



# Fundamentals of Academic Law

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*Navigating legal issues in Medical Education*

## **SIU Academic Law and the Resident**

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# Outline:

- Legal Background
- Sources of Law
  - Employment Law
  - Academic Law
- Case Law Review
- MedStar's Process
- Lessons Learned





# Background

- Two schools of thought:
  - ACGME: Residents are Students
  - NLRB: Residents are Employees
- Separately evolving lines of thought.
  - ACGME Regulations & Court Cases.
  - NLRB Decision in the Boston Medical Center Case
- Bottom Line: Residents are BOTH.





# Why do we care?

- Discharge, Discipline and Due Process . . .
  - Implicates both Academic and Employment Law principles.
  - Academic Law Defines the Minimum Necessary Standards of Due Process
  - Employment Law makes it Complicated.





# Employment Law Issues

- Discipline, Discharge, Promotion, Failure to Promote = The Heart of Employment Law
- Applicable Employment Law Principles: Employers are free to D-D-P-FP Residents as long as they:
  - Do Not Discriminate
  - Follow Written Policies
  - Comply with Written Contracts





# Academic Legal Requirements

- Schools are free to dismiss, or elect not to promote students, for academic reasons, as long as they assure students:
  - Notice and Opportunity to Cure
  - Careful, reasoned decisions
  - In other words, Due Process





# Legal Requirements for Misconduct Cases

- Misconduct cases are slightly different: Schools do not need to give Residents an Opportunity to repeat Misconduct.
- Instead, Due Process Means: Residents must be given:
  - Notice of the Charges
  - An Opportunity to be Heard
  - A careful and reasonable decision-making process



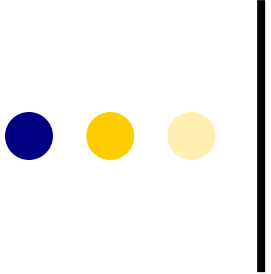


# An Opportunity to be Heard

- Not a “hearing”
- Not a “trial”
- Not a “review board”
- No lawyers, testimony, evidence, etc.
- Simply a meeting.
- Perhaps a second meeting with a neutral reviewer.
- So long as it’s a meaningful opportunity.







# University of Missouri v. Horowitz (1978)

- Female Med Student.
  - Excelled academically
  - Noted for poor bedside manner, slovenly appearance and lack of hygiene in her reviews.
  - School met with her and told her she would not be promoted.
  - She complained that this was unfair.





# Missouri Case Cont' d

- School agreed to allow her one month to rotate with 5 independent clinicians who would evaluate her.
- A month later, the consensus was that she remained deficient in areas of bedside manner, appearance and attitude.





# Missouri Case Cont' d

- School decided to dismiss her.
- She sued claiming
  - 1] religious discrimination and
  - 2] lack of due process.





# Missouri Case Cont' d

- Supreme Court Upheld School's decision:
  - Notice and Opportunity to Cure.
  - Reasonable Academic Decision
  - Court won't intrude on province of Academic Judgment.





# Missouri Case . . .

- Rotational Evaluations gave Notice and Opportunity to Cure.
- Decision not to promote was made
  - At a regular faculty meeting
  - Called for that purpose.
- THUS: Due Process.
- Court: Univ. gave: “far more process than was due. . . .”





# Univ. of Michigan v. Ewing (1985)

- Ewing was enrolled in a 6 yr. Joint Degree Program for Medical School.
- He became eligible to take NBME Part 1 after completing 4 years, and failed 5 of 7 parts.
- Total score 235. Passing score was 345. 380 for licensure; and 500 was the national mean.
- Based on failure, he was dismissed.





# Ewing

- Ewing argued that he should have been given the opportunity to retake the exam, and continue the program.
- 32 prior medical students had been allowed to retake the exam – 10 were allowed to take the exam 3 times, and 1 a 4<sup>th</sup> time.
- Ewing was the only student not allowed to retake the exam.





# Ewing

- Court sided with the University:
  - Faculty Decision was “made conscientiously and with careful deliberation. . . .”
  - Despite “routine practice” of re-testing.
  - School properly looked at Ewing’ s entire record
  - And reasonably concluded that he should not be given another chance or continued in the program.







# Ewing

- Ewing's Entire Record:
  - Took 6 years to complete 1<sup>st</sup> 4 years of curriculum.
  - Accumulated 7 incompletes; repeatedly dropped courses; earned consistently low grades; required reduced course loads throughout.
  - NBME test scores were lowest ever at Michigan.





