

# Faculty Misconduct: Legal Implications

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## Overview – Substantive Issues

- ◆ Americans with Disabilities Act
- ◆ Drug testing
- ◆ Hostile work environment issues
- ◆ Billing compliance implications
- ◆ Licensing
- ◆ Post-employment references
- ◆ Liability concerns

## Overview – Process Issues

- ◆ What procedural protections is the faculty member entitled to?
  - By law
    - » Is the institution public or private?
  - By contract
  - By University/Department policies
  - Other sources?

## Procedural Issues

- ◆ Is the faculty member entitled to
  - Notice & cure?
- ◆ Nature of sanction depends upon conduct
  - Is the misconduct subject to cure?
  - Does the misconduct endanger patients or others?

## Background Issues

- ◆ Is the misconduct the first offense?
  - Or part of a pattern of misconduct?
    - » If the latter, how has the Dep't handled prior incidents?
      - Warning to faculty member?
      - Education/training?
      - Any notice regarding repercussion of subsequent misconduct?

How has the Dep't dealt w/ similar issues involving other faculty?

## Get Help Early On

- ◆ Consult experienced counsel (employment law) early on to:
  - Plan strategy
  - Identify options
  - Identify risks
- ◆ Best investment: understand land mines ahead

## Americans with Disabilities Act



### Americans with Disabilities Act

- ◆ Particularly if conduct pertains to substance abuse, must consider ADA protections
  - ADA: Prohibits discrimination on basis of disability in employment
  - Protects “qualified individuals with disabilities”

### Americans with Disabilities Act

- ◆ “Qualified individuals w/disabilities”
  - Physical or mental impairment that substantially limits one or more major life activities
  - Record of such an impairment, or
  - Is regarded as having such an impairment

### Americans with Disabilities Act

- ◆ History of substance abuse is considered to be a disability
  - Not current illegal or abusive use of drugs or alcohol
- ◆ Employer cannot discriminate against a person w/a *history* of drug addiction, but who is not currently using drugs & who has been rehabilitated

### ADA Dos & Don'ts

- ◆ Can prohibit illegal use of drugs & use of alcohol at workplace
- ◆ Can test for illegal use of drugs\*
- ◆ Can discharge person who currently engages in illegal use of drugs
- ◆ Can require employees who use drugs or alcohol to meet same performance & conduct stds that apply to others

\* More on this point later

### ADA & Drug Users

- ◆ Not protected:
  - Employee who illegally uses drugs
    - ↳ Casual user or addict
- ◆ Employer may uniformly enforce its rules prohibiting employees from illegally using drugs

## ADA & Drug Users

- ◆ ADA protects individuals who:
  - ▶ Have been successfully rehabilitated & who are no longer engaged in the illegal use of drugs
  - ▶ Are currently in rehab & are no longer engaging in illegal use of drugs
  - ▶ Are regarded - erroneously - as illegally using drugs

## ADA & Drug Users

- ◆ Depending upon **when** a Dep't takes action, can violate the ADA
  - If faculty member is **currently using** illegal drugs, can take action **without** violating the ADA
  - If the Dep't waits, may violate the ADA
- ◆ And, depending upon sanction imposed
  - May result in wrongful termination

## Reasonable Accommodation

- ◆ Absent undue hardship, a qualified individual with a disability is entitled to reasonable accommodation to perform a job
  - How to balance patient safety & reasonable accommodation?
  - Do you put a former drug user on call?
    - ▶ Often, alone with access . . .



## Drug Testing

- ◆ Do not implement a drug-testing program without first
  - Checking state law
  - Establishing policies consistent w/state law
    - ▶ Notifying Dep't members of policies

## Drug Testing Issues

- ◆ When?
  - Pre-employment vs. during employment
  - What circumstances? Random?
- ◆ What?
  - Screening for what drugs/substances?
- ◆ How?
  - What method? Reliability? Procedures?
- ◆ Who pays?

## Drug Testing Issues

- ◆ ***If*** you have a drug testing policy and ***if*** permitted under state law
  - Best to test an employee ***immediately*** if any suspicion of drug or alcohol use while at work (or on call)

## Drug Testing Issues

- ◆ If state law restricts how drug tests may be administered and
- ◆ If the drug test was not conducted in accordance with state law
  - Dep't would be precluded from using "*fruits*" of the tainted test
- ◆ Hard to show drug test results were not a factor in decision

## Drug Testing Issues

- ◆ In addition to ADA, other legal landmines include
  - **State privacy laws**
    - ▶ Be cautious about disclosing the situation beyond a limited circle of those who need to know



## Hostile Work Environment



## Hostile Work Environment

- ◆ Misconduct may create a hostile work environment
  - Does the misconduct involve abusive conduct directed at others in the Dep't?
  - Does the individual make others uncomfortable?
  - Sexual harassment?
- ◆ Employers must address hostile work environment issues

Failing to address hostile work environment issues can lead to claims of discrimination

