



New Deans and Chairpersons Workshop

APRIL 27, 2018

OFFICE OF THE ATTORNEY GENERAL OF MARYLAND

Agenda

Introduction—A Shift in Perspective

Office of the Attorney General

Legal Issues

- Due Process
- Employment Discrimination (Title VII, Title 20)
- Reasonable Accommodations (Employees and Students)
- First Amendment
- FERPA
- Title IX
- Final Thoughts

A Shift in Perspective

“Toto, I’ve a feeling we’re not in Kansas anymore.”

- * Orientation: identity as a faculty member, with some administrative duties added
- * Reality/Goal: a member of the administration, whose perspective is informed by experiences as a faculty member

One aspect of the new reality is the need for increased understanding of policies and procedures, and the ways in which these are informed by legal considerations.

Office of the Attorney General Educational Affairs Division

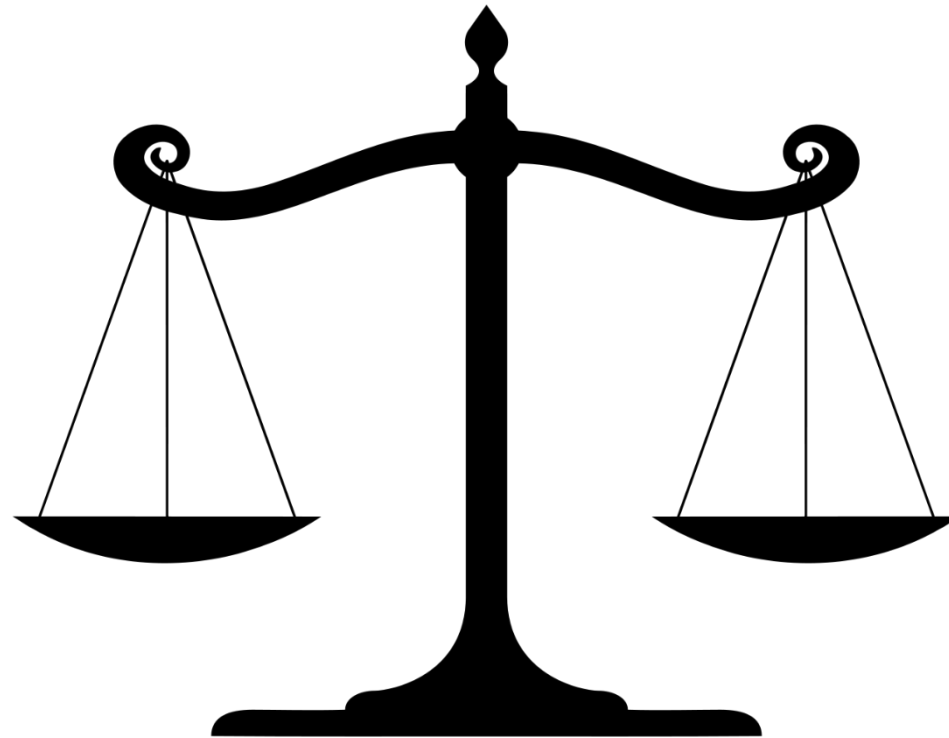


Advice and representation to the USM and its constituent institutions

- Review and drafting of policies
- Review of contracts
- Representation of institutions and employees in litigation in state and federal courts and matters before administrative agencies, such as the EEOC, OCR, MCCR
- Advice on employment matters, student conduct issues, compliance with state and federal law, policy interpretation and application
- Real estate, procurement
- Coordinate with general counsel at the institutions

Due Process

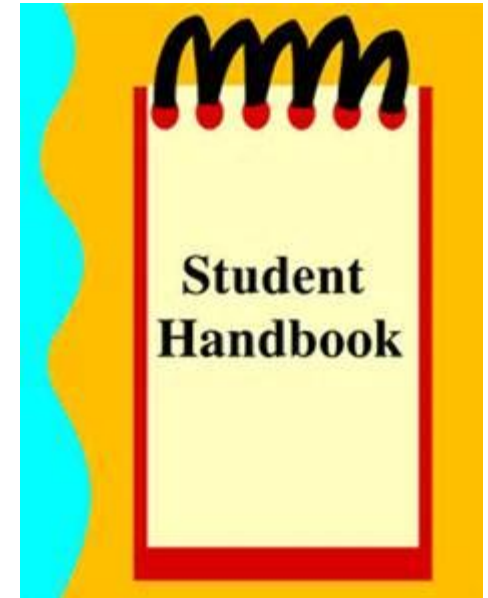
Fourteenth Amendment protects an individual's property and liberty interests from deprivation by a state without due process of law



Policies and procedures

Policies and procedures provide due process.