# Ewing

- Court noted that because decision was a “genuinely academic decision” and reached “in good faith”
  - The Court would show great respect for the faculties’ judgment.
  - Would not question whether Ewing was “similarly situated to” others who were treated better.
  - The individual case was reasonable.





# Horowitz & Ewing

- Stand for the Principles that so long as a Resident receives:
  - Notice and An Opportunity to Cure;  
and
  - The Faculty decision is conscientious and deliberate.
- Courts will not second guess the academic decision.





# It Can't Be that Simple



○ Can it?





# Some Complications

- ACGME
  - Written Policies
  - Written Contracts.
- Employment Laws
  - Follow your policies
  - Comply with your contracts





# Written Policies and Procedures

- The more we write the worse it gets.
- Policies end up creating far higher standards than the legal standards.
- Policies often do not mesh with day to day decision-making practices.
- Policies require careful training and implementation.





# MCO Case

- 2000 Decision in the Trial Court of Ohio.
- Female New PGY 3 Surgical Resident
  - 3<sup>rd</sup> Rotation of year is Peds at Children's Hospital in Cincinnati.
  - Resident LEFT the Hospital during her shift without approval, and failed to report the next day.
  - Also had complained loudly about having to work extra shifts to cover for absent resident.





# MCO Case

- At Children's Hospital's request, Program Director at MCO Suspended Resident.
- PD initiated an inquiry, and 2 days later, PD terminated the Resident.
- In the interim, Resident apologized to faculty at Children's, who requested in writing that Resident be reinstated without prejudice.
- PD refused.







# MCO Case

- R invoked MCO's fair hearing process and requested a review of the PD's decision by the GMEC.
- PD, sitting as the GMEC, met with R and "heard" her case.
  - He allowed her 1 hour to state her case and submit evidence (including a letter from Children's).
  - He upheld his earlier decision.





# MCO Case

- R sued in court seeking an injunction requiring the MCO to reinstate her to the Program and allow her to continue her training.
- The Court **GRANTED** her request for an injunction.





# Other Legally Important Facts:

- During his inquiry, PD learned the following about the Resident:
  - R had started her PGY-1 year at UCLA. There she complained to ACGME of Sexual Harassment, which resulted in termination of at least 1 attending MD from UCLA.
  - At end of year, UCLA did not promote R. She sued, claiming retaliation, and won, but the case was then on appeal.





# More Info

- R was accepted into a 2d year at University of Texas.
- After 6 months in that Program, she withdrew, claiming she had been further sexually harassed, and retaliated against for her case with UCLA. She received NO CREDIT for this year.
- The following year, R entered and successfully completed her PGY-2 (preliminary) at SUNY-Nassau.





# More Info

- R had listed UCLA and SUNY-Nassau on her application, but not UT.
- She did not explain the gaps in her training in her application, but DID explain the circumstances to one MD who interviewed her.
- That MD did not report the facts to anyone until PD was conducting his inquiry.





# More Info

During PD's meeting with R, PD never mentioned or inquired about any of these "new facts."

After the "GMEC hearing" with R, PD met with faculty and also learned that "although they hadn't reported it," R had some academic problems during her first 2 rotations as well.

- In Court, the Hospital claimed R was terminated because of her earlier academic problems, as well as her bad attitude, AND her failure to disclose her past training problems.





# Court's Reasons

- The ONLY thing that changed between suspension and termination, was PD becoming aware of her prior history.
- The PD improperly relied on evidence he acquired after his initial decision, and after the Hearing without providing Notice of the Charges to R.
- The PD improperly sat as both the decision-maker and the GMEC, thus defeating the fairness of the “the fair hearing.”
- The PD violated the Hospital's own policy.





# Court's Reasons

- The Process did not give R Notice of Key Accusations.
- No Actual Opportunity to be Heard.
- The Process was not REASONABLE or careful under the circumstances.
- The Policy was violated by the Hospital.
- THUS, the Court was forced to intervene.







# CAVEAT:

- No doubt, the Hospital attempted to do the right thing in a situation that was spinning fast out of control.
- Lack of understanding of Key rights/obligations made situation more complicated.
- Training/Policies are Critical to effective management of bad cases.





# My Experience

- Most hospitals look a lot more like MCO than Michigan or Missouri.
- Confusion between Employment Law principles and Academic Law principles.
- Leads to Complex Policies with Hearing Rights, Multiple Appeals.
- Policies do not reflect actual decision-making processes.





# Experience . . .

- They use a multi-party hearing to make employment/ academic decisions.
- They take too long and use too many resources.
- They create a hostile adversarial atmosphere.
- They create substantial risk of liability.





