

Academic Affairs Leadership Workshop

APRIL 27, 2018



Dealing With Difficult Employees: A Typical Scenario

- Employee is not performing well. You discuss your concerns with Employee. Employee disputes the criticism and claims her performance is satisfactory – exemplary even – and points to past outstanding performance reviews. Employee's performance deteriorates further, and attendance becomes an issue.
- You seek assistance from Human Resources. Formal memos are drafted and delivered to Employee. Employee continues to claim her performance is fine, while performance and attendance deteriorate further. Employee claims that your performance is sub-par or that you focus only on her performance issues, while ignoring those of others in the unit (mostly younger men).

Scenario, contd.

- Human Resources helps you place Employee on a performance improvement plan. This requires weeks, if not months, of close supervision, tracking assignments, and monitoring results, while Employee grows ever more difficult.
- Near the end of the performance plan, Employee provides doctor's note stating she has a serious health condition (anxiety, for example) and requests Family & Medical Leave.

Scenario, contd.

- For the next three months, you are in limbo. Other employees are forced to pick up Employee's duties. HR tells you not to take any action against Employee while she is out on FML leave. You are so exhausted by this process, you complain about Employee to others. You ask HR if you can fire Employee or transfer her elsewhere. *Employee gets wind of this.*

What happens next?

- You get a call from the General Counsel's Office or the Office of the Attorney General. Employee has filed suit against the University, Board of Regents, and you personally. She alleges *breach of contract, violation of her right to due process, sex and age discrimination, retaliation and defamation*.

What could you have done to prevent this?

- Pay attention to how your employees are performing.
- Provide accurate, honest performance reviews.
- Address specific problems as they arise by talking to employees and keeping notes in your file of these discussions, including dates.
- Seek assistance from HR to formally counsel, reprimand or discipline employees, as necessary.
- Monitor attendance of employees and insist ALL employees accurately and timely report their time worked and leave taken.
- Apply rules and policies to all employees equally.
- Don't ignore employee complaints – refer them to the appropriate campus office.

Employment Claims

Employment-related claims make up the majority of legal claims against universities.

Most Common Claims:

- Discrimination
- Retaliation
- Termination
- Hiring
- Promotion
- Tenure
- Family & Medical Leave
- Hostile environment
- Reasonable accommodation

Other Common Claims

- Fair Labor Standards Act
- Breach of Contract
- Violation of Constitutional Rights (e.g. free speech, due process, equal protection)
- Whistle-blower
- Defamation
- Terms and conditions of employment

HOW CAN YOU PROTECT THE UNIVERSITY?

Discrimination Claims

- Take a strong personal and professional stance on diversity, inclusion and a discrimination-free environment.
- Know your policies; create policies if needed.
- Insist on training for your supervisors and staff.
- Understand your campus grievance and complaint procedures; refer complainants to the appropriate office/person.
- Work with on- and off-campus experts in handling grievance/complaints:
 - Understand the legal requirements
 - Use good people skills
 - Effectively negotiate/mediate
 - Appropriately document
 - Be fair

HOW CAN YOU PROTECT THE UNIVERSITY?

Termination Claims

- Be involved in the decision and understand the real reason.
- Ensure others understand their roles and what is required for:
 - Exempt vs. Nonexempt employees
 - Contingent Employees
 - Unionized Staff
 - Tenured and Tenure-Track Faculty
 - Non-tenure Track Faculty
 - Graduate Assistants
 - Student Employees
- Know the process; ensure it is followed.
- Appropriately document and disseminate information.

HOW CAN YOU PROTECT THE UNIVERSITY?

Retaliation Claims

- Create an environment in which employees are encouraged to raise concerns through appropriate channels and not labeled troublemakers for doing so.
- Think twice when taking any “adverse action” against an employee who has filed a complaint or supported a complainant.
- Adverse actions are broader than you think; they include any action that would dissuade a reasonable worker from making or supporting a claim. Courts have stressed that “context matters,” so the determination is very fact-dependent.
- Use legal counsel or HR to guide your actions.

