

Conducting Internal Investigations

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DISCRIMINATION AND HARASSMENT SOLUTIONS LLC

Ground Rules

We will not:

- Discuss actual workplace situations
- Debate whether the law is good or bad
- Violate our internal policies during the training
- Construe this to be legal advice



Ground Rules, *cont.*

We will:

- Share airtime by balancing talking and listening
- Place cell phones on silent



Learning Objectives

Participants will learn about:

- When to conduct investigations;
- Three stages to an effective investigation;
 - The investigator's role
 - Planning for and conducting the interview
 - Making findings of fact, writing the report and corrective action

Vocabulary

- Complainant
- Respondent
- Preponderance of the evidence
- Scope of the investigation
- Findings of Fact

Complaints

- Unconscious bias – when we allow our own attitudes, feelings, stereotypes, or beliefs to impact our judgment or understanding of other people.
- Microaggressions - brief and common daily verbal, behavioral, and environmental communications, whether intentional or unintentional, that transmit hostile, derogatory, or negative messages to a target person because they belong to a stigmatized group.

Consider Informal Resolution

- Some policies provide for informal resolution;
- All parties must be willing to participate;
- Mediate the dispute with the parties;
- Conduct separate discussions with those involved;
- Document the agreement and have all involved sign it;
- If the parties can not come to an agreement, then investigate.

Responsibility of the Investigator

- Impartial and neutral
- An active listener – resist the urge to speak over
- Able to demonstrate empathy
- Use appropriate questioning skills
- Maintains confidentiality

Key Steps to an Investigation

- Investigate promptly
- Maintain confidentiality as *Practicable*
- Interview relevant parties and review relevant documents
- Prevent retaliation
- Take interim measures pending the results
- Reach a determination and write up report
- Take remedial action and follow up

Stage 1 – Investigator's Role

- The Initial Considerations

The 5 W's

- What
- Why
- When
- Who
- Where

Decide What Claims to Investigate

- Investigate when there is....
 - A formal or informal complaint
 - Suspicion of misconduct (“rumor”)
 - Receipt of a grievance or MCAD/EEOC complaint
 - If the behavior is open and obvious

**Complaints do not need to be in writing

What is a complaint?

- I don't want to say anything but..."
- "Can we just keep this confidential?"
- "Let's just talk off the record."
- "Can I give you a hypothetical?"
- "They want you to know about this."

Do we still investigate?

- Employee states that they don't want anything done.
- Someone other than the alleged “victim” complains.
- The alleged “victim” is no longer employed.
- The alleged “harasser” is no longer employed

What claims to Investigate YES/NO

- “I heard a rumor that our client Jane hit our employee Jason at the holiday party”
- “My subordinate Jenny emailed a sexual joke to me”
- “Just between us, I’m sick of Jim always asking me about my sex life”
- “I know you’re investigating John’s comments to Jose, but what about his comments to Julio”

Stage 1 – Investigator's Role

- Why Investigate:
 - Ordered by the MCAD;
 - The EEOC – must investigate promptly if an EEO allegation is made;
 - To correct the situation;
 - Prevent any further wrongdoing.

Stage 1 – Investigator's Role

- When should the investigation be conducted?
 - As soon as practicable;
 - Do not unnecessarily delay the investigation because it can impact the findings.

Hostile Work Environment v. Toxic Work Environment?

Stage 1 – Investigator's Role

Who should conduct the investigation:

- Consider consulting an attorney;
- Decide who should conduct the interviews
- Is there a conflict for Human Resources

Where should the investigations be conducted:

- Conference room without internal windows;
- Possibly offsite or at headquarters

Stage 1 – Investigator's Role

- What additional matters to consider:
 - Identify alleged adverse action and protected category;
 - Decide who to interview and in which order;
 - Consider needed documents.

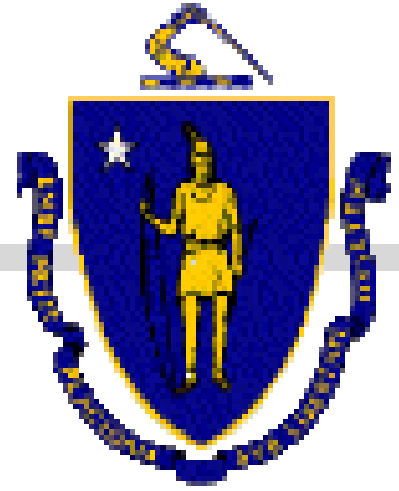
Stage 1 – Investigator's Role

- Is there evidence of discrimination?

