



FRATERNAL LAW™

A fraternity law periodical
published by Manley, Burke, Lipton & Cook
A Legal Professional Association

January 2000

Number 71

NEBRASKA UNIVERSITIES HAVE DUTY TO PROTECT STUDENTS AGAINST HAZING

In October, the Supreme Court of Nebraska ruled that universities may be liable for injuries caused by hazing.¹ Jeffrey Knoll was a pledge of the Phi Gamma Delta (FIJI) Fraternity at the University of Nebraska at Lincoln (UNL). In November of 1993, Knoll was a participant in a FIJI pledge sneak.

Knoll was forcibly tackled by active FIJIs, handcuffed and taken to the FIJI house. There, while handcuffed to a radiator over a period of 21 ½ hours, he was forced to consume some 15 shots of brandy and whiskey and three to six cans of beer. After he became ill and was taken to the bathroom, Knoll attempted to escape by going out the third floor bathroom window and climbing down a drain pipe. He fell from the third floor and suffered severe injuries. At the time of the injuries, the 19 year old's blood alcohol content was .209.

If the university had taken reasonable steps to protect students against hazing — the university may yet escape liability for Knoll's injuries.

Knoll filed suit against the university, which subsequently filed a motion for summary judgment. The trial court granted the university's motion finding that the university did not have a duty to protect Knoll from injuries due to hazing. The Supreme Court of Nebraska disagreed.

The Supreme Court stated that:

"The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.... Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury. In determining whether a duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk; (2) the relationship of

the parties; (3) the nature of the attendant risk; (4) the opportunity and ability to exercise care; (5) the foreseeability of the harm; and (6) the policy interest in the proposed solution."

While noting that the injuries to Knoll took place on property owned by the Phi Gamma Delta House Corporation, not on university property, the Court nonetheless concluded that landowner liability applied to the university and relied on the fact that the university treats fraternity houses as student housing units which are subject to the UNL Student Code of Conduct.

The Court also found that the university had ample reason to know of potential hazing and of its dangers, despite the fact that the university had argued that the FIJI active members' conduct toward Knoll was "not criminal in nature, but, rather, ... simply 'horseplay'." The Court found that in the four years preceding the injuries to Knoll, there had been two separate hazing incidents on campus, though neither involved FIJI. The Court recognized however that there were at least six separate incidents involving misconduct by FIJI members, including alcohol in the FIJI house in violation of university regulations, a sexual assault on a female student in the FIJI house, and the discovery of an intoxicated and unconscious FIJI member by UNL police in the third floor restroom of the FIJI house.² The Court concluded that "the record reflects that the university had notice that pledge sneaks could lead to illegal hazing and that, therefore, the university had an obligation as a landlord/invitee to students

The Court found that the university had ample reason to know of potential hazing and of its dangers, despite the fact that the university had argued that the FIJI active members' conduct toward Knoll was "not criminal in nature, but, rather, ... simply 'horseplay'."

Editor: William A. McClain; Associate Editor: Gary E. Powell; Managing Editor: Jana M. Hitt; Contributors: Daniel R. Beerck, Barbara Schwartz Bromberg (of Thompson, Hine & Flory), Timothy M. Burke, David M. Cook, Gary Moore Eby, George Fabe, Matthew W. Fellerhoff, Rhonda S. Frey, Johnathan M. Holifield, Andrew S. Lipton, Ann Lugbill, Robert E. Manley, Richard C. Melfi, Todd B. Naylor, Robert H. Mitchell, Gerald D. Prager, Bernice L. Walker.

© 1982, 1999 Manley, Burke, Lipton & Cook, A Legal Professional Association

to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the university property and the harm that naturally flows therefrom."

It is important to recognize that the Supreme Court's decision only means that the case against the university must now return to the trial court for trial. In their concluding paragraph, the Supreme Court of Nebraska stated:

"We recognize that reasonable minds could differ on the issue of whether the university breached its duty to act reasonably under the circumstances; but this issue, along with the issue of proximate causation, should be tried to the finder of facts with the benefit of the totality of the evidence presented at trial."

In essence, what the Court was saying was that while they found as a matter of law that the University of Nebraska at Lincoln owed a duty to Knoll, there was still a question to be determined by a jury as to whether or not that duty was, in fact, breached. If the Court finds that the university's duty was not breached -- if the university had taken reasonable steps to protect students against hazing -- the university may yet escape liability for Knoll's injuries. A variety of defenses may be available to the university, including the fact that the university had no prior knowledge of FIJI's

"pledge sneak" and that the FIJIs, in violation of the university's regulation, kept that activity secret from the university.

