



BARCLAY DAMON LLP

Navigating Complaints and Investigations

Human Resources Professional Conference

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Agenda

- » Strictly HR Complaint and Investigations:
When Compliance Need Not Be Involved,
At Least at the Outset
- » Harassment Issues
- » HR/Compliance Overlap

Current Environment



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When to Conduct an Investigation

- » Reports of workplace discrimination
 - › Employee claims they are being treated differently
 - Pay, promotion, working hours
 - › Disparate Impact
 - Unintentional discriminatory effect of policy
- » Termination of an employee
 - › My manager falsely accused me because of my race
 - › Cat's Paw Liability
- » Sexual harassment allegation
 - › Employee's failure to utilize an employer's internal complaint procedure is an affirmative defense to sexual harassment claims.



Follow Policy

- » Follow your policy in a consistent manner in determining how and when you conduct investigations
 - › Ensure disciplinary actions taken are consistent
- » Courts have held that deviation from company policy, particularly uneven application of company rules, is probative circumstantial evidence of discriminatory intent.
- » Make sure your policy/notification re: Harassment follows NYS Law and guidance (Model Policy and Complaint form).



How to Conduct the Investigation

- » Take every complaint seriously.
- » Investigate thoroughly
- » Document, document and document some more
 - › E-mails, text messages, notes, written statements
 - › Be careful about documenting your findings unless filtered through legal counsel.



Appointing the Right Investigator

- » Use someone truly impartial.
- » It is important that the investigator have no past dealings with either the claimant or the alleged perpetrator which would suggest prejudice, bias, or predisposition.
- » Someone intelligent and articulate
 - › Think how would they serve as a potential witness
- » Reliable and will maintain confidentiality.
- » The investigator(s) should have a thorough knowledge of the sexual harassment policy.
- » The investigator needs to be properly trained.
- » Consider using a third party (e.g., HR consulting firm or attorney).
- » Consider using two investigators.



Appointing the Right Investigator

- » Potential advantages:
 - › You can assign a male and female investigator;
 - › Each investigator serves as a check on the other;
 - › One investigator can take notes while the other conducts interviews; and
 - › The investigators can corroborate each other in the event the matter goes to litigation.
- » Potential Negatives:
 - › Confidentiality; and
 - › Differing opinions or recollections.



How to Conduct the Investigation

- » An investigator should consider reviewing the following documents:
 - › Claimant's personnel file
 - › Claimant's job description
 - › Alleged harasser's personnel file
 - › Alleged harasser's job description
 - › Relevant records (e.g., e-mails, phone messages, text messages)
 - › Attendance records



How to Conduct the Investigation

- › Payroll records
- › Transfer requests
- › Organization chart or roster of employees
- › Board policies on discipline and sexual harassment
- › Employee handbooks
- › Copies of all pertinent posted notices
- › Reports of other relevant investigations
- › Prior complaints involving either the claimant and/or the alleged harasser
- › Prior discipline records, if applicable



Interviews

- » Review and provide additional copy of the harassment policy.
- » Have the complaint reduced to writing.
- » Explain that his/her/their complaint will be fully investigated as are all complaints of sexual harassment.
- » The investigator should explain what the investigation will entail, and inform the complainant that a written report will be prepared including the results of the investigation with a recommendation for corrective action if warranted.



Interviews

- » The investigator should explain that they cannot promise complete confidentiality. However, the investigator should also indicate that they shall endeavor to limit the number of people who know about the complaint.
 - > Consider standard language for investigator to read at the start of each interview.
 - > Checklists
- » Give complainant general time frame for response.



What to Ask

- » The investigator should obtain the following information with as much detail as possible:
 - › What was allegedly said?
 - › What physical acts occurred?
 - › Where the events took place?
 - › Who else was present?
 - › Any adverse employment actions (e.g., change in work hours, denied vacation, bad evaluation, smaller office, reduced pay, bonuses)?