Failure to follow a policy may subject the University to a due process claim.



Employment: due process

Tenured faculty and faculty during contract terms have a property interest in continued employment entitling them to notice and an opportunity to be heard before they can be deprived of that interest.

Students' right to due process

Courts have assumed that students have a property right in higher education.

Policies provide notice of what conduct is prohibited and potential consequences of violation.



Due process hypothetical

John is a sophomore taking a course in the Philosophy Department with Adjunct Professor Linda Smith. This is Professor Smith's first semester teaching at your institution. Professor Smith gives John an "F" grade on his first assignment, a research paper, because she suspects that he plagiarized certain portions of the paper. John asks Professor Smith for an explanation as to how she came to this conclusion and she refuses to give him any specific information. Professor Smith also tells John that because he has been suspected of plagiarism, he will automatically fail the entire course. As a result of Professor Smith's comments, John stops coming to class.

Two months later, a week before the end of the semester, John comes to you, the Department Chair, very upset about what happened with Professor Smith. He denies that he plagiarized anything in the paper and wants to return to Professor Smith's class and clear his name.

Due process hypothetical, cont.

Your institution's procedures state that a student may appeal a faculty member's finding of academic misconduct to the department chair within 5 days of the finding. What do you do?

Title VII/FEPA Employment Discrimination



Title VII of the Civil Rights Act of 1964 Prohibits discrimination in employment on account of:

- Race
- Color
- Religion
- Sex (including pregnancy)
- National origin

Maryland's Fair Employment Practices Act also prohibits discrimination in employment on account of:

- Sexual orientation
- Gender identity
- Genetic information
- Disability
- Marital Status
- Age

Employment Discrimination

Can take the form of:

- Discrimination based on membership in protected class
- Harassment based on membership in protected class sufficient to create a hostile work environment (subjectively unwelcome, severe or pervasive misconduct sufficient to alter conditions of victim's employment and create abusive working environment)
- Retaliation against an individual who opposes discrimination or participates in protected activity

Discrimination: disparate treatment

An individual is treated less favorably because of membership in a protected class

Can be proved by:

- Direct evidence of discrimination
- Indirect evidence of discrimination

Adverse employment action

Virtually any job-related action

- Recruitment
- Hiring
- Job assignment
- Promotion
- Wages
- Discipline
- Discharge
- Any other term or condition of employment

Proving discrimination under Title VII and FEPA

Part 1: Employee's Prima Facie Case

1. Employee belonged to protected group.
2. Employee was qualified in all respects for the position they sought/held (was performing at a level that met employer's legitimate expectations).
3. Employee was rejected in spite of being fully qualified (suffered adverse employment action).
4. The employer sought/hired applicants with the same qualifications (similarly situated employees outside class were treated more favorably)

Part 2: Non-discriminatory basis

Employer offers evidence that employer had a legitimate, non-discriminatory basis for making the decision it made.

Part 3: Pretext

Employee offers evidence that the employer's legitimate non-discriminatory reason is pretextual, and discrimination based upon the protected classification was the real determining factor for the decision.

Retaliation Under Title VII and FEPA

1. Employee engaged in a protected activity.

- Employee voiced opposition to discrimination.
- Employee engaged in the complaint process.
 - As a complainant
 - As someone who assisted a complainant

2. Employee experienced adverse treatment.

3. There is circumstantial or direct evidence of a causal connection between the protected activity and the adverse action.

Required Proof for Retaliation Claim

The plaintiff must show that the employer's conduct would not have occurred *but for* the protected status of the employee

- By showing that the employer's explanation of a legitimate non-discriminatory reason is unworthy of credence
- By offering other forms of circumstantial evidence sufficiently probative of retaliation

Employment discrimination hypothetical #1

You chair the Physics Department. Jenna, a teaching assistant in the department, is on a year-to-year contract that will expire at the end of the month. Jenna's supervisor does not want to renew her contract because she feels she is "not a good fit" for the department. Yesterday, Jenna came to your office and expressed the view that the Department has made insufficient efforts to recruit and retain female graduate student and to appoint female teaching assistants. You discuss with her the Department's efforts to do so. Two weeks later, Jenna's appointment expires, and the Department informs her via letter that it will not be renewed.

Employment discrimination hypo #2

Selina is a contractual staff member who works as a secretary in the Department. You and others in the Department are not satisfied with her work performance. Her written work is careless, she is regularly late for work, and she spends excessive time on personal phone calls. You are non-confrontational and do not feel comfortable discussing these issues with Selina. You do, however, give her a satisfactory rather than outstanding evaluation during her review. When her contract ends, you decide not to renew it, and you hire Ellen, who is white, for the position. Selena, who is Hispanic, sues the University for national origin discrimination.