The decision by the Nebraska Supreme Court is in line with the decisions of the Indiana Supreme Court which were discussed in the September 1999 issue of *Fraternal Law* (Issue No. 69) in "Duty to Fraternity Guests Explained by Indiana Court." This obviously is a particularly troublesome trend for universities and ought to increase the vigilance yet again with regard to hazing. It also suggests though that house corporations ought to pay attention to this issue as well. In Nebraska, if the university can be found to have landowner liability, even where they are not the landowner, but simply the regulator of land, in all likelihood, a house corporation which is the landowner and leases only to a fraternity might be found to have a duty to protect against hazing on its property.

• Timothy M. Burke

¹ *Knoll v. Board of Regents of University of Nebraska*, 258 Neb. 1, 601 N.W.2d 757 (1999).

² A Stipulated Statement of Facts had been agreed to by the parties and filed with the Court. The Court took these facts from that stipulation.

\$930,000.00 AWARDED IN KENTUCKY HAZING CASE

On July 30, 1999, a Kentucky jury awarded over \$930,000.00 to a former University of Louisville student who claimed he was badly beaten as a result of hazing by the Omega Psi Phi Fraternity. Shawn A. Blackston was awarded \$181,428.00 for medical expenses, lost wages and mental and physical suffering. In addition, he was awarded \$750,000.00 in punitive damages against the historically Black fraternity.

The testimony at trial showed that the chapter members involved in the beating and other hazing practices kept the hazing secret from national fraternity officials.

Mr. Blackston alleged that he was beaten with a wooden paddle by Omega Psi Phi chapter members in 1997. Mr. Blackston and other prospective members at the University of Louisville chapter were also forced to eat dog food, stay

up all night and run around a track carrying bricks. Mr. Blackston was hospitalized for acute kidney failure as a result of the hazing.

Since at least 1990, when Omega Psi Phi and the other National Pan-Hellenic Council (NPHC) fraternities and sororities adopted a membership intake process, the fraternity has banned hazing and does not permit physical contact during the membership intake process. The testimony at trial showed that the chapter members involved in the beating and other hazing practices kept the hazing secret from national fraternity officials. Nonetheless, the jury found that the Omega Psi Phi National knew or should have known that the fraternity chapter was hazing initiates. The jury also found that the national fraternity failed to exercise sufficient care to ensure that students participating in the membership intake process would not suffer injuries as a result of hazing.

The jury determined that Mr. Blackston should receive 95% of the jury award because it found him only 5% responsible for what had happened.

• Gary E. Powell

FINAL DISCLOSURE RULES ARE ISSUED

INTRODUCTION

The Treasury Department recently issued the long-awaited final Treasury Regulations regarding the obligation of all tax-exempt organizations such as fraternal organizations and fraternal foundations (other than private foundations) to provide copies of its exemption application (Form 1023 or 1024) and its annual Federal tax returns (Form 990) to any person requesting copies. The effective date of these Regulations was June 8, 1999. The key provisions of the final Regulations are described below.

Please note that the IRS interprets the penalty provisions described below as being imposed personally upon responsible organization managers and not on the organization.

What Documents are Affected?

If requested in writing, an organization must provide copies of its exemption application (unless it filed its application before July 15, 1987 and it did not have a copy of its application on that date) and its 3 most recent annual Federal tax returns. For example, if you receive a request for copies of your exemption application, you must provide copies of the following documents:

- The filled out application form as filed (Form 1023 or Form 1024);
- All documents and statements filed by the organization, or on its behalf, in connection with the exemption application;
- Any letter or other document issued by the IRS (this would include the organization's favorable determination letter or a list of questions from the IRS about the application and written responses to such questions).

If you receive a request for copies of your 3 most recent annual Federal tax returns, you must provide copies of the following documents for each of those years:

- The filled out forms as filed (Form 990, 990-EZ, 990-BL, or Form 1065);
- Any amended returns that may have been filed relating to the above years;
- All schedules, attachments, and supporting documents filed with the returns.

However, note that you are not required to disclose the names and addresses of the contributors to your organiza-

tion, nor are you required to disclose Form 990-T (unrelated business taxable income information). Since you will be required to provide copies immediately in some instances, all organizations should consider having a copy of each year's return ready for copying or distributing from which contributor information and the Form 990-T have been removed. In this way, you can avoid inadvertently distributing this sensitive information.