Interviewing the Accused

- » When beginning the interview, the alleged harasser needs to be informed that the employer is investigating a complaint of sexual harassment against the person.
- » Make sure the person realizes that you are there to hear their side of the story and that no pre-judgment has been made.



Interviewing the Accused

- » Note: Warn the alleged harasser against retaliation of any form. Also, warn the person again at the close of the interview.
 - › Includes using others to retaliate
 - › Will be terminated for any retaliation
- » Consider written notice of anti-retaliation policy stating the person will be fired if it is violated.



Avoiding Additional Liability

- » Ensure no retaliation occurs
 - › Important: Advise the witness that it is illegal under federal and state law for anyone to retaliate against the witness for cooperating in the investigation. In addition, the witness should be advised not to tolerate retaliation and to report it should it occur.
- » Also, the witness should be told who to contact in the event of perceived retaliation.
- » Advise the witness not to retaliate against the claimant or harasser.



Avoiding Additional Liability

- » Confidentiality
 - › Can I advise witness or complainant NOT to discuss the allegations/investigation with others?
- » Banner Health Systems, Case 28-CA-023438 (07/30/12)
- » Per se rule violates §8(a)(1) of the National Labor Relations Act.
 - › Case by case basis
 - › Consider the topic you're asking to keep confidential
 - › Pay rate/benefits—No!
- » IGNORE much of what you read about the Banner Health decision
 - › Does not preclude confidentiality



Avoiding Additional Liability

- » Balance against duty of confidentiality and EEOC guidance.
- » Determine whether, in any given investigation, witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up.



Taking Statements

- » Substance of statement should adequately describe events, dates, times, and witnesses whenever possible. Identify source of any information not based on personal knowledge.
- » Each page of the statement should be signed at the bottom and any corrections should be initialed.
- » Allow individual to read statement, and make corrections, additions, or deletions.
 - › Close out statement: "I have read the above statement in its entirety and swear it is true to the best of my knowledge".
 - › Give copy of statement to individual?
 - Probably Not
 - › Safeguard all original statements
 - Best Evidence Rule



Weighing Evidence

- » After the investigation has been completed, the investigator should do the following:
 - › Determine which facts are uncontested and which facts are contested.
 - › Confirm whether or not there is evidence to suggest which position is correct.
 - › Seek out corroborating evidence.
 - › Weigh credibility of complainant, alleged harasser and witnesses.



Considerations

- » The factors that an investigator should consider at this stage include:
 - › Is it first-hand knowledge or merely hearsay?
 - › Is there any obvious bias or motivation to be dishonest?
 - › Is the story internally consistent?
 - › Is any portion of the witness' testimony clearly in error?
 - › Are there stories of witnesses who share a common bond?
 - › What do truly disinterested people have to say?
 - › Are there details reported which would only be known if the conduct had occurred as alleged?



Report

- › Note the documents reviewed and the witnesses interviewed.
- › Describe each interview. Incorporate significant portions of witness statements into the report. If necessary, attach copies of their statements as exhibits to the report.
- › Identify conflicting evidence and state how the conflicts were resolved or how credibility determinations were made. Attach any relevant documents used in the process and explain their significance.
- › For all witnesses, distinguish between first-hand knowledge and hearsay.
- › State conclusion as to whether sexual harassment occurred and provide specific justification for the conclusion.
- › Recommend corrective action if sexual harassment occurred.
- › Share with complainant, if satisfied -- get it in writing.



Actions

- » The application of formal disciplinary action, e.g., written reprimand or warning, suspension, or discharge, depending on all pertinent circumstances.
- » The transfer, reassignment, leave of absence, or resignation of the harasser may be appropriate under the circumstances.
- » Ensure that any action taken does not in any way adversely affect the complainant.
- » Resolution of any concerns by the complainant, including remedying any damages.
- » Consider offering the complainant professional counseling, if appropriate.
- » Follow through to make sure remedial actions are effective.



