

UAB Professor Loses Due Process Suit

One of the consequences of terminating a worker's employment is the difficulty that he/she may encounter, because of the termination, in obtaining other employment. This is a concern to public employers, such as the University, because an individual's right to seek employment is considered a "liberty" interest under the Due Process Clause of the Fourteenth Amendment, which applies as a limitation on action by all state entities. If the circumstances of the termination "stigmatize" the worker, foreclosing opportunities for securing another job, the worker's liberty interest is infringed. While the employer may go forward with the termination, in order to avoid a charge that it has acted unconstitutionally (that is, in violation of the Due Process Clause), it must provide certain procedural protections to the employee. In broad terms, the employer must afford the worker an opportunity to "clear his/her good name" through a hearing in which the worker may dispute the stated reason(s) or cause(s) for the action.

A "liberty interest" challenge may arise under several scenarios. Ordinarily, terminating an at-will employee is not considered to implicate the employee's liberty interest, unless it is done for egregious misconduct and is not kept confidential by the employer. The failure to reappoint or grant tenure to a faculty member is also not generally considered stigmatizing. The rule is different, however, when the termination involves a tenured faculty member or a faculty/staff employee prior to the end of his/her specified term, since such action is almost always undertaken only when "substantial cause" exists. It is the "cause" that may render the individual unmarketable for future employment.

A due process "liberty interest" infringement claim under the Fourteenth Amendment may arise in other situations as well, as illustrated by *Liu v. Board of Trustees*, 330 Fed.Appx. 775 (11th Cir. 2009). The hospital clinical privileges of Liu, a faculty member at the University of Alabama at Birmingham (UAB), were suspended while he was investigated for failing to comply with performance standards. He subsequently resigned, following which he sought a faculty position at the University of Southern California. His UAB department director refused to provide certain peer review materials to USC but did furnish a letter indicating that Liu had been placed on probation prior to resigning. Liu was not hired, and he then sued, alleging that his Fourteenth Amendment due process rights were violated by the director's actions, which effectively "blacklisted" him in his profession. Liu appealed the trial court's dismissal of his action to the Eleventh Circuit Court of Appeals.

The appellate court acknowledged that the Fourteenth Amendment's liberty interest component includes a right to pursue one's profession, a right that must not be unreasonably hampered by a state employer. However, the Court cited previous decisions that a liberty interest deprivation requires that the state employer be shown, not just to have interfered with one's job prospects, but to have precluded them completely. Here, Liu had been successful in obtaining staff privileges at another hospital in California, and thus he was unable to show "that a state agent's conduct entirely foreclosed his freedom to pursue employment in his chosen field as either a cardiologist or a professor of medicine." The lower court's dismissal of the lawsuit was affirmed.