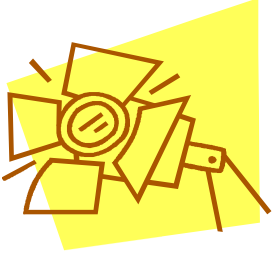


SPECTRUM



Spotlight on.....Do You Have I³? (Internal Investigations Intelligence)



In the fall of 2013, many Kansans were glued to their television sets as the Kansas City Chiefs started their season with nine straight wins. Even with this excitement just a few miles away, many of us at the Kansas Human Rights Commission (KHRC) were following a different professional football team, the Miami Dolphins, and not because of their win-loss record.

Instead, we were reading reports that Miami Dolphins offensive lineman Jonathon Martin left the team on October 28, 2013 due to alleged harassment by fellow teammate Richie Incognito. It was widely reported that Martin was subjected to a broad range of offensive behavior including racial slurs, racial epithets, inappropriate physical touching, lewd gestures, and vulgar taunts about his sister and mother. The incidents reportedly took place in the Dolphins' workplace, including the practice field, locker room, and team airplane, as well as social settings away from work. The alleged harassing behavior took the form of in-person conduct, i.e. "jokes" and "banter", telephone conversations, voice mails, and texts.

The behavior reportedly permeating the Dolphins' offensive line is not unlike many discrimination complaints filed with the KHRC.

The Dolphins requested the National Football League (NFL) to investigate the allegations. The NFL, in turn, hired an outside law firm to independently investigate and report their findings.

How to Begin?

Unlike the Dolphins and the NFL, many employers do not have the resources to hire an outside firm to investigate allegations of harassment, and are unsure how to proceed when an employee complains of bad behavior.

The steps to an effective investigation begin before the first complaint is received with the employer taking reasonable care to prevent and promptly correct harassment. According to the U.S. Equal Employment Opportunity Commission (EEOC), "Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment."

Employers should create, make readily available, and

enforce anti-harassment policies and complaint procedures. Employers should provide every employee with a copy of the policy and complaint procedure, and re-distribute it periodically. Some organizations prefer to distribute their policies annually. Many organizations ask their employees to sign an acknowledgment that they have received and understood the policy. The Dolphins in 2013 distributed a workplace conduct policy to all players and asked that they sign an acknowledgement form stating they understood the policy.

In addition to distributing policies to each individual, many companies post them in central locations, such as break rooms or beside time clocks, and include them in employee handbooks. In the digital age, policies can be

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The EEOC provides that an anti-harassment policy and complaint procedure should include, at a minimum, the following points:

- **A clear explanation of prohibited conduct;**
- **Assurances that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;**
- **A clearly described complaint process that provides accessible and multiple avenues of complaint;**
- **Assurance the employer will protect the confidentiality of harassment complaints to the extent possible;**
- **A complaint process that provides a prompt, thorough, and impartial investigation; and**
- **Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.**

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made available on company intranet web-sites or computer networks.

Puzzled About Policies?

The employer should make it clear in easily understood language that it will not tolerate harassment based on any of the prohibited categories. The Kansas Act Against Discrimination and/or the Kansas Age in Employment Discrimination Act prohibit harassment in employment because of race, religion, color, sex (including pregnancy discrimination), disability, ancestry, national origin, age, and retaliation. Discrimination based on genetic screening and testing is also prohibited. Organizations should also be aware of local ordinances. For example, the City of Lawrence prohibits discrimination based on sexual orientation and gender identity. Some employers opt to prohibit offense behavior based on categories not in law, such as sophomoric or “toxic” behavior directed towards others not based on a prohibited basis.

The policy should protect employees by prohibiting harassment by everyone in the workplace and non-employees who come into contact with employees, such as customers or delivery personnel.

Employers can emphasize the importance of the policy and heighten its awareness by the organization’s leader or top management issuing it. The policy should also encourage employees to report bad behavior before it reaches the thresholds of severe or pervasive. (Likewise, employers should investigate reported offenses, even if they don’t initially appear to be illegal.)

Employees should be trained on the policies.

Retaliation

No policy is complete without clearly forbidding adverse treatment of employees who complain of or participate in investigations of harassment internally, with the KHRC, with the EEOC, or with local human relations commissions. In Fiscal Year 2013 (June 12, 2012 – July 1, 2013), retaliation was the most cited reason for filing an employment complaint

with the KHRC. The KHRC received 438 employment retaliation complaints during this period, far outdistancing the second place basis of disability with 260 instances. Also, it is not uncommon for the KHRC to find “probable cause” on the retaliation charge while the initial allegation is found “no probable cause”.

EEOC Regional Attorney John C. Hendrickson said, “We are focused on putting an end to retaliation. Federal law guarantees everyone the right to complain when she believes job discrimination has occurred. The EEOC will support employees in exercising the rights Congress has guaranteed them.”

