

Legally Effective Workplace Investigations

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Legal Reasons

- LEGITIMATE BUSINESS REASON
- RATIONALLY RELATED TO JOB DUTIES
- AFFIRMATIVE DEFENSE TO HARASSMENT
- DEFENSIBLE REASONABLE ACCOMMODATION
- NEGLIGENT INVESTIGATION

Adams v. CDM Media USA (2/24/15)

- The **legitimacy** of the reason offered by an employer for an adverse employment action established by admissible evidence to require the plaintiff to offer evidence of pretext
- Recent sales experience held not “legitimate” because not related to the “ability of the employee to perform the work in question.”

Shimose v. Hawaii Health System Corp. (1/16/15)

- An overly broad reading ... would eviscerate the protections afforded to persons with conviction records ...
- **NOT** disqualified from consideration for hospital radtech position because of conviction for possession with intent to distribute crystal meth.

- There is no indication that radtechs at HMC administer or even assist patients with any type of drugs. A felony drug conviction simply has no bearing on an individual's ability to perform the primary imaging duties of a radtech at HMC. Accordingly, there is no rational relationship between Shimose's drug conviction and the core duties of a radtech at HMC that would have entitled HHSC/HMC to disqualify Shimose from prospective employment.

Know When The Duty To Investigate Arises

- Formal complaint by victim
- Direct observation
- Hearsay comments by third parties
- Direct observation by third parties
- “But please don’t tell anyone” remarks by the alleged victim

workplace investigations

- • Violation of workplace rules and procedures
- • Substance abuse
- • Discrimination complaints
- • Harassment complaints
- • Threats against others
- • Abusive behavior
- • Workplace theft
- • Vandalism and other sabotage
- • Safety issues
- • Attitude problems
- • Retaliation claims
- • Security breaches

Intake

- Listen without making judgments or stating opinions
- Get factual details
- Filter matters that are not job-related
- Get a signature or written confirmation
- Document Employee's request NOT to proceed
 - *Hardage v. CBS Broadcasting, Inc.*, (9th Cir 2005)

Harassment

- Document Prompt Investigation
 - *Hardage v. CBS Broadcasting, Inc.*, (9th Cir 2005)
 - Document Employee's request NOT to proceed.
- Document rationale for Discipline
 - *Arquerro v. HHV*

Assessment

- If true, what policies potentially violated?
- What laws?
- Who may be affected?
- Is an investigation required?

- The primary goal of an investigation is to provide the employer with the appropriate findings and facts to make a decision regarding the matter.



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Select An Investigator

Someone who is unbiased and credible

Employee Investigations

- Plan:
 - Identify relevant policies, contract provisions, work rules etc.
 - Identify potential sources of evidence
 - Preserve Evidence
 - Identify witnesses and consider order of interviews

- Review relevant documents and policies
- Identify who should be interviewed and in what order.
- Document all interviews.
- Retain all documents pertaining to the investigation.

Interviews

- Introduction
- Non-retaliation
- Confidentiality:
 - Can you promise it?
 - Can you require it?

Confidentiality?

- Banner Health System d/b/a Banner Estrella Medical Center, 358 N.L.R.B. No. 93 (2012) - an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct

Representation?

- Can employee bring their attorney?
- Can employee bring union representative?

Recording?

- By employer
- By employee

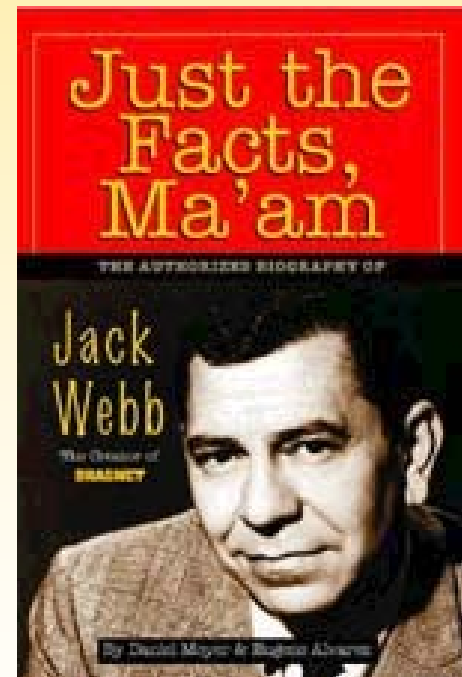
Note taking

- Thoroughness key to establish ‘good faith belief’
- Note taking, rewriting
- Statements

Interviews

Obtain the following types of information:

- What happened?
- When did it happened?
- Where did it happen?
- Who was present or involved?
- How did you respond?
- Did you continue working?



- When interviewing witnesses, however, it is important that you avoid unnecessarily providing the witnesses with information.
- Begin the interview with broad questions which do not lead the witness to respond in a specific way.
- Examples:
 - How has everyone in the department been getting along?
 - Have you seen any behavior which is inappropriate or seems to offend anyone?
 - Have you noticed any behavior which involved violent or sexual [race, disability, etc.] matters?

Follow up . . .

- Once you complete the initial round of interviews, is further questioning of anyone warranted?



Evaluate/Report

- Document your conclusion regarding whether a violation of company policy took place.
- Do not make legal conclusions (i.e. conclusions regarding whether a hostile environment was created).
- Document your conclusions regarding credibility determinations and state the basis for your conclusions.

Report

- BE CLEAR: Use simple English and proper grammar
- Don't exaggerate!
- Your written word lives on forever
- BE FACTUAL
- Confidence is reflected in writing
- Vague terms show lack of confidence
- BE LOGICAL
- BE COMPLETE

Assess Credibility

- consider the interviewee's demeanor,
- the consistency of the interviewee's story,
- the plausibility of the interviewee's version of events, and
- the presence of other factors which might make the interviewee biased – e.g., any reason to be mad at the accused?
- document conclusions regarding credibility and state the basis for those conclusions.

TAKE ACTION

- If you conclude that no violation of company policy occurred:
 - Advise the complainant that the evidence was insufficient to conclude that a violation of policy or law occurred.
 - Encourage the complainant to bring any additional facts or evidence to your attention.
 - Remind the complainant that retaliation is expressly forbidden and that any acts of retaliation should be brought to your attention.

- Advise the alleged wrongdoer of the results of the investigation.
- Remind the alleged wrongdoer that retaliation against the complainant or any witnesses is forbidden and that any retaliation will result in disciplinary action.
- If you conclude that a violation of company policy occurred:
 - Take effective remedial action which is reasonably calculated to end the wrongful behavior .
 - Take disciplinary action which is appropriate given the severity of the conduct involved.

Violation found (cont.)

- Advise the complainant that appropriate action has been taken and that you expect no further conduct to occur.
- Follow up with the complainant afterwards to confirm things still ok

Documentation

- Keep Investigation Records

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Thank you!