

Avoiding Liability to Employment Complaints

Parallax Education: Helping Companies Avoid Liability to Employment Litigation

Parallax Education
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Protecting Your Assets

- Training
- Policies/Procedures
- Investigation
 - Immediate
 - Thorough
 - Complete
 - Objective
- Come to Conclusion
- Communicate
- Remedy
 - Reasonably calculated
 - Must remedy!
- Guard Against Retaliation
- Document
- Continue to Monitor

The Tale of Two Companies

- **McCard v. Birraporetti's** – Harassment was snapping towels at server's buttocks. \$3.2 million, followed none of the steps.
- **Jane Doe v. Fortune 100** – Harassment was forced oral copulation and rape. \$100,000 at mediation, followed all the steps.

Protecting Your Assets

- Training

- 2005 – Two hours minimum, “highly interactive”, Instructor-led – facilitator must have minimum 2 years HR experience. Web-based – “Click and Read” is non-compliant.
- Watching a videotape is insufficient.
- Should be interactive, case studies, practical experience.
- Gathering supervisors around a monitor is non-compliant.
- Don’t sugar coat the truth with supervisors.

Protecting Your Assets

- Policies/Procedures
 - Policies too specific, layperson in supervisory role cannot meet.
 - Promises regarding speed of response or other deadlines.
 - Requirements that the complaint be in writing before being considered.
 - Too few options for reporting. E.g.: Employee must report to their direct supervisor.

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- Investigation

- Investigate everything – EEO related or Human Resources related.
- No such thing as a “he said/she said”.
- Worst mistake I’ve seen – supervisory staff untrained, so don’t respond to a complaint.
 - Employee asks supervisor to “keep it confidential”.
 - Something happens outside work that affects the work environment but company fails to respond.

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- Investigation – Immediacy:
 - Complainant is on vacation or alleged harasser, so investigation is not begun.
 - Supervisor fields complaint, but neglects to forward it to EEO or HR due to operational emergency.
 - Employee complains to ombudsperson, or 800 line and the complaint isn't forwarded.
 - Taco Bell model.

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- Investigation – Thoroughness
 - Stop after interviewing the complainant & alleged perpetrator.
 - Stop without interviewing the perpetrator, or his/her witnesses.
 - Stop for fear of what will be discovered.
 - Random interviews will invariably show patterns of behavior.
 - Failure to view worksite.
 - Failure to research employee files for patterns.
 - Can't be too thorough.

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- Investigation – Completeness:
 - One round of interviewing will always surface discrepancies.
 - Investigators & HR professionals invariably overworked and want to stop here.
 - Great opportunity to return to either party and have them recant their statements.
 - Matrix.

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- Investigation – Objectivity:
 - Since investigation is handled internally, must do everything to make appearance of objectivity.
 - Outside counsel for the company offers to conduct the investigation.
 - Partner or associate of counsel for the company conducts the investigation.
 - Handwritten notes are destroyed after being “cleaned up” and typewritten.

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- Come to a Conclusion:
 - Company fails to make a conclusion due to an investigation that wasn't thorough enough.
 - Investigator claims “inconclusive” when facts bear out conclusive proof. Ex: EEOC case.
 - Investigator makes legal conclusions – calls something “sexual harassment” rather than “violation of company policy”.

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- Communicate to Alleged Harasser & to Complainant:
 - Company communicates in writing to the complainant, doesn't communicate to the alleged harasser.
 - Vice versa.
 - Company doesn't communicate in writing, then alleged testifies that they didn't reprimand him/her.
 - Company doesn't communicate in writing, then complainant testifies that they didn't conclude the investigation.
 - Company communicates to too few persons who are now required to monitor the workplace.

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- Remedy:
 - Has to meet two legal criteria:
 - “reasonably calculated”.
 - It has to stop the behavior.
 - Remedy is insufficient.
 - Perpetrator repeats the behavior.
 - At this date, in California, hard to “over-remedy”.
 - FEHA recognizes training as an effective remedy.

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- Guard Against Retaliation:
 - Invariably, a well-meaning manager will make the decision to move the complainant, or change his/her work assignment while the investigation is in progress.
 - ANY change to complainant's workflow, workspace, assignments, can be twisted by plaintiff's attorney to appear as retaliation.
 - Family members of complainant, persons "associated with" the complainant, and persons interviewed during the investigation are also protected from retaliation.
 - List of behaviors that could be considered to be retaliation should go into the hands of supervisory staff while the investigation is in progress, and for a time thereafter.

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- Document:
 - Keep all original notes, scribbles, copies, examples, e-mails.
 - Do not rewrite the notes.
 - Simplify using the matrix.
 - Even verbal warnings should be in writing.

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- Continue to Monitor:
 - Assign a “retaliation buddy”.
 - Supervisor or HR neglect to check back with the complainant on a regular basis.
 - The supervisor says nothing more specific than “How’re things?” then claims he/she was monitoring the situation.
 - Lack of documentation that you’ve taken this step.

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- Workplace Violence Training Required by July 1st, 2024 for All Employers

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Thank you for your time!