Therefore, the EEOC advises, “Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management should also scrutinize employment decisions affecting the complainant and witness during and after the investigation to ensure that such decisions are not based on retaliatory motives.”

The Complaint Process

The complaint process should not deter the filing of complaints by creating barriers. Rather, the process should facilitate the filing of complaints. For example, the employer is obligated to investigate a complaint, no matter how it is received—written, verbal, e-mail, etc. The employer should also provide alternative complaint contacts. As such, the employer should not require the employee to solely report harassment to that individual’s supervisor because the supervisor might be the harasser or the employee might feel uncomfortable reporting harassment to the supervisor for a variety of reasons. It is advisable for the employer to provide complaint contacts outside the employee’s chain of command, such as designee(s) in human resources or other supervisors. The employer should also make provision for employees in outlying offices or second and third shifts to have access to complaint contacts.

The policy should also contain information about filing deadlines with the

KHRC (within 6 months) and the EEOC (within 300 days of the last date of harassment).

Shhhh?

Some employees may ask that their complaint be kept entirely confidential. From a practical standpoint, it would be difficult to honor this type of request. It is better to keep allegations confidential to the extent possible. To conduct an effective investigation, the employer will likely need to reveal or ask certain information of the alleged harasser or witnesses.

On occasion an employee may report harassment to a supervisor, but then ask the supervisor not to report it. The supervisor should not comply with the request as not investigating risks incurring employer liability. The employer must carry out its duty to investigate.

Let the Investigation Begin

The employer should start a prompt, thorough, and impartial investigation once a complaint is received. The extent of the investigation will depend on the individual circumstances.

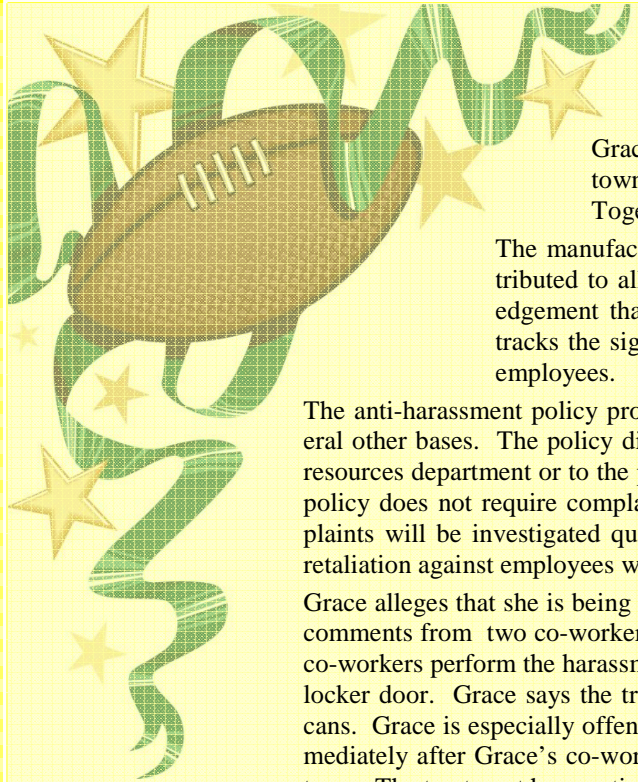
In addition, it may be necessary for the employer to take temporary action so that additional alleged harassment cannot occur. For example, the employer may make scheduling or supervisory reporting changes so the parties do not come into contact. Other measures may include placing the alleged harasser on temporary, non-disciplinary leave while the investigation is in process or transferring the alleged harasser. The complainant should not be involuntarily transferred, shifts changed, etc. as these types of changes might constitute retaliation.

The investigator should be unbiased and base recommendations on the investigative facts. The alleged harasser should not supervise the investigator or have any direct or indirect control over the investigation or its recommendations.

Who, What, When, Where, How?

If necessary, the investigator should interview the complainant, the alleged harasser, and any witnesses or others with relevant information. The investiga-

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You Decide Case Study


Grace (not her real name) works for a small manufacturing plant in Anytown, Kansas. Grace is Hispanic and is married to an African American. Together they have one son.

The manufacturing plant has 100 employees. The anti-harassment policy is distributed to all employees annually. Employees are required to sign an acknowledgement that they understand and will abide by the policy. Human resources tracks the signature forms to make sure acknowledgements are received from all employees.

The anti-harassment policy prohibits harassment based on national origin and race, as well as several other bases. The policy directs employees to report harassment to their supervisor, the human resources department or to the president of the company, and provides contact phone numbers. The policy does not require complaints to be submitted in writing. The policy promises that all complaints will be investigated quickly, in an unbiased manner, and discreetly. The policy prohibits retaliation against employees who report harassment or act as witnesses in the investigation.

