PRIMA'S 2018 RISK MANAGEMENT
WEBINAR SERIES

CONDUCTING WORK PLACE INVESTIGATIONS EEOC STYLE

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Work Place Investigations

- How many of you know how an investigator is selected to do a workplace investigation in your organization?
- Do you know if the investigator has received any training on how to conduct an investigation?
- If the investigator has received training do you know how much and whether it is documented?

Why Should You Care?

$$$$, maybe from you

and

Your organization promised it would properly conduct workplace investigations

EEOC Guidance on Investigations

- Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors", EEOC, June 18, 1999, available at http://www.eeoc.gov/policy/docs/harassment

Workplace Investigations

A few of the reasons Workplace Investigations are necessary

- Americans with Disabilities Act
- Rehabilitation Act of 1973
- Discrimination Claims
- Harassment Claims
- Department of Labor and Department of Education Matters
- Whistleblower Claims

A Little, and I Mean a Little, Background

Employer's Complaint Process

- Should be easy for employees to follow.
- Should not be rigid or rigidly applied against the complainant.
- Should provides various ways to and to whom to report a complaint.
- For harassment claims, should include time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and explain that the deadline runs from the last date of unlawful harassment.

Employer's Duty when Complaint is Made

- **Follow the policy.**
- **Be prompt in all that is done.**
- **Do not ignore the complaint.**
- When the complaint is received the employer must appoint an investigator.

The failure to investigate a harassment claim can compound the problems for the employer. At least one United States Court of Appeals case has held that such failure can support a retaliation claim. *Kurtts v. Chiropractic Strategies Group, Inc*. 481 Fed. Appx. 462 (11th Cir. 2012). A key factor in determining whether there was retaliation is whether the conduct, "might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

Employer's Duty when Complaint is Made

- appoint an investigator to begin an investigation ,
- start documentation by keeping thorough records of the investigation and the complaint process,
- take steps to immediately preserve evidence, determine whether mandatory reporting of the event is required, and
- **protect the complainant (and those supporting the complaint) from retaliation.**

Employer's Duty when Complaint is Made

Take steps to preserve any potential evidence.

- This includes writings, videos, photographs, voicemails, text messages, emails, and any other written or electronic data, and physical evidence pertaining to the allegations that is in the control of the employer.
- It also includes evidence in the possession of third parties, in the control of the employer.

Employer's Duty when Complaint is Made

- The final determination of the complaint by the employer must be based on facts reached honestly, after an appropriate investigation and not based on arbitrary or capricious acts.
- Think of it like this, if the facts do not support the decision, it is arbitrary or capricious.
- The determination must be made on good faith basis and not as a pretext for discrimination.

Scope of the Investigation

- **An investigation must be reasonable and effective.**
- As soon as it learns about a complaint, management must determine whether a detailed fact-finding investigation is necessary.
- It almost always is required.
- The only example the EEOC guidance provides where a detailed investigation is not needed is when the party admits the accusation.

Investigator

- The EEOC says, “Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.”

- Essentially, the investigator will review and understand the significance of relevant documents, conduct interviews, and obtain evidence.

Investigator

- Should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility

- Investigation must be done in good faith, and a lack of training can indicate a lack of good faith

Impartial Investigator

- Does not have preconceived notions or bias
- Has an open mind, not necessarily blind
- Is not directly involved in the complaint
- Seeks relevant facts
- Makes a determination from the findings in the investigation
- Is not a witness
- Is not supervised by the accused

Investigation

- Once the evidence is obtained, the investigator will compare the various versions of the facts, will make findings of facts, and if authorized will decide whether the facts violate the relevant policy, such as a nondiscrimination policy.

- The final determination of the complaint by the employer must be based on facts reached honestly, after an appropriate investigation and not based on arbitrary or capricious acts.

Investigation

- Think of it like this, if the facts do not support the decision, it is arbitrary or capricious.

- The determination must be made on a good faith basis and not as a pretext for discrimination.

- **Must be prompt, thorough, and impartial – an open mind and not directly involved in the complaint**

Confidentiality

- In public sector employment it really cannot be kept confidential for a variety of reasons.
- However, reasonable effort should be made to limited disclosure, as possible.
- Keep in mind that in claims like harassment the employer is obligated to investigate, even if the complainant does not want it investigated.

The Purpose of the Investigation

- It is not a criminal investigation.
- It does not require the investigator to make legal conclusions, i.e. whether there was a violation of a law.
- A workplace investigation is for work place purposes. It is used to determine whether there has been a violation of the employer's policy.

Employer's Duty when Complaint is Made

- Start documentation by keeping thorough records of the investigation and the complaint process.
- Take steps to immediately preserve evidence.
- Determine whether mandatory reporting of the event is required.
- Protect the complainant (and those supporting the complaint) from retaliation.

Conducting the Investigation

- Receive and review the complaint
- Review the relevant policies and documents
- Begin interviews, usually interviewing the complainant first
- Investigation must be tailored to the particular allegations and facts

Conducting the Investigation

- Emphasize the need for the witness to tell the truth, and not what the person being interviewed thinks the investigator wants to hear
- Remind the person of the confidential nature of the interview and not to discuss it with anyone

Conducting the Investigation

- Ask open ended questions. (questions that do not suggest an answer)
- While the investigator may have a list of questions to ask during the interview, the investigator must be flexible so follow up questions can be asked, as needed.