Forms of Discrimination:

1. Disparate Treatment
2. Harassment – sexual or other protected class
3. Disparate Impact
4. Accommodation

Protected Categories



- Age
- Criminal records (inquiries only)
- Disability
- Gender
- Gender identity
- Genetics
- Military status
- National origin or ancestry
- Race or color
- Pregnancy and pregnancy related conditions
- Religion
- Retaliation
- Sexual orientation

Stage 1 – Investigator's Role

- Consider all parties' interests:
 - Complainant and Respondent;
 - Witnesses;
 - Employer.

Stage 2 – Planning and Conducting the Interviews

- Collect Information;
- Create a timeline and an outline of facts;
- Planning for the Interview:
 - Who
 - When
 - Where
- The Interview.

Stage 2 – Planning and Conducting the Interviews

- Collect Information
 - All documents relevant to the events
 - Preserve videos, emails, texts etc
 - Personnel files
 - EEO files
 - Organizational charts
 - Workforce Profile
 - Relevant Policies
 - Comparative Information
 - Training materials and sign in sheets

Stage 2 – Planning and Conducting the Interviews

- Planning for the interview

Who?

Determine who should be interviewed and in what order

Generally the accuser first

Meet with as many people as necessary to determine what happened; as few to avoid getting more people than necessary involved

When?

As soon as practicable but make sure due diligence is complete;

Where?

Onsite or off?

Conference room?

Not back to back.

Stage 2 – Planning and Conducting the Interviews

- Preliminary Comments:

Ask do they agree to tell the truth and answer each question to the best of their ability;

Explain that you can not keep information confidential because a report is being prepared;

Explain that no one can retaliate;

Explain they can provide new information at anytime .

Stage 2 – Planning and Conducting the Interviews

Good morning, as you know, my name is Ms. Investigator, and I'm going to be asking you some questions today regarding an investigation that I'm conducting for the Town of X. Today is July 31st, 2023. It's 9:16 AM. Before I ask any questions, I would like you to confirm that you understand this interview is being recorded. Also, I want to confirm that you are represented by counsel here today? Mr. Attorney you also understand this interview is being recorded, correct?

Ms. Witness, I also want to remind you that the Town's policy prohibits retaliation in the workplace. if anyone ever retaliates against you for participating in this investigatory process, you would need to report that. Do you understand that? **for the respondent – you are reminded that you cannot retaliate against anyone involved in the investigation.

Stage 2 – Planning and Conducting the Interviews

Also, I can't put you under oath, but my expectation is that you will answer each question truthfully, honestly, and to the best of your ability. Do you agree to do that?

Further, what you tell me here today, I can't guarantee will be kept confidential because I will be doing a report to the Town and something you say may end up in the report. Do you understand that?

Stage 2 – Planning and Conducting the Interviews

Also, I ask for you to keep what we talk about here today confidential, but I can't order you or instruct you to do that. I believe it preserves the integrity of the investigation. Does that make sense?

Please know that I haven't reached any conclusions yet as I am still gathering information. I need you to do your best to provide all relevant information that you may have about this matter. Do you understand?

Stage 2 – Planning and Conducting the Interviews

Tape-recording interviews:

MA is a two-party consent State

Get this permission on the recorded line

Zoom interviews

Confirm they are alone

Pros and cons

Stage 2 – Planning and Conducting the Interviews

- Conducting the interview
 - Develop standard talking points about:
 - Yourself
 - The investigation - timeline
 - The witnesses rights
 - The witnesses obligations

Stage 2 – Planning and Conducting the Interviews

- Explain:
 - What you are investigating
 - To whom you will report your findings
 - No determinations made yet

Stage 2 – Planning and Conducting the Interviews

- Explain the investigation
 - Why is it being done
 - What may happen as a result
 - If the individual is being accused, let them know
 - Confidentiality-as much as practicable.

Stage 2 – Planning and Conducting the Interviews

- Witnesses Rights
 - Prohibition against retaliation
 - As much confidentiality as possible/need to know
- Witnesses Obligations
 - Not retaliate
 - Maintain confidentiality
 - Be truthful

Stage 2 – Planning and Conducting the Interviews

- After the introduction begin questions
 - Begin with generalized questions, rather than elicit information;
 - Assess potential bias/prejudice;
 - Inquire about sources of helpful information;
 - Inquire to get an understanding of relationships

Stage 2 – Planning and Conducting the Interviews

- Avoid using accusatory language
- Don't debate or argue with the person complaining or reporting
- Don't cast blame or responsibility
- Don't judge
- Avoid asking them why they may have waited to share these details with you.
- Ask more open-ended questions

Stage 2 – Planning and Conducting the Interviews

- Miscellaneous Information:
 - Do due diligence before the interviews
 - Allow two hours for complainant and respondent and one hour for witness
 - Break in between interviews so no one is walking by the next person
 - Ask them to keep the questions asked of them confidential
 - Try to avoid telephone interviews
 - Interview room – no windows

Stage 2 – Planning and Conducting the Interviews

- Key Interview Challenges:
 - “You don’t understand my group.”
 - “I’m sure you know exactly how I feel since you are a member of my group.”
 - “Am I required to talk to you?”
 - “Do you think I have a case?”
 - “I want a lawyer.”
 - “Can I bring a union representative?”