What if I am sued?

- Under Maryland law, you are generally immune from suit as an employee of the State.
- the Attorney General's Office will provide an attorney to defend you.
- You must assist in your own defense – be cooperative, provide necessary information, show up for required meetings, hearings, depositions.
- Caveat – you are not immune from suit and the Attorney General may not defend you if you act outside the “scope of your employment,” act with legal malice or gross negligence, or intentionally injure someone.

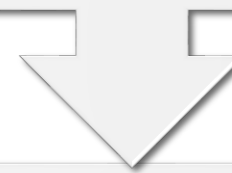
TIP #1

LEARN THE RULES, FOLLOW THEM, AND
MAKE OTHERS FOLLOW THEM.

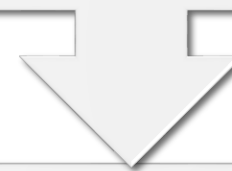
- **Good news:** Courts are typically not interested in second-guessing substance (firing, tenure decisions, etc.).
- **Bad news:** Courts are very interested in process and procedural defects, including minutiae.

Template for a Law Suit:

The University fails to follow a policy or law.



Since the University's policies are binding like laws are binding, the University has violated someone's "due process," legal rights or contract rights.



Consequently, a dispute is created.

What are the Sources for Policies?

- Handbooks
- Memoranda of Understanding
- Faculty Senate by-laws
- Faculty Contracts
- Memos from Human Resources
- Memo from 1980 about a policy that hasn't been used since then but also hasn't been updated or repealed



Very
Important:

“The Golden
Rule”

Decent treatment may mean that you prevent a suit.

It definitely will mean that the jury likes the University better.

They will ask: was the plaintiff treated the way I'd want to be treated?

TIP #2

**KNOW THAT EVERYTHING YOU SAY,
EVERYTHING YOU WRITE, AND
EVERYTHING YOU COMMUNICATE
ELECTRONICALLY CAN AND WILL BE USED
AGAINST YOU.**

- A plaintiff will ask for - and receive - every scrap of paper, every e-mail, every text message, every Facebook posting, every draft letter, and every calendar entry related to the dispute.
- Anything that is carelessly written, indiscreet, or offensive may become the theme of litigation.
 - Example: “Our department is getting stale – we need to make room for new, creative, younger faculty.”

TIP #2, cont'd.

- Write as if your words could end up in the newspaper: accurately, measured, and professionally. For example, don't refer to employees as "the Barbie doll," "Grandpa," "Lurch," or "Stormy Daniels," even in jest.
- You may have to be negative when you write, such as in performance reviews, tenure evaluations, and memos regarding disruptive students. Do not shirk this responsibility!
- Everything you say is fair game - the rumors you spread, opinions you express, anything you say "confidentially." Confidentiality can never be guaranteed when you are speaking with staff or students.

E-Discovery

The federal rules now permit parties to obtain all stored and retrievable electronic records from any device used for work. This includes:

- Drafts of documents;
- Deleted voice mail messages;
- Calendar entries;
- E-mail;
- Text messages; and
- Metadata.

Very Important:

E-mails and
Texts are
Permanent
Records

Use of e-mails and texts should be limited because:

- They are producible.
- They never go away.
- You have no legal and protected expectation of privacy, even on home computer, iPad, and cell phone if you conduct work on them.

Actual conversations may be better in many circumstances.

TIP #3

LEARN TO ISSUE-SPOT.

Be alert to any complaints that relate to:

- Allegations of discrimination;
- Any serious personnel matter;
- A dispute over disability accommodations;
- Sexual misconduct;
- Abusive behavior or bullying;
- Physical injury;
- A whistle-blower action; or
- Ethics.



TIP #4

CALL FOR HELP.

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*WITH THANKS TO FORMER ASSISTANT ATTORNEY GENERAL ANNE
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