertise in professional journals for teaching candidates. According to Zeitz, Kao started yelling and screaming. At that time, Zeitz allegedly feared for his personal safety.

On multiple other occasions, Kao acted in a way that frightened colleagues. For example, he ranted in a meeting and bumped into a colleague walking on campus.

In a letter dated Dec. 29, USF informed Kao in writing that he was suspended without pay and that his employment would be terminated if he did not submit

to a "fitness for duty" examination by Jan. 15, 2009. In response, Kao declined to submit to an examination, claiming that he never intentionally tried to frighten or threaten anyone. He then offered to provide a letter promising not to harm anyone.

The university terminated Kao and banned him from campus. Kao sued the university, but a jury ruled against him.

On appeal, Kao claimed he was disabled because of a major depressive disorder and the side effects of his prescribed medication. He asserted that California's statute concerning disabled persons required USF officials to engage in an interactive process with him before demanding a medical examination.

The appellate court ruled that there was no requirement for an interactive process because Kao never acknowledged having a disability or sought any accommodation for one.

The panel affirmed the verdict, ruling that the jury was justified in finding that it was vital to the university's business to obtain an independent assessment of Kao's fitness for duty. ■