Employee supervision, evaluation and discipline

- Communicate expectations clearly
- Address problems at the earliest possible stage
- Fully investigate complaints
- Determine applicable policies and procedures and follow them
 - Meet all applicable deadlines
- Communicate clearly and directly
- Document all communications and performance issues
- Evaluate performance accurately and completely
 - Evaluate – give factual examples
 - Remediation plan
- Discipline conduct in accordance with policies and be consistent in how you impose discipline for similar conduct.

Disability Discrimination

Applicable laws:

- Americans with Disabilities Act
- Section 504 of the Rehabilitation Act
- Title 20 – Maryland's Fair Employment Practices Act

These laws prohibit discrimination against a qualified person with a disability.

Disability

A physical or mental impairment that substantially limits one or more major life activities

A record of such an impairment

Being regarded as having such an impairment

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Qualified person with a disability

If an employee: can perform the essential requirements of the job with or without a reasonable accommodation

If a student: can perform the essential requirements of the academic program with or without a reasonable accommodation

Reasonable accommodation

Employee/student must make known the disability and provide documentation in a timely manner.

University must engage in an interactive process to identify a reasonable accommodation.

Reasonable accommodation, cont.

No requirement to:

- provide the best and most expensive accommodation
- lower standards or fundamentally alter the program
- incur undue financial or administrative burdens.

University must demonstrate that relevant officials considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would lower academic standards or require substantial program alterations.

Reasonable accommodations, cont.

Reasonable accommodations for students include:

- Additional time for exams
- Other exam modifications: separate room, breaks
- Substitution for course work
- Extension on assignment
- Permission to record class lecture
 - Instructors may not forbid a student's use of an auxiliary aid if the result is to limit the student's participation in the educational program

Disability discrimination in employment

Failure to Accommodate a Disability

1. The employee has a disability.
2. The employer had notice of the disability.
3. The employee could perform the essential functions of the position with a reasonable accommodation.
4. The employer refused to make the accommodation.

Note: In some cases, additional leave may be a reasonable accommodation under the ADA, even after exhausting FMLA leave.

Hypothetical

Roberta, a junior faculty member in the Chemistry Department, complains to the Department Chair that the classroom where she is assigned to teach two courses during the semester has mildew on the carpet and is causing her asthma to worsen. Roberta provides a doctor's note to the Department Chair indicating that her asthma has been worsening.

After the Department Chair learns that there are no other classrooms available in the science building during Roberta's scheduled classes due to building renovation, he asks someone in maintenance to inspect the classroom for mildew. After maintenance finds no evidence of mildew, the Department Chair denies Roberta's request.

Roberta comes to you, the Dean, asking you to step in and force the Department Chair to reassign her classes to another room.

The Family Medical Leave Act (“FMLA”)

Entitles eligible employees to up to a total of 12 workweeks of leave in any 12-month period for any of the following reasons:

- To care for the employee’s spouse, child, or parent with a serious health condition, or an adult child who cannot care for himself
- A serious health condition that makes an employee unable to perform functions of the employee’s job
- Birth of a child and to care for the newborn child
- Placement with the employee of a child for adoption or foster care
- For an absence due to any qualifying exigency arising out of the fact that the employee’s spouse, child, or parent is a covered military member on covered active duty
- 26 weeks of leave to care for covered service member who has suffered serious injury or illness

FMLA, cont.

- FMLA provides the employee with a legal entitlement to take leave and job protection during leave. It does not govern how the employee is paid during leave. FMLA leave generally runs concurrently with other paid leave.

FMLA prohibits:

- Interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by FMLA.
- Discharging or in any other way discriminating against a person for opposing or complaining about any unlawful practice under the FMLA.

FMLA, cont.