Grace alleges that she is being subjected on an almost daily basis to derogatory names, “jokes”, and comments from two co-workers about herself, her husband, and her son. Grace complains that the co-workers perform the harassment in front of their supervisor. Grace has found “jokes” taped to her locker door. Grace says the treatment demonstrates bigotry against Hispanics and African Americans. Grace is especially offended that racist jokes are told about her son. The treatment began immediately after Grace’s co-workers learned about her family through casual conversations and pictures. The treatment has continued for five months from July 2013 to December 2013.

Grace complained to her supervisor on numerous occasions about hostile comments from the co-workers in November 2013 and again in December 2013. Grace says the supervisor’s response has been that the co-workers are just having fun. The supervisor has the authority to make tangible employment decisions as he hired Grace for her current position.

Grace telephoned the Human Resources Manager about “concerns” in December 2013. The Human Resource Manager told Grace to put her complaint in writing. Grace tried to follow up with the Human Resources Manager by lodging her complaints in person. The Human Resources Manager told Grace that she needed to make an appointment, he could not take her complaint, and Grace would have to submit the complaint in writing. The Human Resource Manager acknowledges that Grace repeated the same complaints that she previously telephoned about, including naming the co-workers as alleged harassers, and reporting that she previously complained to her supervisor many times, and the supervisor was a witness. A day later Grace submitted her complaints via e-mail to the Human Resources Manager.

The Human Resources Manager asked Grace’s supervisor to investigate. Grace’s supervisor reported that he questioned the two named co-workers and they denied making the offensive remarks. The supervisor did not talk to Grace or any other co-workers. The Human Resources Manager feels that they have not determined if a violation of the Kansas Act Against Discrimination occurred.

Grace reports that she constructively quit her job in January 2014 due to the almost daily harassment and because the company did not respond to her complaints. She filed a complaint with the KHRC.

You determine:

Yes, the employer had an effective complaint process.

No, the employer did not have an effective complaint process.

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tor should document each step of the investigation. The investigator should ask open-ended questions such as:

Of the complainant: Who committed the alleged harassment? Who are witnesses? What exactly happened? What was said? When did it happen? Where did it happen? How often? Were there other victims? Is there physical evidence, such as notes, e-mails, photographs, texts, or social media postings? Did touching occur?

Of the alleged harasser: What is your response to the allegations? If the accused says the allegations are false, why would complainant be mistaken or lie? Who are witnesses or others with relevant information?

Of witnesses or others with relevant information: Who else saw or heard what happened? What did you see or hear? When did this happen? Where did it take place?

In order to maintain the pledge that the complaint will be kept confidential to the extent possible and avoid starting rumors, the investigation should be limited to those that need to be involved.

The investigator may also need to assess the credibility of the parties.

Making a Determination

Management should make a determination as to whether harassment occurred when the investigation is concluded. It may be difficult to come to a conclusive decision due to contradictory statements or the lack of witnesses. The lack of eye witnesses does not necessarily undercut the allegations because harassment often occurs when no one else can observe it. A written report should be finalized. The parties should be informed of management's determination.

If management cannot reach a determination, the employer should take preventative action, such as training or redistribution of its anti-harassment policy and complaint process.

Corrective Action

If the employer determines that harassment happened, the employer should take immediate and appropriate corrective measures. Discipline should be proportionate to the harassment. Remedial actions can range from an oral or

written reprimand, to transfer, to suspension, to discharge. Training is an important option. The corrective action should stop the harassment and prevent it from occurring again.

The EEOC recommends that measures be taken to correct the harassment's impact on the complainant. Examples might include an apology from the harasser, monitoring treatment of the complainant to ensure that retaliation does not occur, etc.

Summary

Employers should take care not to "fumble the ball" when it comes to addressing harassment in the workplace. An effective anti-harassment policy and complaint process are important tools in making the workplace better for all employees.



Source: www.eeoc.gov: "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" and "Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors"

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You Decide Case Study Conclusion

No, the employer does not have an effective complaint process. The supervisor, an eye witness, did not report Grace's complaints (or take steps to stop the harassing behavior). Also, the company did not initiate any type of review or investigation at first contact. Even though Grace contacted the designated Human Resources Manager, and was consistent in her allegations on more than one occasion, no investigation was undertaken until the complaint was submitted in writing. The company delayed starting the investigation until the complaint was received in writing. The company also selected an inappropriate investigator, the supervisor who allegedly witnessed the harassing behavior but did not report it or take action to stop it. The investigation was incomplete as only the alleged harassers were interviewed and no one asked Grace if there might be other witnesses or physical evidence of the "jokes". The company still has not concluded their investigation despite the passage of a significant amount of time.

In conclusion, the employer did not exercise reasonable care to prevent and correct harassment.