Instead of requesting the entire exemption application or an entire tax return, a requester can request copies of only a specifically identified part or schedule of the organization's exemption application or annual Federal tax returns. If you receive such a request, you need only provide copies of the part or schedule requested.

In Which Offices Must You be Prepared to Handle Copy Requests?

You must be prepared to handle copy requests in your organization's principal office and, in some cases, at your regional or district offices, if any. The rules for whether your regional or district offices must comply with the final rules are complex, but generally if (a) the office has paid employees whose aggregate number of paid hours per week are normally 120 hours or more and (b) the office has one or more management staff employees (with administrative responsibilities), you must be prepared to handle copy requests made to that office. Regional or district offices that are obligated to respond to copy requests, however, do not have to provide copies of annual Federal tax returns until 30 days after the date the return is filed.

What are the Time Requirements for Providing Copies?

If a request for copies is made in person during regular business hours at the organization's principal office or at a regional or district office that is obligated to respond to copy requests, you must provide the requested copies on the day the request is made, unless "unusual circumstances" exist. (Examples of unusual circumstances identified in the final Treasury Regulations include (a) receipt of a volume of requests that exceeds the organization's daily capacity to make copies; (b) requests received shortly before the end of regular business hours that require an extensive amount of copying; or (c) requests received on a day when the organization's managerial staff capable of fulfilling the request is conducting special duties, including attending an off-site meeting or convention. If a request for copies is made at one of your offices on a day when unusual circumstances exist, you must provide the copies no later than the earlier of the next business day following the day that the unusual circum-

stance ceases to exist or the fifth business day after the date of the request.)

If a request for copies is made in writing (i.e., by mail, e-mail, facsimile, or private delivery service) generally you must mail the copy of the requested documents within 30 days from the date you receive the request. If your organization adopts a prepayment policy (see the following section), you must mail the requested copies within 30 days of receipt of the payment, rather than within 30 days of the receipt of the request.

Only requests that are made in person or in writing must be honored. Telephone requests do not have to be honored.

How Much Can You Charge for Copying and Postage?

For all requests for copies (whether made in person or in writing), you can charge a reasonable fee for copying the requested documents. The final Treasury Regulations set the fee at a maximum of \$1.00 for the first page and \$0.15 for each additional page. This fee is tied to the copying fees the IRS charges, so it may change over time. You may also charge actual postage costs and demand payment in advance.

If you choose to charge a fee for copying and postage and to demand payment in advance, there are a number of applicable rules. You will be required, for example, to respond to questions from potential requesters concerning your fees for copying and postage so that requesters may include payment with their requests for copies. You must provide upon request your charges for copying and mailing your exemption application and each of your annual Federal tax returns, with and without attachments. If you receive a request in writing without payment or with insufficient payment, you must notify the requester of your prepayment policy and the amount due within 7 days of receiving the request.

If your organization adopts a prepayment policy, it is advisable to prepare in advance a form letter acknowledging receipt of the request for copies and advising the requester of your prepayment policy. This memorandum or letter should be supplied to each requester promptly, but in no event, later than 7 days following the request.

For requests made in person, you must accept payment by cash and money order; for requests made in writing, you must accept payment by certified check, money order, and either personal check or credit card.

You Can Avoid Having to Respond to Requests for Copies by Posting Your Exemption Application and Your Annual Federal Tax Returns on the Internet

If your organization is willing to post its exemption application and returns on the Internet, you can avoid having to comply with the requirements discussed above. There are, however, numerous technical requirements that must be

complied with to achieve an acceptable Internet posting. For example, your exemption application and annual Federal tax returns must be posted on a World Wide Web page that you establish and maintain or on a World Wide Web page established and maintained by another entity as part of a database of similar documents of other tax-exempt organizations. Additionally, your documents must be available for downloading free of charge and without the need for special computer hardware or software.

The Treasury Department expects that less than 1% of the tax-exempt organizations will comply with the Regulations through a posting on the Internet. If you choose to comply through an Internet posting, you will need to review the technical requirements set forth in the Regulations.

Harassment Campaigns

The Regulations provide relief for a tax-exempt organization that is the object of a harassment campaign. Generally, a group of requests for an organization's exemption application or annual Federal tax returns is indicative of a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of that organization rather than to collect information about the organization. Among the facts and circumstances that indicate that a tax-exempt organization is the target of a harassment campaign are: (1) a sudden increase in the number of requests; (2) an extraordinary number of requests made through form letters or similarly worded correspondence; and (3) requests that contain language hostile to the organization.

