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California Supreme Court Holds Private Universities Do Not Need To Permit Cross Examination Of Witnesses In Administrative Disciplinary Proceedings

Client Alert | August 1, 2023

Decided July 31, 2023 ***Boermeester v. Carry*****, S263180 Yesterday, the California Supreme Court held that private universities do not need to provide students accused of misconduct with the right to cross examine accusers and other witnesses at live hearings during administrative disciplinary proceedings. Background:** The University of Southern California expelled student Matthew Boermeester after determining he violated USC's policy against intimate partner violence. Boermeester filed a petition for writ of administrative mandate under Code of Civil Procedure 1094.5(b), alleging that he was deprived a "fair trial." Specifically, he claimed that his common-law right to a fair procedure was violated when he was denied the right to attend a live hearing at which he or his attorney could directly cross examine his accuser and third-party witnesses.

The trial court disagreed with Boermeester and denied the petition. A divided Court of Appeal reversed, concluding that USC provided unfair procedures because USC did not provide Boermeester with the opportunity to cross examine critical witnesses at an in-person hearing.

Issue: The common-law right to fair procedure requires fair notice of the charges and a meaningful opportunity to be heard. Must private organizations provide in-person hearings with the right to cross examination in order to comply with the common-law right to a fair procedure? **Court's Holding:**

No. Private organizations are not required to provide accused individuals with the opportunity to directly or indirectly cross examine the accuser and other witnesses at a live hearing.

> *"[T]here is no absolute right to a live hearing with cross-examination in administrative proceedings, even where constitutional due process applies."*

Justice Groban, writing for the Court **Gibson Dunn submitted an *amicus* brief on behalf of the California Women's Law Center and Equal Rights Advocates in support of respondent:** *University of Southern California* **What It Means:**

- Although this case arose in the context of private university disciplinary proceedings, the Court's reasoning appears to extend to administrative proceedings in other private organizations.
- The opinion distinguishes between the procedures afforded to individuals in criminal trials versus private administrative hearings. Even "where constitutional due process applies," "there is no absolute right to a live hearing with cross-examination" in private "administrative proceedings."

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- Instead, private universities “must balance competing interests, including the accused student’s interests in a fair procedure and completing a postsecondary education, the accuser’s interest in not being retraumatized by the disciplinary process, and the private university’s interests in maintaining a safe campus and encouraging victims to report instances of sexual misconduct or intimate partner violence without having to divert too many resources from its main purpose of education.”
- The Court recognized that there are “practical limitations” on the ability of private organizations to “function as courts” because they, for example, lack subpoena power, rely on voluntary participation of witnesses, and such administrative hearings “divert both resources and attention from” the organization’s main calling.
- The Court expressly declined to consider under what circumstances an individual must be permitted to submit questions for an adjudicator to ask any accuser or third-party witnesses outside the presence of the individual under investigation.

The Court's opinion is available here. Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court. Please feel free to contact the following practice leaders:

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