



## **NYSPELRA Newsletter: March 2007**

### **PRACTICAL TIPS FOR AN EFFECTIVE HARASSMENT INVESTIGATION**

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Conducting an effective investigation is critical when an public employer is faced with a harassment complaint. Not only can an effective investigation help determine whether inappropriate conduct occurred and provide an opportunity to resolve the issue before it escalates into costly litigation, but it is also vital to an employer's defense at trial. In particular, evidence of an effective investigation can be used by an employer to demonstrate that it has an effective anti-discrimination policy in place, that it took prompt and effective remedial action, and that it should not be held vicariously liable for its supervisor's conduct. Although courts have not issued formal guidelines specifically spelling out what makes an investigation effective, several have identified principles that should be followed by an employer upon receiving a harassment complaint.

First, an employer must carefully select who will conduct the investigation. This selection likely will be influenced by the nature of the complaint and the severity of the conduct at issue. Regardless of these factors, the investigator should be capable of objectively and impartially evaluating the complaint, the witnesses' credibility and all other evidence relating to the investigation. As a result, using an investigator from outside the organization is often preferable to using an internal investigator because they do not know the "players" and thus will not be subject to accusations that their findings are biased or self motivated. Further, the investigator should be knowledgeable about workplace harassment issues and have a thorough understanding of the substantive law and the legal ramifications of his/her findings so that he/she does not make a bad situation worse. The investigator also should have strong interview techniques and interpersonal skills to ensure that he/she obtains all relevant information from the witness(es). The investigator should be able to ask difficult questions without becoming easily embarrassed due to the subject matter. Finally, the investigator should have superior communication, writing and analytical skills because he/she has to report his/her findings in an articulate and intelligible manner to the employer and in the event he/she is called as a witness in any subsequent litigation.

Second, employers should make sure investigations are initiated promptly after a harassment complaint is filed. While there is no hard and fast rule for determining what constitutes a "prompt" investigation, it is widely understood that the process should commence immediately upon notice of the complaint (within 24 hours if the investigator is immediately available and the complainant is cooperating) and certainly no later than one to two weeks after receiving same. The length of an investigation, however, will depend on the complexity of the allegations, the number and availability of witnesses, the level of cooperation the investigator receives and other extenuating circumstances. Whenever the investigation is delayed by factors beyond the investigator's control (lack of cooperation from witnesses, illness, vacation schedules etc.), the

investigator should document the reason and keep the complainant informed of the status of the investigation.

Third, the employer should ensure the investigator carefully and thoroughly gathers all relevant information concerning the complaint. At a minimum, the investigator should conduct an in-depth interview of the complainant, the accused (remember: in unionized shops an employee may be entitled to union representation during this interview) and all other witnesses who have relevant knowledge regarding the complaint. These interviews should include a determination of the credibility of the witnesses and a thorough accounting of the allegations including, but not limited to, a detailed description of the alleged misconduct, dates of occurrence, potential witnesses and supporting documents. The investigator also should collect and review any and all documents that relate to the complaint, including the complaint itself, notes prepared by management personnel and witnesses, the applicable anti-harassment policy and complaint procedure, and prior complaints by or actions taken against the accused and the complainant.

Fourth, the employer should take steps to prevent retaliatory actions being taken against the complainant. This should include asking the complainant if he/she is comfortable remaining in the work environment while the investigation is pending. If the employee indicates he/she is not comfortable, the employer may place one or both parties on a paid leave of absence, transferring the accused (but not the complainant) during the pendency of the investigation or temporarily modifying the reporting structure. Additionally, the employer should advise the accused that the investigation must be kept confidential and that retaliatory actions against the complainant are subject to discipline up to and including termination.

Fifth, once the investigation is completed, the employer should notify the complainant of the results of the investigation. However, the report should not be provided to the complainant. The complainant should be advised that the employer has conducted a thorough investigation and has taken steps to stop any inappropriate conduct. Further, it should instruct the complainant to notify human resources if he/she is subjected to any additional objectionable or retaliatory conduct. These instructions to the complainant should be memorialized in writing.

Sixth, where the investigation substantiates inappropriate conduct, the employer always should take some type of remedial action against the wrongdoer(s), even if it is merely issuing a written warning or requiring training. This is so because an employer's failure to take any disciplinary action against an employee who has been found to have engaged in inappropriate conduct could be construed as implied acceptance of, or deliberate indifference to, workplace harassment. The severity of the response should be dictated by the seriousness of the conduct, notions of progressive discipline and civil service regulations, where applicable.

Seventh, it is also advisable to use the conclusion of the investigation as an opportunity to reaffirm the employer's commitment to maintaining a harassment-free workplace. This can be accomplished by: reviewing and revising the anti-harassment policy to insure it prohibits all types of discriminatory/retaliatory conduct, re-circulating the anti-harassment policy, with a cover letter reciting the employer's commitment to preventing and remedying workplace harassment, conducting additional anti-harassment training, and monitoring the workplace to ensure no additional objectionable conduct is occurring.

By employing the foregoing tips, employers can ensure their harassment investigations are effective and legally sound. Of course, where questions arise as to how to handle a harassment investigation, experienced labor and employment counsel should be consulted for guidance.

## **TENTATIVE 2007 NYSPELRA ANNUAL TRAINING CONFERENCE PROGRAM**

Your Annual Training Conference is scheduled for the Holiday Inn In Saratoga Springs, beginning with early registration on Sunday July 22 at 4 p.m. Registration information and complete program details will soon be sent. Those wishing to make a hotel reservation should call 518/484-4550 and mention that you are registering for the NYSPELRA Annual Conference. The block on hotel reservations at \$147 daily, single or double, extends through June.

The Conference offers presentations that are the direct result of the training needs expressed by Association members. The early Conference registration fee (prior to June 29) is \$275; \$325 for non-members. After June 28, the member rate will be \$300 and the non-member rate \$350. Presentations will include:

- an update on current developments in the Interplay of ADA/FMLA/HIPAA/NYSHRL/workers' comp, with an emphasis on handling medical information;
- the art of negotiating settlement agreements – best practices for getting to “yes”
- how the federal USERRA and State military laws apply to public employers;
- trends in health insurance negotiations;
- an update on decisions of the Public Employment Relations Board and staff;
- the annual assessment of grievance and compulsory interest arbitrators;
- the care and feeding of your personnel officer/civil service commission;
- dealing with an employee whose State-issued license has been revoked or suspended;
- preventing violence in the workplace;
- using mediation effectively; and
- an update on bills in the 2007 Legislative Session affecting public employers.