Other Considerations

- » The complainant should be asked to identify all witnesses or potential witnesses to any incidents reported in complaint.
- » The complainant should be asked to identify by name any other victims known or reasonably believed to have suffered sexual harassment at the hands of the employee(s) involved.
- » The complainant should be asked to produce all physical evidence supporting or tending to support his/her claims.
- » The complainant should be asked about reports to any superiors concerning the incident and any responses.
- » The complainant should be asked about any communications either verbal or in writing wherein he/she communicated that the advances were unwanted.
- » All witnesses should be interviewed separately and confidentially.

»» Other Considerations

- » Steps should be taken to ensure the confidentiality of the investigation and to explain to witnesses that they should maintain strict confidentiality concerning it.
- » Determine whether the incidents were reported to supervisory personnel in a timely and clear fashion.
- » Determine whether the employer knew or had reason to know that the conduct was occurring.
- » If the complaint is determined to be founded and a transfer of one or both is contemplated to avoid further problems, extreme care should be taken to ensure against a claim of discrimination or retaliation if it is decided to move the victim.
- » Hotel/motel registers.
- » Photographs/videos.

»» Other Considerations

- » Keep a log of scheduled interviews, canceled interviews, those unwilling to be interviewed, and all attempts to contact witnesses.
- » Assume every conversation is being taped.
- » Re-interview complainant, giving opportunity to complainant to explain away apparently inconsistent or non-corroborative witness statements.
- » Ask complainant if he/she made any prior report of harassment to ranking officials, or if officials were somehow aware of harassment.
- » Use of attorneys and/or outside investigators.
- » Employer's best interests versus fair investigation.
- » Use of legal stenographer, tape recorder, or videotape for interviews.

Other Considerations

- » Medical exam of alleged harasser, i.e., identifying marks.
- » Make sure you have a sexual harassment prevention policy and annual training in compliance with NYS Law.
- » Promptly investigate claims of sexual harassment pursuant to policy; follow-up with complainant.
- » Keep complete and accurate personnel records.
- » Conduct periodic in-service training.
- » When a complaint is filed, seek legal expertise at the outset and take steps to avoid the filing of an outside complaint or, if one is filed, a finding of probable cause.
- » Check for insurance coverage.

Ostrich Approach = Bad





Workplace Harassment Is More Than Sexual Harassment

- New York State and/or federal law prohibit harassment on the basis of:
 - Age
 - Race
 - Religion/Creed
 - Color
 - National Origin
 - Sexual Orientation
 - Military Status



Workplace Harassment Is More Than Sexual Harassment

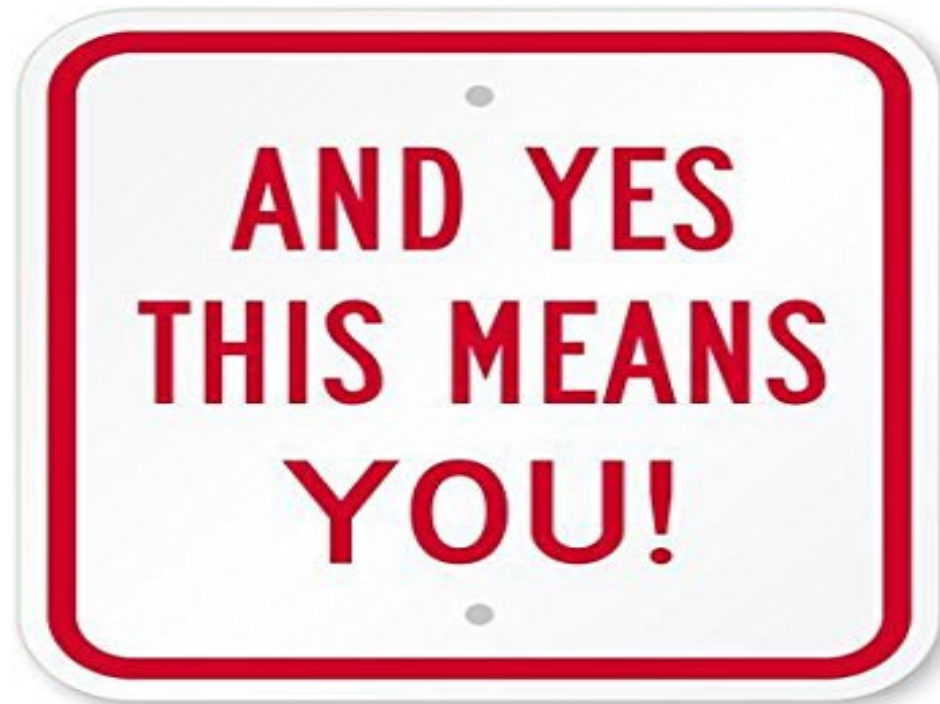
- » Sex
- » Disability
- » Predisposing Genetic Characteristics
- » Familial Status
- » Marital Status
- » Domestic Violence Victim Status
- » Gender Identity