Conducting the Investigation

- Do not argue with a witness
- Seek clarification to seek understanding or to test credibility
- Determine what the witness knows about the event and how the witness has that information
- Conduct the interview in person, when possible, to observe the demeanor (outward appearance) of the witness

Conducting the Investigation

- Do not discuss with a witness what others have said or the results of an ongoing investigation
- Always let the participates know that there will be no retaliation for their participation

EEOC Investigative Steps

The EEOC investigation includes the following subdivisions:

- Questions to Ask Parties and Witnesses
- Questions to Ask the Complainant
- Questions to Ask the Accused
- Questions to Ask Third Parties
- Credibility Determinations
- Reaching a Determination

Questions to Ask Complainant

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?”
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?

Questions to Ask Complainant

- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else?
- Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask Complainant

- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Accused

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties

Generally these will be witnesses to the event or individuals who have relevant information, either first hand or through another person

- What did you see or hear? When did this occur?
- Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

One Question to Always Ask

One question that is not in the EEOC list that should be asked of all the witnesses is

- Do you know of any writing, such as emails, notes, text messages, other documentation, physical information, or evidence pertaining to the complaint, and if so, its location or who has control of it.

EEOC guidance list 5 factors to consider:

1) Inherent plausibility:

Is the testimony believable on its face? Does it make sense?

2) Demeanor:

Did the person seem to be telling the truth or lying?

Credibility Determinations

3) Motive to falsify:

Did the person have a reason to lie?

4) Corroboration:

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Credibility Determinations

5) Past record:

Did the alleged harasser have a history of similar behavior in the past?

Reaching a Determination

- Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred.
- Determination can be made by the investigator, or by a management official who reviews the investigator's report.
- The parties should be informed of the determination.

Additional Factors to Gauge Credibility of Witness

How credible or believable is each witness?

The weight given give to any factor is up to the investigator.

Additional Factors to Gauge Credibility of Witness

6th Circuit Federal Pattern Jury Instructions in a Civil Case – Factors an investigator may consider

How well was the witness able to see or hear the events? Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

- How good the witness's memory seemed to be? Did the witness seem able to accurately remember what happened?

- Was anything else that may have interfered with the witness's ability to perceive or remember the events.

Additional Factors to Gauge Credibility of Witness

- How the witness act while giving a statement or information? Did the witness appear honest? Or did the witness appear to be lying?

- Did the witness have any relationship with the parties or anything to gain or lose from the matter that might influence the witness's testimony.

Additional Factors to Gauge Credibility of Witness

- Did the witness have any bias, or prejudice, or reason for giving the statement that might cause the witness to lie or to slant the testimony in favor of one side or the other.

- Was the witness consistent or inconsistent in their statement or did the witness say or fail to say or do something at any other time that is inconsistent with the witness's statement.

Additional Factors to Gauge Credibility of Witness

- If you believe there was inconsistency, ask if this makes the witness's statement less believable.

- Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.

Additional Factors to Gauge Credibility of Witness

- How believable was the witness's statement in light of all the other evidence.

- Was the witness's testimony supported or contradicted by other evidence that you found believable?

Additional Factors to Gauge Credibility of Witness

- If you believe that a witness's statement was contradicted by other evidence, consider that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

Additional Factors to Gauge Credibility of Witness

- Use your common sense and your everyday experience in dealing with other people.

- Then decide what testimony you believe, and how much weight you think it deserves

Additional Factors to Gauge Credibility of Witness

Additional factors you might consider

How long was the witness watching or listening?

Was the witness distracted in any way?

Has there been evidence regarding the witness' intelligence, respectability, or reputation for truthfulness?

Additional Factors to Gauge Credibility of Witness

- Has the witness' testimony been influenced by any promises, threats, or suggestions?

- Did the witness admit that any part of the witness' testimony was not true?

Fact Finding

When fact finding the investigator should consider:

- what is admitted
- what is disputed
- what is “I don’t remember”
- what is unknown?

A Word about Hearsay

- Don’t worry about the legal definition

- Always try to get it from “the horse’s mouth”

Preparing the Report

Include:

- the allegations;
- the dates of the investigation and a brief summary of the breadth of the investigation;
- the relevant policies reviewed or applicable;
- the name of each person interviewed, their position, the date of the interview, and a summary of the interview;

Preparing the Report

- a summary of the documents reviewed and any physical evidence reviewed and considered;

- the finding of facts; (a determination of credibility and why a person was or was not considered credible is generally part of the finding of facts); and

- the conclusion from the investigation.

P.E.A.C.E. Model

The PEACE model of interviewing witnesses, used in England by all police departments, provides a framework for interviewing, so it may be a helpful reference when conducting an employment investigation.

- P - Planning and Preparation
- E - Engage and Explain (develop rapport)
- A - Account, Clarify and Challenge (determine what the witness knows, and clarify the witness account of the situation)
- C- Close
- E - Evaluation

Conclusion

- Thoroughly train investigators
- Be prompt in all that is done
- Always investigate
- Document
- Protect the complainant and witnesses from retaliation

Questions

Please ask your questions.