## Hostile Work Environment

- ◆ What position does the offending faculty member hold?
  - Supervisory?
    - ▶ An employer is always liable for harassment by a supervisor on a prohibited basis if it culminates in a "tangible employment action"
      - Significant change in employment status

## Hostile Work Environment

- ◆ If a tangible employment action taken, no defenses can be asserted
- ◆ If no tangible employment action
  - Employer can raise affirmative defense to liability or damages:
    - Employer exercised reasonable care to prevent/correct promptly harassment, &
    - Employee failed to take advantage of preventive or corrective opportunities

## Avoiding/Correcting a Hostile Work Environment

- ◆ Employers must establish, publicize, and enforce anti-harassment policies & complaint procedures
  - Prohibition against harassment
  - Protection against retaliation
  - Effective complaint process
  - Confidentiality
  - Effective investigative process
  - Immediate & appropriate corrective action

## Billing Issues/ False Claims Liability



## Billing Compliance

- ◆ Does the misconduct involve matters pertaining to billing for services?
  - Preanesthesia assessment
  - Medical direction - residents/CRNAs
  - Documentation
    - Timing of documentation
  - Calculation of time

## Billing Compliance

- ◆ Potential for faculty misconduct to result in submission of false claims
  - Easy to violate False Claims Act
    - Do not need intentional effort to defraud
    - Fail to provide each service claimed
- ◆ No defense that legitimate, otherwise reimbursable services were provided

## False Claims Act Exposure

- ◆ Liability (\$\$\$) mounts up fast
  - Not just amount of claim:
    - Penalties (\$11,000/claim)
    - **Three** times the claim amount
    - Legal fees
- ◆ *E.g.*, single claim for \$400=\$12,200



## Licensing & NPDB Reporting



## Licensing & NPDB Reporting

- ◆ Assuming misconduct is sufficiently serious to warrant suspension or revocation of hospital privileges:
  - How is the misconduct treated?
  - Who takes the action?

## Licensing & NPDB Reporting

- ◆ How is the misconduct treated?
  - As a contractual matter under the Group's contract w/ the Hospital?
  - OR as a Medical Staff matter - action by the Hospital?
- ◆ Who takes the action?
  - The Group - Not reportable to NPDB
  - The Hospital - Reportable to NPDB

## Licensing & NPDB Reporting

- ◆ If the Hospital takes the action, it also may be obligated to report to State Medical Board
  - Implications for the faculty member's license

## Post-Employment References



## Post-Employment References

- ◆ Liability associated with providing references
  - What can you say when you are responding to a reference check?
  - Answer largely depends on state law
    - Does state law provide immunity?
      - Even so, potential claim that adverse information not given in good faith

### **Kadlec v. Lakeview Anesthesia**

- ◆ Read the 2008 decision in this case!
- ◆ Anesthesiologist diverted Demerol
- ◆ After confrontation, did not follow agreement & account for withdrawals
- ◆ On- duty practice while impaired
- ◆ Terminated by anesthesia group for cause
- ◆ Group's response to reference request?

### **Kadlec v. Lakeview Anesthesia**

- ◆ Anesthesiologist 1:
  - Worked w/Dr. for 4 yrs
  - Excellent clinician
  - "Would be an asset to any anesthesia service"
- ◆ Anesthesiologist 2:
  - "Recommended him highly as an anesthesiologist"

### **Kadlec v. Lakeview Anesthesia**

- ◆ Lakeview Medical's response:
  - Confirms dates of privileges
- ◆ Then: On- duty use of drugs at Kadlec results in catastrophic injury to patient
- ◆ Judgment: \$8.24 million
- ◆ Kadlec sues Lakeview Medical & Lakeview Anesthesia

### **Kadlec v. Lakeview Anesthesia**

- ◆ Court: "After choosing to write referral letters, the defendants [Anes. Group] assumed a duty not to make affirmative misrepresentations in the letters"
- ◆ Lakeview Medical: no duty to disclose
  - No liability - letter not misleading
- ◆ Lakeview Anesthesia: Liable
  - Letters were false & misleading

### **How Much Can/Must You Say?**

- ◆ Under state law, do you have an obligation to disclose the misconduct?
  - If not, substantial risk if you volunteer information
- ◆ Has former employee has executed a broad release?
  - May not immunize Dep't

### **Potential Liability**

- ◆ If you provide info on the misconduct, former employee may claim:
  - Defamation
  - Invasion of privacy
- ◆ To minimize potential liability, centralize authority for responding to requests for references
  - Small number of people, trained in risks

## Professional Liability Issues



## Professional Liability Concerns

- ◆ **Liability for poor quality of care**
  - If the misconduct results in adverse patient outcome, very difficult to defend
- ◆ **Liability to patient for misconduct**
- ◆ **Particularly w/substance abuse, next to impossible to defend**
  - Forces settlements in otherwise defensible cases

## Conclusion

- ◆ **Deal w/misconduct EARLY on!**
- ◆ **Consult experienced counsel EARLY on!**
- ◆ **Understand how state law applies**
- ◆ **Best defense: Early intervention**