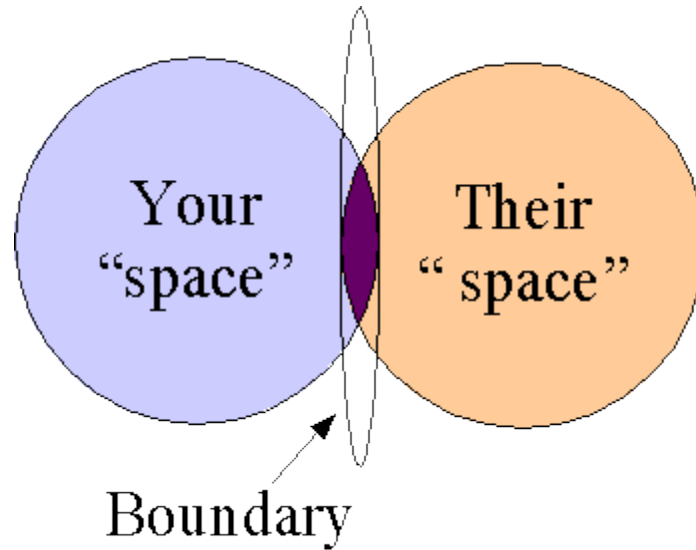
Follow Your Policy

- » Follow your policy in a consistent manner in determining how and when you conduct investigations.
- » Ensure disciplinary actions taken are consistent.

Policy Applies To You



Boundaries



Who Can Harass Who?

- ❖ Male – Male
- ❖ Male – Female
- ❖ Female – Female
- ❖ Female – Male
- ❖ Supervisor – Subordinate
- ❖ Subordinate – Subordinate
- ❖ Subordinate – Supervisor
- ❖ Vendor – Employee
- ❖ Employee – Vendor
- ❖ Customer – Employee
- ❖ Employee - Customer

Report & Investigate

TO DOs

- Report of Misconduct
- ~~Ignore it & hope it goes away~~
- Perform robust HR Investigation



Investigation & Corrective Action

- » All reports of harassment, whether information was reported in verbal or written form, will be completed within a reasonable timeframe.
- » The investigation should be confidential to the extent possible.

Cooperation Obligation

- » Does your employee have an obligation to cooperate with a sexual harassment investigation?
- » All employees, including managers and supervisors, are required to cooperate with any internal investigation of sexual harassment.

Resolution

- » After any investigation, there should be resolution and it should be made known to the complainant, to extent possible
- » Encourage feedback and reports of further issues



Investigations: When Compliance Needs to Be Involved



Your HR Department: Personality Traits

- » Practical Expeditors
- » ESTJ (Extravert, sensing, thinking, judging)
- » ESTJs thrive on order and continuity. Being extraverted, their focus involves organization of people, which translates into supervision. ESTJs are content to enforce “the rules,” often dictated by tradition or handed down from a higher authority.