- **Key Employee:** A salaried employee who is among the highest paid 10% of all employees employed by institution within 75 miles of employee's workplace at time of employee's notice of need for leave.
 - President or designee may deny restoration to position held by Key Employee when FMLA leave commenced if necessary to prevent substantial and grievous economic injury to the institution's operations
 - Key Employee must receive adequate notice of Key Employee status at time FMLA leave was requested or commenced, whichever was earlier
 - Additional explanatory notice must be provided if President or designee intends to deny restoration upon completion of leave
- May arise for faculty members with concurrent administrative appointments
 - Now governed by Staff FMLA Policy (BOR VII-7.50), which addresses Key Employees

Revised USM Faculty FMLA Policy (BOR II-2.31)

- Faculty member must give written notice to immediate supervisor and Provost (or designee), sufficient to make institution aware of need for FMLA leave
 - 30 days in advance if practicable, or else as soon as practicable
- Once faculty member requests FMLA leave, or institution acquires knowledge that leave may be for an FMLA-qualifying reason, institution has responsibilities to provide certain notices and designate the leave as FMLA-qualifying if so
 - Institution may require medical certification in most instances (not childbirth)
- Calculation of FMLA leave allotment based on a *rolling* 12-month period, rather than calendar year
 - Each time a faculty member takes FMLA leave, the remaining leave amount is the balance of the 12-week allotment that has not been used during the immediately preceding 12 months
- Faculty with concurrent administrative appointments governed by Staff FMLA Policy

FMLA hypothetical

You chair the Math Department and supervise Professor Wright directly. Professor Wright emails you and the Provost informing you both that he will be out on sick leave continuously for 6 weeks in November for knee surgery. He took 4 weeks of FMLA leave last April to care for his daughter, but otherwise has not previously taken FMLA leave. He says he will not be using his FMLA leave this time.

- Has Professor Wright provided adequate notice?
- Should HR be contacted?
- Must institution issue necessary notices to Professor Wright and designate his leave as FMLA-qualifying? Does it matter that he does not want to take FMLA leave?
- Will Professor Wright's sick leave run concurrently with the FMLA leave?
- May institution request supporting medical certification?
 - May you as Chair and Professor Wright's direct supervisor ask Professor Wright's health care provider to clarify information in the medical certification?

First Amendment Issues

The government may not restrict expression based on its content.

- Certain exceptions:
 - Speech inciting lawless action
 - Speech integral to the commission of a crime
 - Fighting words
 - True threats
 - Obscenity
 - Child Pornography
 - Certain types of defamatory speech
 - Certain types of commercial speech

First amendment issues in the employment context

A member of the faculty or staff experiences an adverse employment action and claims they were retaliated against for exercising their First Amendment rights.

Proving First Amendment Retaliation

1. Did the employee experience an adverse employment action (one that would chill the speech of an ordinary person)?
2. Was there a causal connection between the speech and the employment action: was the speech a motivating factor?
3. Is it protected speech?

Protected speech

1. Is the employee speaking as a private citizen on a matter of public concern, i.e., an issue of social, political, or other interest to a community?
2. Does the employer lack an adequate justification for treating the employee differently from a member of the general public?
 - Is the employee's interest in speaking out on a matter of public concern outweighed by the government's interest in providing effective and efficient services to the public? Government can restrict speech that has the potential to affect its operations.

Speech in the Classroom

The classroom is considered a non-public forum in which content of speech may be regulated, as long as the regulation is viewpoint-neutral and reasonable

Classroom speech should advance the academic message and be germane to the subject matter

Not protected: speech that is disruptive to the educational process, unrelated to the course or at variance with the prescribed curriculum



Campus speech

A campus is a “limited public forum”

- For members of the campus community, any restriction on content of speech is subject to “strict scrutiny.” It must be narrowly tailored to serve a compelling state interest.

First Amendment hypothetical #1

The University's non-discrimination policy prohibits discrimination based on sexual orientation. The University's strategic plan emphasizes the goal of "recruiting, retaining and celebrating a diverse university community." The University's HR director writes an opinion piece for a local newspaper in which she opposes extending civil rights to the LGBT community because "their preferences should not give them special rights." The University decides that the director's speech contravenes its mission and that it no longer wants her to lead the HR department. Her employment is terminated and she files a First Amendment retaliation suit against the University. Who wins?

First Amendment hypo #1, cont.

Would your answer be different if she weren't the HR director?

What if she were the dean of students?

What if she were a faculty member?

First Amendment hypothetical #2

A student posts on a community bulletin board in a café open to the campus in a residence complex an offensive drawing directed at a particular ethnic group. Another student removes the drawing, but not before photographing it and distributing it on Twitter with a comment condemning the expression as hate speech. In an effort to respond to the strong campus outcry, to offer an outlet for campus members' feelings, to demonstrate that hate speech has no place on campus, and to facilitate healing, the residence director plans to sponsor an activity, "Take Back the Café," inviting students to post about positive experiences concerning diversity on campus. Any potential problems?

FERPA: Family Educational Rights and Privacy Act

Limits the institution's right to disclose records or information from records about a student without the student's consent.

Gives students the right to:

- Inspect and review their educational records
- Request amendment under certain circumstances
- Requires institutions to provide annual notice to students about these rights and the procedures for exercising them.