A tax-exempt organization that reasonably believes it is the target of a harassment campaign may suspend compliance with respect to any request for copies that it reasonably believes is part of the harassment campaign, provided that the tax-exempt organization files an application for a determination by the IRS within 10 business days of the date it first suspended compliance. A tax-exempt organization is liable for all penalties resulting from failing to provide copies in a timely fashion if the IRS determines that the organization did not have a reasonable basis for requesting a harassment determination or a reasonable belief that a request was part of a harassment campaign. The IRS intends to publish additional guidance concerning harassment campaign determinations.

What are the Penalties for Failure to Comply?

If a tax-exempt organization fails to comply with the requirement to provide copies of its annual Federal tax returns, the responsible person will be subject to a \$20 penalty for each non-compliance day, with a maximum penalty for a single return of \$10,000.00. If a tax-exempt organization fails to comply with the requirement to provide copies of its

exemption application, the responsible person will be subject to a \$20 penalty for each non-compliance day. There is no maximum with respect to this penalty. Moreover, a responsible person will be subject to a penalty of \$5,000.00 for each willful failure to provide an annual Federal tax return or exemption application.

CONCLUSION

Because the above penalties are personal to organization managers and may be substantial for inadvertent failure to

comply with a request, it is recommended that all organizations subject to these rules adopt a log-in and compliance procedure to carefully track all requests and responses and that it be reviewed periodically to ensure that the requirements of the final Regulations are being met.

- Barbara Schwartz Bromberg

ASSOCIATION RIGHTS OF CHAPTER DENIED

Last summer, the United States District Court in Pennsylvania struck a blow to Pi Lambda Phi's efforts to regain recognition at the University of Pittsburgh.¹ In its decision, the Court gave surprisingly little credence to the First Amendment Freedom of Association claims of the fraternity.

In late April of 1996, police raided the Pi Lambda Phi Chapter at the University of Pittsburgh.² Four fraternity members and four other individuals were arrested for possession or distribution of drugs. Both the university and the fraternity's international office initially suspended the chapter. While the international ultimately reinstated the chapter, the college has continued to refuse to do so, and has instead extended the chapter's indefinite suspension. The fraternity sought relief from the university's refusal to recognize the chapter, arguing that it had both First Amendment freedom of association rights and Fourteenth Amendment equal protection rights to be recognized.

With regard to the freedom of association claims, the Court noted that:

"There are two types of association protected by the Constitution: (1) intimate association, based on intimate human relationships; and (2) associations formed 'for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.'"

The Court made short work of the intimate association claim stating that right was limited to familial relationships such as found in a marriage, the raising and education of children, or co-habitation with one's relatives. While quoting from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), one of the lead cases of freedom of association rights and their limits, the Court failed to note that in its discussion of intimate association rights, the United States Supreme Court in *Roberts*, defined intimate association relationships, such as families, as those which:

"Involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspect of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion of others in critical aspects of the relationship." 468 U.S. at 619-620.

It is not clear from the Court's decision that it considered or had before it facts which would have demonstrated that the chapter fit within those guidelines. Certainly, the Court does not discuss them. Yet, assuming that chapter operates like the vast majority of other fraternity chapters, it is relatively small, its members are selected through a process of rush and pledgeship activities that make the ultimate bonds of membership highly selective, and through their ritual and private meetings, important aspects of membership are private, shielded from public view or intrusion. Fraternities and sororities ought to be able to establish that they meet the tests of intimate association articulated by the Supreme Court, yet the trial judge in the Pi Lambda Phi case rejected that out of hand.

With regard to expressive association, the Pennsylvania Court held that: "While the fraternity has several purposes, we find that the central purpose of the fraternity is social."

With regard to expressive association, the Pennsylvania Court held that: "While the fraternity has several purposes, we find that the central purpose of the fraternity is social." Again, from the brief discussion of this issue engaged in by the Court it is impossible to determine whether or not it ex-

amined the many other aspects of Pi Lambda Phi or fraternities in general. For example, it is not unusual to find in the governing documents of fraternities and sororities purpose language that establishes a high moral purpose to the organization, sometimes based on religious beliefs, but almost always with an eye toward the betterment of society. Fraternities are intended to be far more than simply "social clubs." Those chapters which lose track of their broader purpose run the risk of losing their freedom of association rights just as did the Pi Lambda Phi Chapter in the trial court's decision.

