## TCHR CHANGING TIDES

Thompson Coburn's Annual Labor, Employment and Employee Benefits Law Seminar



# CHANGING TIDES

#### Sailing Through Troubled Waters

Issues and Best Practices in Workplace Investigations

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#### **Purpose: Investigations Matter**



- Employers have an obligation to investigate complaints
  - Harassment/discrimination
    Title VII, <u>ADA, ADEA</u>
- Corrective action can provide a defense to liability

   Ellerth/Faragher



**Purpose: Investigations Matter** 



- Practically: investigation provides opportunity to remedy problems
- Significant damages
  - Back pay
  - Emotional distress
  - Punitive damages
  - Attorneys' fees



#### **Scope: Complaint**



- "Should have known" standard
- Complaint does not have to be written
- Anonymous complaint is sufficient
- Specific incident/general unfair treatment
- Combined discrimination/harassment complaints
   Title VII, ADA, ADEA



#### **Scope: Complaint**



- Beyond discrimination/harassment:
  - Threats against others
  - Vandalism and other sabotage
  - Violations of work rules
  - Safety problems OSHA
  - Sexual impropriety
  - Theft
  - Drugs/alcohol





- Be careful not to waive, especially where outside counsel is involved
  - "Legal capacity"
  - Ellerth/Faragher
- If using outside counsel, take strategic steps to protect privilege
- Bifurcate process





#### Plan: How to Run The Investigation

- Steps of investigation:
  - Pre-investigation
  - Investigation
  - Make a determination
  - Post-investigation issues





- Consider running investigation through Legal Department
  - Ensure that all communications are directed to the Legal Department to protect attorney-client privilege
- Identify potential witnesses
- Determine if there are other documented reports of related activity





- Determine if it is necessary to transfer or place the subject of the complaint on leave
  - Review personnel file of subject of complaint
  - Other complaints? Outcomes?
  - Current/former supervisors



#### **Pre-Investigation**



- Create confidential investigation file
- Cooperate fully with the ensuing investigation
- Review complainant's personnel file
   Possible motivations?



#### **Pre-Investigation**



- Consider reviewing computers and other company technology of complainant and subject of complaint
  - Consent
- Work with HR and/or the Legal Department to prepare a timeline
- Remember: promptness!



#### **Pre-Investigation**

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- Schedule witness interviews
- Develop an outline of questions
  - Open-ended preferred
  - Neutral language
- Review company policies
- Consider contacting insurance carrier
- Consider consulting outside counsel
  - Attorney-client privilege



- Prompt
- Thorough
- Confidential
- Fair
- Documented
- Follow-through







#### Goals

- Establish sound, factual basis for decisions
- Produce reliable documentation to support decisions
- Determine whether policies were violated
- Reveal whether misconduct occurred
- End further wrongful actions





- Select an investigator
  - Two individuals are preferable (consider whether gender is important)
    - Consider an investigator from outside of department with trustworthy reputation
  - Remember that the investigator may become a witness
  - Attorney-client privilege reminder





- Investigator(s) should:
  - Schedule interviews promptly
  - Keep contemporaneous notes throughout investigation
    - Documentation is key
  - Reminder: the notes may later be evidence
    - Be cautious and thorough
    - Don't make conclusions before the investigation is complete





- Interview complaining party
  - Retaliation is prohibited
  - Neutrality and impartiality are imperative
  - Do NOT promise complete confidentiality
    - "Need to know"
  - Use open-ended questions, but obtain specific information





- Interview complaining party
  - Get witness names
  - Repeat the story to complainant for accuracy
  - Consider preparing statement
  - Document facts
    - Remember, NOT opinions
  - Complainant expectations/follow-up





- Interview subject of the complaint
  - Suspected of misconduct or policy violation
  - Purpose to obtain information
  - No judgments; maintain impartiality
  - Provide opportunity to respond to accusation(s)
  - Ask for additional witnesses' names
  - Retaliation is prohibited



- Interview witnesses
  - Who, what, where, when
  - Avoid "fishing expeditions"
    - No preconceptions
  - Exposed to similar conduct
  - Avoid discussing interview/allegations
  - Emphasize that retaliation against the complainant or others is prohibited
  - Thank witness for time and cooperation
  - Document everything







- Witness credibility
  - Demeanor
  - Consistency
  - Chronology
  - Corroboration
  - Plausibility
  - History/Motivation



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- Determine whether policy was violated
- Consider preparing a full report of investigation
- Inform complainant and the subject of the complaint of the determination





- If reasonable evidence exists that a violation has occurred:
  - Assess the severity
  - Ensure that the discipline decided upon is consistent with past practices
  - Review labor agreements and policy handbooks
  - Document the disciplinary actions taken





- If reasonable evidence exists that NO policy violation has occurred:
  - Inform the complainant and the subject of the complaint that the investigation did not substantiate the complaint
  - Reiterate company policy
  - Emphasize that retaliation is prohibited



- If the investigation results are unclear:
  - Follow the steps for unsubstantiated complaints/suspicion
  - Possibility of a second level of investigation, if appropriate
    - Law enforcement
    - Private investigator
  - Continue to monitor the workplace



#### **Important Reminder**



- Document the results of the investigation
- Ensure incident files are current with results from investigation and subsequent activity
- Keep investigative file separate
- Follow record retention policies



#### **Other Issues**



- Third parties/customers
  - Complaints should be investigated even if not by an employee
- Beware of claims by the subject of the complaint
- Emails between investigator and others
- HIPAA/ADA



#### **Employee Crimes**

- Investigation
  - Confidential
  - Prompt, statute of limitations
  - Decide whether leave is appropriate
  - Employee safety
  - Document everything
  - Do not retaliate against complainant
- Notifying Law Enforcement
  - Facts, not speculation
  - Risk of disruption in workplace





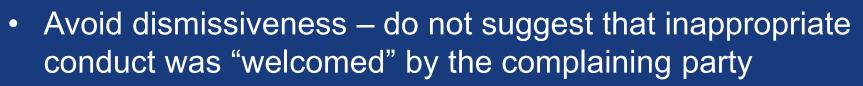
- Consider investigation with Legal Department guidance
- Be careful about documentation and correspondence
- Give the subject of the complaint every opportunity to be heard





- Remind all that retaliation will not be tolerated
- Share the results and/or resolution of the investigation with the complaining party and the subject of the complaint





- Be thorough interview the complaining party, the accused, AND other witnesses
- Neutral language: rather than asking employees if they have been "harassed," etc., ask if they witnessed behavior they found inappropriate/in violation of Company policy





- Information disclosure: protect information on "need to know" basis
- Investigation documents should be stored separately from personnel files

- Create a permanent, confidential investigatory file

 Avoid instructing witnesses not to talk to the complainant



#### Most Important Rule . . .



#### Keep an Open Mind!



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#### Questions?

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