What records are protected?

FERPA protects all records that are directly related to a student and that are maintained by the institution.

A record is directly related to a student if it is *personally identifiable to a student*.

Examples: transcript, financial aid records, letters of recommendation, class schedules, e-mails, department files, disciplinary files

What records are not protected?

Directory information

Records created and maintained by a campus law enforcement unit for law enforcement purposes

Certain records kept in the sole possession of the maker and not shared with anyone (not student records)

Records of information obtained about the student only after the student has left the institution (i.e. alumni records)

Treatment records (protected by other laws)

Sharing information within the institution

FERPA permits disclosure to other personnel within the institution who:

1. Are authorized under university policy to receive the information.
2. Have a legitimate educational interest in the information (the official needs access to perform their duties).

Disclosures requiring consent

Disclosure to anyone other than authorized institutional officials, unless the disclosure falls within an exception to the consent requirement.

This includes roommates, employers, media, classmates, spouses, and in most cases, parents.

Exceptions to the consent requirement

1. directory information (unless student asks to block)
2. true health or safety emergency
3. certain information about the final results of a student conduct proceeding to be disclosed to the victim of certain crimes of violence
4. disclosure in response to a duly issued subpoena or court order

Title IX of the Education Amendments of 1972

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

Title IX also prohibits same-sex sexual harassment and discrimination on the basis of gender identity or actual or perceived sexual orientation.

Sexual harassment

Conduct or expression that is:

- Sexual in nature,
 - Unwelcome, and
 - Creates a hostile environment.
-
- Hostile environment: severe or pervasive misconduct sufficient to
 - Interfere with or limit the student's ability to participate in or benefit from a school's educational program
 - Alter conditions of victim's employment and create abusive working environment

University's obligation

If the University knows or reasonably should know about sexual harassment, it must take immediate action to:

- Eliminate the harassment
- Prevent its reoccurrence
- Remedy its effects

Who is a responsible employee?

Any employee:

- Who has the authority to take action to redress sexual harassment
 - Who has been given the duty of reporting incidents of sexual harassment
 - Whom a student could reasonably believe has this duty or authority
-
- Under USM policy, all faculty and administrators are responsible employees.

Responsible employees' obligations

To report sexual incidences of sexual misconduct to the institution's Title IX coordinator, including

- Name of alleged perpetrator (if known)
- Name of reporting student
- Other individuals involved (if known)
- Other relevant facts (date, time, location)
- To inform a student who may wish to keep the information confidential of the employee's obligation to report, the student's option to request confidentiality, and the student's ability to share information confidentially with counseling staff.

Interim measures

To ensure equal access to education programs and protect the complainant and respondent pending completion of an investigation

May include:

- Change in course schedules, assignments or tests

- Change in living, transportation, dining, working situation

Your Title IX responsibilities

Report allegations of sexual misconduct immediately to the University's Title IX coordinator

Require that responsible employees within your department do the same.

Coordinate with the University's Title IX coordinator to implement interim measures and remedial measures.

Title IX Hypothetical

Student Sonia approaches you and reveals that her Faculty Advisor Alex has been making her uncomfortable. According to Sonia, Alex recently requested her as a friend on Facebook, and she reluctantly agreed to friend Alex. Alex has developed a habit of talking to Sonia while standing behind her and rubbing her shoulders, when the two are in lab. Sonia tells you that she hasn't told Alex that he is making her uncomfortable because she's afraid of how Alex will react. Alex is known for having a temper, but Sonia says for the most part that Alex doesn't lose his temper with her. Alex has asked Sonia out to dinner on a couple of occasions now, and each time Sonia says that she has made up an excuse as to why she can't dine with Alex. Sonia says she doesn't want you to do anything.

Final thoughts

No good deed goes unpunished. Bending the rules, going beyond outside the applicable policy, making exceptions might seem like the collegial thing to do, but it can create expectations and lead to a perception of favoritism or discriminatory practices. Talk to counsel before agreeing to personnel “deals” or non-standard arrangements with respect to leave or end-of-career packages.

Be careful what you say. Casual conversations, emails and texts (including on private devices and phones) can become public and are likely to be subject to discovery in litigation, so informal communication is on record.

Remember the hat you are wearing. If you are acting in an administrative role as department chair or as dean, always try to maintain the “administrator” perspective, albeit informed by your roots as a faculty member. You will often be the first official point of contact with your institution’s administration, so you set the tone of professionalism.

Know where you should turn for advice on different topics. There are different resources for different problems. Identify the resources available to you, and keep a list handy, and avail yourself of the expertise early when an issue presents.