Pi Lambda Phi, for example, points to its status as "North America's first non-sectarian and non-discriminatory fraternity." While not advocating a religious basis to the organization founded more than 100 years ago, the fraternity makes clear that its purpose is to promote equality. Certainly, its formation was an effort to assemble people of like-minded views in order to ultimately build a better society. That is an expressive activity protected by the First Amendment.

The Court noted that even if the fraternity was an expressive association with First Amendment protection, the university's refusal to recognize the fraternity under the facts before the Court was justified. In *Healey v. James*, 408 U.S. 169 (1972), the Supreme Court looked at the First Amendment freedom of association rights of a local chapter of Students for a Democratic Society (SDS). While ruling that the university had improperly denied SDS the right to recognition, the Court did note that a university may adopt reasonable regulations with respect to the time, the place and the manner in which student groups may conduct their speech-related activities and may suspend or withdraw recognition from groups which violate valid university rules.

The University of Pittsburgh claimed that the Pi Lambda Phi Chapter, which under the university's rules relating to fraternities was responsible for violations by its members, had violated university rules when drugs were found in the house in the possession of members and other occupants. There is nothing to suggest that the fraternity affirmatively authorized or knew of the presence of those drugs, but the university's assumption was that the fraternity was responsible for the rule violations of its members. The Court noted that even where there is a First Amendment right, university actions may be valid if they are supported by a compelling state interest. Here, the Court found a compelling state interest in maintaining a safe educational environment and in combating the evils of drugs. The Court refused to review the expansiveness of the university's withdrawal of recognition which deprived, not only the wrongdoers of the benefit of university recognition, but those members who joined the fraternity even long after the wrongdoers had been removed from campus. As the Court stated: "We will not sit in place of the university and second-guess whether the sanction was the most appropriate method of promoting the university's interest."

On the equal protection issue, the Court first recognized that there is a heightened awareness of equal protection rights

where discrimination occurs between individuals classified by race or national origin. In those circumstances, such classifications are subject to strict scrutiny and must meet a compelling state interest. On the other hand, a classification such as the distinction between fraternity groups and non-fraternity groups on a campus was viewed by the Court as not involving a suspect class. Therefore, the distinction was presumed to be constitutional and the Court found that the burden of challenging that distinction fell to the fraternity which was required to demonstrate there was no conceivable rational basis for the distinction.

In the Pi Lambda Phi case, the judge noted that the rule regarding corporation liability of the fraternity for the individual conduct of its members, was little different from similar obligations imposed on other students and student groups. According to the Court, the University of Pittsburgh Student Code of Conduct imposed on all residents of campus housing, liability for the conduct of their guests. As a result, the Court argued that the plaintiffs had "failed to show how fraternities and sororities are treated differently from the rest of the student body, therefore, plaintiffs have failed to show an equal protection violation." The Court went on to point out that even if there were a difference in how fraternity and non-fraternity groups were treated, there was a rational basis for that distinction. The Court summarized that distinction as:

"Unlike other student groups, fraternity and sorority members often live in the same house together, inductees undergo an intense 'rush' and/or pledging, and fraternities and sororities frequently serve alcohol at social functions."

Pi Lambda Phi has determined that it will appeal this decision. In the meantime, this decision ought to be a warning to chapters across the country to exercise significant care in ensuring that they do not lose track of the real purposes for which they were founded and exist, that they celebrate and honor those purposes and that they revisit the seriousness with which they enforce their prohibitions against illegal drugs in the house on fraternity property.

● Timothy M. Burke

¹ *Pi Lambda Phi vs. Univ. of Pittsburgh*, U.S. District Court, Western Dist. of Pennsylvania (August 4, 1999).

² *Fraternal Law* has followed the legal issues arising in the aftermath of the raid. See "Two Cases of Note in Pennsylvania," *Fraternal Law*, No. 62, November 1997; "Update on Pi Lambda Phi Pennsylvania Case," *Fraternal Law*, No. 65, September 1998; and "Pi Lambda Phi Case Awaits Word from Pennsylvania Supreme Court," *Fraternal Law*, No. 67, January 1999.

© 2000 Manley, Burke & Lipton
A Legal Professional Association

The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

Fraternal Law is published four times yearly as a non-profit service of Manley, Burke, Lipton & Cook, A Legal Professional Association, 225 West Court Street, Cincinnati, Ohio 45202 U.S.A. (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address. Individual subscriptions by first class mail are available at \$12.00 per year. Bulk subscriptions are available upon request at reduced rates. Second class postage paid at Cincinnati, Ohio.

Printed in U.S.A.