



HOW TO CONDUCT A WORKPLACE INVESTIGATION

Investigating Allegations of Discrimination and Harassment

Webinar

April 26, 2011



KOPON AIRDO, LLC
ATTORNEYS AT LAW





Kopon Airdo, LLC

233 S. Wacker Drive
Suite 4450
Chicago, Illinois 60606
P: 312.506.4450
F: 312.506.4460
www.koponairdo.com



Andrew Kopon Jr. and Rachel E. Yarch

INTRODUCTION





Federal Law: Title VII

- **Title VII of the Civil Rights Act of 1964:**
 - Applies to employers with 15 or more employees
 - Protected categories: race; color; religion; sex (including pregnancy); national origin; ethnicity; and genetic information
 - Prohibits discrimination, harassment, retaliation, failure to accommodate (religion)



Other Statutes

- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- The Fair Labor Standards Act of 1938
- State and local laws



Damages

- Injunctive relief
- Back pay
- Front pay
- Punitive
- Attorney's fees
- Liquidated damages (for willful violations of the ADEA)





Employment Law

CONDUCTING WORKPLACE INVESTIGATIONS



When To Investigate?

- Oral and written complaints.
- Supreme Court Decision – March 22, 2011
- *Kasten v. Saint-Gobain Performance Plastics Corporation*

PART II:
AFFIRMATIVE DUTY TO
INVESTIGATE





Affirmative Duty to Investigate

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1998)

West v. Tyson Foods, Inc., 2010 WL 1507629 (6th Cir. 2010)

- Allegations or observations of discrimination/harassment *must* be investigated



What triggers affirmative duty?

- What to look for in employee complaints:
 - Bullying members of a particular class
 - Negative stereotypes
 - Slurs
 - Innuendos
 - Inequality



Timely Investigation

- Timeliness is crucial to avoid or limit liability
- Failure to investigate or delay in investigating could result in punitive damages
- Deter further harassment/discrimination



PART III:
POLICY IN PLACE





Policy in Place

- Establish written policy
- Policy must provide reporting mechanism
- Must include anti-retaliation language
- Circulate policy to all employees
- Signed acknowledgement



Policy Should Include

- General prohibitions
- Protected classes under state or local law
- Specific sexual harassment prohibitions
- Employees' rights and responsibilities
- Managers' responsibilities to report harassment



PART IV:
CONDUCTING THE
INVESTIGATION





Choosing an Investigator

- Identify individual to conduct investigation
 - Unbiased: HR person or supervisor who does not work directly with the parties
 - May not want to ask your attorney to investigate





Scope of the Investigation

- Make conclusions regarding veracity of the complaint
- Determine whether there was a policy violation
- Make recommendations regarding discipline or other corrective action



First Step of Investigation

- Interview complaining employee
 - Complete lists of acts complained of
 - Whether isolated incident or pattern
 - Demeanor of employee
 - Identify witnesses
 - Corroborating evidence





Interviewing Witnesses

- Consider interviewing witnesses prior to interviewing accused – get a full picture
- Interview witnesses individually
- Maintain confidentiality to extent possible



Interviewing Accused

- Confront with general allegations
- Note response to allegations
- Give accused opportunity to respond
- Extent and nature of interactions with complainant
- If denial of allegations, ask for facts suggesting motive for fabrication



Gather Additional Evidence

- Search for supporting documentation or other evidence to corroborate allegations





Making Conclusions

- Things to consider:
 - Credibility of parties and witnesses
 - Strength of evidence
 - Factual conclusions
 - Unresolved factual issues
 - Whether violation of company policy occurred

PART V: DOCUMENTATION





Document Document Document!

- Document each step of the investigation
 - If you receive a complaint orally, draft a memo
 - Draft memos of interviews of each party and witnesses





Draft Report of Findings

- Factual findings regarding each issue
- Dates of interviews and other steps taken
- Critical information from interviews
- Focus on policy violations
- Actions taken





Document Disciplinary Action

- Document any and all disciplinary action and maintain in employee's personnel file



PART VI: REMEDIAL MEASURES



Types of Discipline

- Apology
- Verbal reprimand
- Written reprimand
- Suspension
- Discharge





Discipline

- Factors to consider in determining appropriate discipline
 - Egregiousness of conduct
 - Prior complaints
 - Prior discipline
 - Prevent harassment from recurring



Alternatives to Discipline

- Re-circulating policies
- Separate complainant and accused
- Training for accused employee
- Training for all employees
- Employee Assistance Program



Questions





Thank You

233 S. Wacker Drive

Suite 4450

Chicago, Illinois 60606

P: 312.506.4450

F: 312.506.4460

www.koponairdo.com

Andrew Kopon Jr. and Rachel E. Yarch