# Back to Basics . . .

- Academic Issues:
  - Notice/Opportunity to Cure
  - Reasonable Decisionmaking Protocol.
- Misconduct Issues:
  - Notice and Opportunity to be Heard.
  - Reasonable Process for Evaluating.





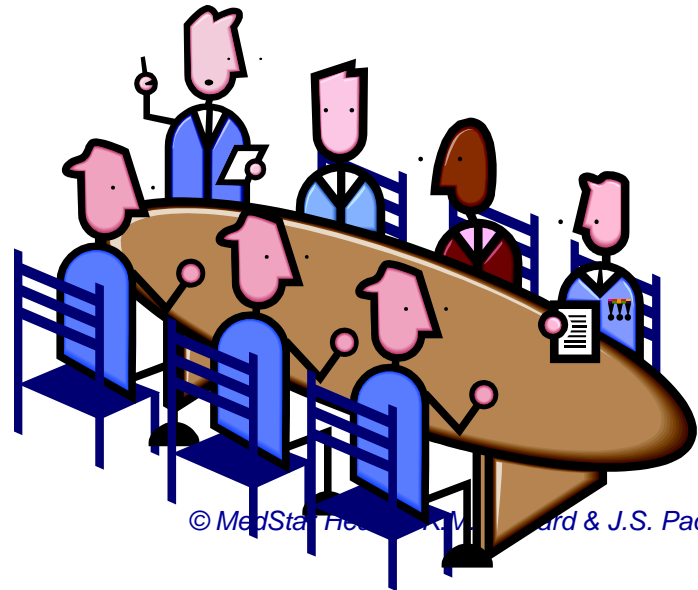
# Academic Issues

- Notice and opportunity to cure
  - Natural Educational Process
    - Assessment, evaluation, feedback
    - Verbal or Written
- Reasonable decisionmaking process
  - Regularly called faculty meeting, called for the purpose of discussing resident performance.
  - Clinical Competence Committee



# Clinical Competence Committee

- A regularly called meeting of the faculty for purposes of discussing resident performance and advancement
- Recommendations to PD
- Not a vote



# What if there is not “consensus”?

- Consensus is not required in GME
- Ultimately, it is the program director’s decision to determine the best course of action based on all of the information
- Regardless of majority or vote
- Regardless of unpopularity of decision





# CCC & Professional Judgment

- “The courts will not reverse a decision to dismiss a student or to not reappoint a resident where the decision is based upon the faculty members’ professional judgment and a review of the entire record”.
  - Irby & Milam, Acad Med, 1989







# NAS: Next Accreditation System ACGME

- The Clinical Competence Committee will be a core process in evaluation and accreditation
- Requirements are forthcoming
  - Triangulate progress of each resident
  - At least 10 observations/evaluations for a 6 month period
  - At least 5 individuals on CCC
  - Competencies and milestones





# Academics – A few Pearls

- Letters of Deficiency as a tool.
  - Competency based
  - Clear and explicit notice of deficiencies,
  - States consequences for failure to remediate.
  - Resident must reflect upon feedback and return with an Independent Learning Plan (ILP) to discuss with the PGD.





# Academic Pearls

- Independent Learning Plan (ILP)
  - Key to the program director understanding core issues
  - Practice Based Learning and Improvement (PBLI)
  - Why don't residents do them when directed?
    - No insight, i.e., “I don't need to”
    - Can't, i.e., “No one to help me”
    - Doesn't, i.e., “Not important”





# Misconduct Issues

- **Notice and Opportunity to be Heard**
  - Meet with Resident.
  - Listen to his/her side of story.
- **Reasonable Decisionmaking Process**
  - Structured inquiry/investigation; driven by facts.
  - Decision based on facts; tailored to be effective.
  - Business Judgment Rule.

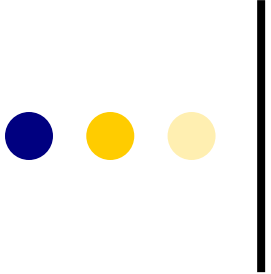




# Misconduct Pearls

- Sometimes misconduct can be a learning opportunity, a “teachable moment”
  - Remediate as Professionalism under Academic Improvement
- Sometimes misconduct is misconduct
  - Action taken should be effective to assure it doesn’t happen again.





“The law provides faculty with the liberty and freedom needed to uphold high academic standards. Let us use that freedom wisely and courageously.”

*David M. Irby, PhD*