Stage 2 – Planning and Conducting the Interviews

- Miscellaneous:
 - Administrative leave
 - Preservation of evidence
 - Signed witness statements
 - Never interview as a group
 - May need to reinterview
 - Personnel/Confidential

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Access credibility of witnesses
- Compare witness statements to documentary evidence
- Re-question witness(es) if necessary to address inconsistencies
- List undisputed facts
- Consider the “reasonable person” perspective
- Determine findings for each allegation

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Access credibility of witnesses:
 - What indicates truthfulness?
 - What indicates deception?

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Assess whether a policy violation has occurred and if so, level of seriousness.
 - Have applicable policies and procedures been distributed and explained;
 - Has the individual been trained on the policy;

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Writing Report
 - Reflect on the nature of the findings and current objectives;
 - Involve key parties in planning and implementation
 - Be consistent
 - Consider what the reporter wanted as an outcome
 - Will the inappropriate conduct likely stop?
 - Is the report consistent with the policies and procedures.

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Writing Report
 - Explain your basis for determination of credibility for witnesses and parties.

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- The evidence supports several adverse findings. First, Councilor Jones violated the Visitor's Code of Conduct. This provision requires "common courtesy" and "respect" when interacting with others and the avoidance of "disturbances" and "offensive behavior." Ms. Smith said that Councilor Jones's face turned red because of his "screaming" and that she positioned herself to create a physical barrier between Councilor Jones and Ms. Ryan. She reported that "[t]his was by far the most hostile environment I have ever experienced." (Exhibit 6) Mr. Covenofore saw the altercation and asked Councilor Jones to call in advance of arriving because he is often contentious with the staff. Councilor Jones ignored his request, caused a disturbance, and then ignored Mr. Covenofore's requests to calm down. He heard Councilor Jones insult Ms. Ryan with words like "useless."

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Dr. Lee's dishonesty is also violative of the district's conduct policy. She lied about missing work because of her aunt's death and her aunt's burial. She lied to Dr. Ryan about her attendance at a professional development session. She lied about having received no prior notice about the IT problems. Every witness interviewed had issues with her credibility. This is hardly "conduct ... that not only reflects credit to the school system but also sets forth a model worthy of emulation by students "

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Joe Holland is universally respected for his business acumen. No one complained that Mr. Holland was incompetent, and most witnesses recognized that he is a skilled business manager. However, the witnesses were also largely uniform in their criticism that he was sometimes unprofessional in the way he interacted with colleagues and invoked an intimidating tone and gestures.

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- There are no violations for harassment, bullying, or retaliation. This matter presents an unfortunate mixture of misinformation and misplaced assumptions.

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Writing Report
 - Scope of the Investigation
 - Summary of Allegations
 - Witnesses Interviewed
 - Documents and Material reviewed
 - Findings of Fact
 - Policy Violations and Conclusions
 - Recommendation

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Executive Summary
 - Summary of Allegations
 - Number of Witnesses Interviewed
 - Number of Documents reviewed
 - Policy Violations and Conclusions

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Notifying the Parties
 - Notify the parties that the investigation is over
 - Document any disciplinary action
 - Inform reporter that appropriate action was taken
 - Remind reporter to immediately report any further problems, including retaliation

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Completing the Investigative File

 - Confidential Investigative File*

 - Type up notes
 - Record of investigation
 - Investigative Report

 - Personnel File*

 - Discipline, if any
 - Only that employees name should be included

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Examples of Progressive Discipline
 - Verbal or written warning
 - Required counseling or training
 - Leave with pay or suspension without pay
 - Transfer
 - Demotion
 - Last chance agreement
 - Termination

**Make sure the discipline is proportionate to the seriousness of the offense

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Ways to Correct Effects of Discrimination
 - Restoring leave taken due to discrimination
 - Expunging negative evaluations that arose from discrimination
 - Reinstatement
 - Apology by the perpetrator
 - Correcting other harm caused by discrimination, such as loss of compensation

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Other Possible Strategies
 - Training for individual, department, office or company
 - Alternative dispute resolution
 - Relocation of one or both parties

Stage 3 – Findings of Fact, Writing Report & Corrective Action

- Follow up
 - Consider who needs to be involved in implementation
 - Document actions, including corrective action plans
 - Ensure no retaliation or further policy violations
 - Calendar follow up steps, if any.

Conclusion

Scan QR code with your camera to open evaluation