Your HR Department

» Stressors

- › They fire people ... a lot.
- › They struggle to hire people ... a lot.
- › They listen to everyone's complaints.
- › They deliver a lot of bad news.
- › They would prefer not to fire people; they would like to hire people; they would like to solve all of the complaints; and they would like to deliver good news, but that is not always in the cards and they do not control hardly any of it.
- › People are afraid of them



Your Compliance Officer: Personality Traits

- » Logical Assimilators
- » ISTJ (introvert, sensing, thinking, judging)
- » ISTJs are very responsible and reliable individuals who can be trusted to do their tasks well. As a result, they will usually excel in management where they are entrusted with responsibilities, expectations and objectives to meet.
- » Also, they are able to work with huge amounts of data and are painstakingly accurate and methodical.



Your Compliance Officer

» Stressors

- › Why didn't we find that sooner?
- › Why didn't you know about that?
- › I thought we trained them?
- › That happened again?
- › When did that ADM come out?
- › Why did it come out yesterday but we were supposed to be following it two months ago?
- › Is it compliance, is it quality, is it an incident, is it all of the above?



Your Systems of Uncovering Issues

- » Audits and monitoring.
- » Process may include interviews, document review, data sampling.
- » The system should provide for:
 - › Routine identification of compliance risk areas;
 - › Specific to our programs; and
 - › Include self-evaluation of such risk areas.
- » Self-evaluations include:
 - › Internal audits and external audits for evaluation of potential or actual non-compliance.

Identified Issues

- » When We Find Possible Issues:
 - › Investigate issues/causes
 - › Address problems (including refunding overpayments)
 - › Implementing sustainable corrective actions
- » Recommendations:
 - › Shared Responsibility and accountability
 - › Issue tracking and management
 - › Timely resolution





When a Concern is Raised

- » Do not assume the outcome will be the worst case scenario.
- » Do not use definitive words early on – actual issue v. possible issue, required repayment, problem, breach – those are conclusions that come at the end.
- » Loop in compliance, finance, HR. Make it an agency review, not a one department review.
- » Do we need to consider privilege?



Every Issue Will Involve

- › Compliance
- › Finance
- › HR
- › The relevant program
- › The Compliance Committee
- › Governance at the appropriate time
- › Quality
- › Sometimes IT



Items We Consider

- » Factors for consideration:
 - › Possible frequency;
 - › The timeframe the issue might have been occurring – is there a logical limit;
 - › What are the various arguments as to why we approached something the way we did;
 - › Is there something we should stop right now;
 - › Impact on quality of services being provided;
 - › Impact on other operations and contracts;
 - › Regulations, ADMs, other guidance; and
 - › Financial impact.



Investigation

- » The system should identify potential problems and actual problems.
- » Process
 - › Personnel interviews
 - › Records and document reviews
- » Evidence of investigations include:
 - › Identification of issues being investigation;
 - › Notes and findings; and
 - › Reports on results of investigations.



Act on Results

- » Fix root cause of identified non-compliances
 - › Not all observations will require a corrective action
 - Correction or other remediation may be appropriate
 - › Triage / prioritize based on risk
 - Safety
 - Regulatory
 - Quality
 - Business
 - › Re-evaluate during management review
 - Risks may change



Overpayments

- » Affordable Care Act Section 6402(a) (42 U.S.C. 1320a-7k) established a requirement that overpayments must be reported, explained and returned by the later of:
 - › 60 days after the date on which the overpayment was identified; or
 - › the date any corresponding cost report is due, if applicable.



Phrases to Consider

- » “As part of our ongoing compliance process.”
- » “Possible issues”
- » “More appropriate”
- » “Not in conformance with our best practices”
- » “Level we are confident defending...”
- » “Refund” vs. “overpayment.”
- » “Steps to improve....”
- » Save definitive phrases for a final report.



Summary and Conclusion

- » Possible issue
- » Pause
- » Include others
- » Decide on a course of action
- » Investigate
- » Decide on a resolution
 - › At any point, we may go back up the bullets to start again and proceed further



What is an Internal Investigation?

- » Factual/legal review of possible problem
- » By outside counsel, in-house counsel, compliance office and/or internal audit team
- » Independent of government



What Should the Provider Expect from an Internal Investigation?

- » Stop possible wrongdoing immediately
- » Implement remedial action
- » Prepare legal defense
- » Disclose to government?



