

How to Conduct a Proper Workplace Investigation

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Outline

- Legal Basis for Workplace Harassment Claims
 - Quid Pro Quo
 - Hostile Work Environment
- Conducting a Workplace Investigation
 - Who Should Conduct the Investigation?
 - Discovery Concerns
 - Conducting Interviews
 - Post-Interview Activities

Legal Basis for Harassment Claims

- Although the annual number of charges filed with the EEOC has decreased from 2010 - 2020, the number of harassment claims filed during the same time period has remained constant
- Categories of harassment claims:
 - *Quid Pro Quo* (“this for that”)
 - Hostile Work Environment

Quid Pro Quo

- Supervisor seeks sexual favors in exchange for a job benefit or to avoid a detriment
- Necessary elements:
 - Employee is a member of a protected class
 - Unwelcomed sexual advances were made
 - Harassment was sexually motivated
 - Employee's reaction negatively impacted employment
 - Harasser had authority over employee
- Strict liability regardless of employer's awareness

Hostile Work Environment

- More common and more subjective
- Employee must show that the harassment was:
 - Unwelcome conduct based on protected class status
 - Attributable to the employer
 - Severe or pervasive conduct based on:
 - Subjective standard
 - Objective standard

Hostile Work Environment

- Unwelcome conduct based on protected class status
 - Conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive
 - Not all workplace harassment is actionable; must be tied to protected class status

Hostile Work Environment

- Must be attributable to the employer
 - The employer knew (or should have known) about the harassing conduct and failed to take corrective action.
 - Employer can be liable for harassment that takes place outside the traditional workspace
- Severe or pervasive conduct based on objective/subjective standard
 - Title VII does not create a general civility code for the workplace

Hostile Work Environment

- Employer Liability depends on the harasser's position
 - Non-Supervisor—employers are generally *not* liable *unless*:
 - Employer knew or had reason to know of the harassment
 - Employer failed to take steps to address the harassment
 - Supervisor Harassment—employers are generally liable *unless*:
 - No tangible adverse employment action
 - Employer exercised reasonable care to prevent/address
 - Plaintiff failed to take advantage of preventative opportunities

Conducting a Workplace Investigation

- A workplace investigation is an important tool for responding to complaints or incidents of suspected workplace misconduct
- Complaints should be investigated as quickly as possible
- Goals:
 - Whether allegations have merit
 - Who was involved in the misconduct
 - What disciplinary measures should be taken
 - What preventative measures could avoid similar conduct

Who Should Conduct the Investigation?

- Internal Investigator
 - Familiarity with corporate culture
 - Cost-effective
- Third Party Investigator
 - Increased objectivity
 - Expertise and experience
 - Presumption of attorney-client privilege

Discovery Concerns

- High likelihood that internal investigation materials will be discoverable in litigation if conducted by management
- Less likely if investigation conducted by in-house attorney or outside counsel
 - Exception: if investigation materials are used as a defense
 - Exception: underlying facts

Conducting Interviews

- Explain the process; identify who the investigator represents
- Request full cooperation; no promise of confidentiality
- Emphasize no retaliation for participation
- Non-leading, non-judgmental and open-ended questions
- Avoid conclusory or judgmental questions

Post-Interview Activities

- Making factual and credibility determinations
- Determine the response
- Drafting a report summarizing the investigation
- Communicating the results on a need-to-know basis
- Lessons Learned