

A SIMPLE GUIDE TO WORKPLACE INVESTIGATIONS

I. INTRODUCTION

Discrimination and harassment undermine the integrity of the employment relationship, compromise equal employment opportunities, debilitate morale and interfere with work productivity.

EEO personnel must develop an objective, fair and efficient means of conducting investigations into allegations of wrongful conduct. They must also develop a system of creating defensible records for every investigation that support their recommendations. The role of the EEO investigator is to be a neutral party focusing on violations of the policies. An investigation should begin promptly after notice of potentially impermissible conduct is received.

There are three objectives of an investigation:

- (1) identify, remedy and/or prevent unlawful conduct;
- (2) maintain and/or improve employee morale and productivity; and
- (3) minimize employer liability.

II. OVERVIEW: POTENTIAL CLAIMS

Personality disputes between two employees, unless the dispute was based upon an employee's membership in a protected class, should not be an EEO matter. However, it may develop into a problem where mediation could effectively be used to resolve conflict.

The most common types of unlawful workplace conduct that prompt investigations are allegations of disparate treatment because of discrimination. Discrimination, from a legal perspective, is any form of differential treatment based on membership in a legally protected class or category. It is important to note that any differential treatment based on membership in a legally protected class or category is unlawful, regardless of whether it is directed toward a member of a group that has historically suffered discrimination or a member of a group that has not historically suffered discrimination. Protected classes are identified below:

Legally Protected Classes/Categories
Race
Color/Creed
Religion
Gender/Sex (Including Pregnancy)
National Origin (Immigrant Status)
Age
Disability
Ancestry (Ethnicity)
Nationality (Citizenship)
Marital Status
Sexual Orientation
Liability for Service in the Armed Forces

Genetic Traits
Domestic Partnership
Gender Identity and Expression
Hereditary Traits

Forms of Discrimination

Discrimination is not always obvious and may at times be hard to detect or uncover. Each situation is fact specific, delicate and unique. However, there are some common forms of discrimination outlined below:

- **Disparate Treatment** is conduct that on its face discriminates on the basis of a legally protected class or category. An example of disparate treatment would be a situation where one protected individual or class of individuals is treated less favorably solely based upon membership in that protected class.
- **Disparate Impact** is conduct that seems neutral on its face but has a discriminatory impact on members of a legally protected class or category. Examples include employment decisions such as hiring, firing, promotions, demotions, and discipline. Where, for example, an employer decides to demote all employees who have a tattoo on their bodies and that seemingly neutral act results in the demotion of all Native American employees because, as a group, Native Americans are more likely to have tattoos than other groups, the seemingly neutral act raises a question of disparate impact discrimination.
- **Hostile Work Environment** exists when an employee is subjected to adverse treatment that would not have occurred but for the employee’s membership in a protected class. To have a successful claim, the adverse treatment must be either severe or pervasive enough that a reasonable person in the same circumstances would believe that the terms or conditions of employment have been altered to create an abusive working environment. This can include physical, verbal, and/or non-verbal misconduct. The misconduct can be actionable even if it takes place outside the physical bounds of the workplace or the regular hours of the workday.
- **Retaliation** is treating an employee differently because the employee has engaged in certain protected activities. Such conduct is prohibited.

Activities Protected From Retaliation
Filing A Discrimination Complaint or Supporting a Complaint
Family or Medical Leave
Filing for Workers Compensation
Whistleblowing

- Examples of retaliation may include:
 - terminating or demoting someone for asserting a grievance or filing a complaint or assisting another in asserting a grievance or filing a complaint
 - failing to promote an otherwise qualified candidate, despite the fact that they are the most qualified candidate

- sudden alteration of work assignment for reasons other than legitimate business reasons
- unwarranted disciplinary action or threatening unwarranted discipline
- ostracizing someone for filing a complaint

Whether these actions indicate an act of retaliation is subjective and fact sensitive and all alleged occurrences of retaliation must be reviewed on a case-by-case basis. The actions listed above, however, are helpful indications of when an action could potentially be retaliatory and should be investigated.

So what do you do when you conclude there is a problem? One course is to investigate internally. Another option is to use an outside investigator that should be impartial. Fact-finding and workplace investigations can be discussed confidentially with Jacobs Center for Justice and Alternative Dispute Resolution (973-226-0499).