Start Investigation Immediately

- » Discover all legal problems before the government does.
- » Gather all facts before the government does.
- » Fully analyze applicable law before the government does.
- » Stop all violations before the government does.
- » Tell the government before the government finds out.
Maybe.
- » Don't obstruct justice.



Obstruction of Justice

It is illegal to attempt to willfully prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a federal health care offense to a criminal investigator.



Managing the Problem

- » Establish reporting protocol
- » Report to CEO/Board on serious matters
- » Senior management must be involved
- » Oral v. written report

Whistleblower





Broadening of the Whistleblower Rule

- » How this change is playing out?
- » What types of complaints could be encountered?
- » How can agencies prepare themselves?

Documentation Retention





Justice Center for the Protection of People with Special Needs





Justice Center

- » How to handle anonymous complaints to JC or HR that appear to be geared toward causing problems for other employees and/or potentially retaliatory.
- » What to do when the Primary Investigator for Justice Center reported incidents to the Agency.



Top issues

- » Staffing/oversight
- » Staff relationships/boundaries
- » False Reporting
- » V&T violations
- » Wrongful Conduct
- » Drugs
- » Death reviews
- » Interviews/Interrogations
 - › Right to Counsel
 - › Upjohn Warnings
 - › Use immunity statements
- » Appeals/Investigative Summary



Top issues

- » Plan of Nursing
- » Emergency care
 - › Respiratory issue
 - › Broken leg
 - › Perforated/obstructed bowel
- » Death reviews
- » Documentation Review
 - › Safeguards
 - › Relevant Policies and Procedures
 - › Plans of Care/PONS
 - › MARS
 - › Assessments and Reassessments
 - › Daily Logs and Monthly Summaries
 - › Incident reports
 - › Staffing reports



Top issues

- » Clinical Review
- » Interviews
 - › Clinicians
 - › Incident management personnel
 - › Management
- » Exit Conference and Report



Responding to unexpected deaths

- » Report as required
- » Thorough internal investigation
 - › Interviews
 - › Policy and Procedure Review
 - › SR Documentation Review
- » Implement Safety Plan
 - › Root cause analysis
 - › Meeting of treatment team to assess situation
 - › Care Plan modifications
- » Develop Corrective Action
 - › Review similarly situated individuals
 - › Conduct training
 - › Impose disciplinary action *if appropriate
 - › Draft/revise p&ps
 - › Perform on-going monitoring



Lessons Learned

- » Clear staff expectations
 - > Clinical monitoring
 - > Chain of Command
 - > Reporting expectations
 - > Supervision
 - > Medication management
 - > Clinical care follow up
 - > Assessments

- » Unwritten rules?
- » Staff accountability
- » Utilize available protocols
- » Reach out and ask for assistance/recommendations

Additional Questions?

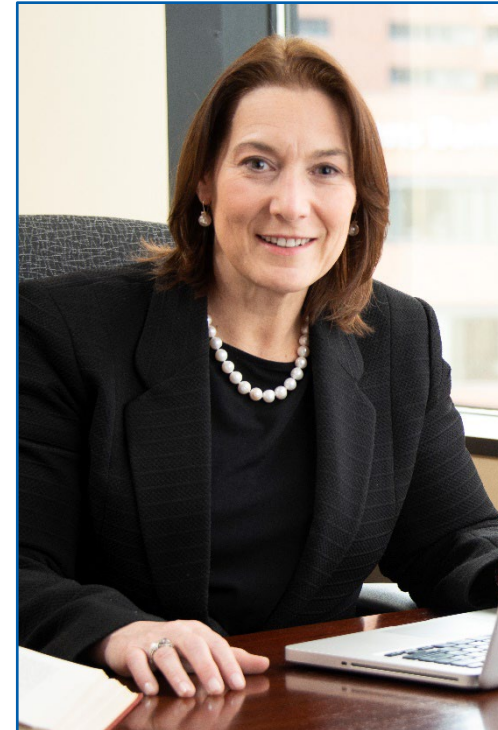


»» Thank You!



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