



WILLIAMS MULLEN

Where Every Client is a Partnersm

2007 Spring DOE/CAA Conference

**U.S. SUPREME COURT
EMPLOYMENT LAW REVIEW AND UPDATE**

April 25, 2007

Overview

- » 2006 was the year employers thought that a 5-4 majority would be pro-business—That's not the case.
- » Most significant change in employment law in 2006 was the change in the retaliation standard and the effect on workplace investigations.



Disturbing Facts on Workplace Investigations

- » Most HR investigators have never been trained in proper investigation techniques.
- » Most employers fail to investigate retaliation claims once the original investigation on harassment or discrimination ends.
- » Jurors expect employers to do proper investigations. When the investigation



Disturbing Facts on Workplace Investigations cont.

is done poorly, jurors are more likely to find for the employee.

- › A skillful attorney will argue to the jury that an organization that employs incompetent HR employees cannot maintain a good faith belief that their policies and procedures are designed to avoid discrimination, harassment and retaliation.



Is the HR Department Really Prepared to Handle Investigations?

- » Does HR have a good understanding of labor and employment law?
- » Are the company's policies up to date?
- » Is there a good complaint procedure in place?
- » Does the company have a Business Code of Ethics?--These are great but they can come back to bite you.



Is the HR Department Really Prepared to Handle...cont.

- › *“We value all employees...”*
- › _____ *prohibits retaliatory action against any associate who, in good faith, raises a concern or question regarding any suspected violation of law, regulation, or the Code of Ethics.*
- › *Any form of harassment based on sex, race, disability, age, religion, ethnic origin, sexual orientation, or other classification protected by law, either physical or verbal, will not be tolerated.*



Is the HR Department Really Prepared to Handle...cont.

- › *The Company is committed to respect in the workplace, where people are valued and their opinions are respected. Such a workplace allows for openness and communication, will not tolerate dishonesty and will not cause any employee to fear for his or her job for doing the right thing.*



Is the HR Department Really Prepared to Handle...cont.

- » Investigation and Interview Skills Training:
 - › Investigators need to take fewer notes and watch how the witness acts and reacts during the interview. There can always be two people in the room on behalf of the company: (1) the investigator and (2) the note taker. Investigators need to listen and follow up with questions based on the answers given by the witness. The reliance on scripted questions should be limited.



Is the HR Department Really Prepared to Handle...cont.

- › Analyzing Demeanor, Candor and Responsiveness
 - › As a general rule (this could change based on cultural differences) a truthful witness should look the investigator in the eye and the witness should not be unduly nervous. *See The Journal of Credibility Assessment and Witness Psychology, Vol. 2, No. 1 (1999).*



Is the HR Department Really Prepared to Handle...cont.

- › For example, did the witness change the subject away from the area of inquiry? Did the witness read from a prepared statement or from notes instead of talking freely? Did the witness fidget too much in the seat? Did the witness cover his or her mouth when talking about different issues?
- › Evaluating Implausible and Inconsistent Evidence
 - › Investigators should review whether the explanation of the witness is implausible, vague or inconsistent as



Is the HR Department Really Prepared to Handle...cont.

compared to the evidence from other witnesses as well as from documents or physical evidence. *See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999).

- › Investigators should determine if the witness has a reason to lie and whether the witness has a past history of the conduct that he/she has been accused of by the alleged victim. Additionally, investigators need to determine if there is any corroboration of the story being told by the witness?



Is the HR Department Really Prepared to Handle...cont.

- › For example, XYZ corporation received a complaint about a supervisor who is using the “N” word in the workplace. The supervisor is 55 years old and grew up in Mississippi. He claims that he has never used a racial slur of any type when describing any minority in his life. That claim seems rather implausible and reminiscent of the Mark Furman’s claims in the *In the Matter of the People of the State of California versus Orenthal James Simpson* .
- › Additionally, if other witnesses claim they have heard the supervisor use the “N” word on a regular basis, the investigator now has a potential inconsistency in the supervisor’s testimony.



Is the HR Department Really Prepared to Handle...cont.

- › Analyzing Omissions and Refusals to Answer
 - › A good investigator will know the facts and will know which facts the witnesses should talk about during the interview.
 - › Most witnesses don't realize that the investigator knows what happened in a case and a good investigator should be able to play "Columbo" as an interviewing technique.



Is the HR Department Really Prepared to Handle...cont.

- › It is also important to be mindful of the facts the witness omits during the interview. When certain relevant facts are omitted, it is probative on whether the witness is being truthful.
- › Also, a refusal to answer questions by a witness is germane to the truthfulness of the witness.



Sample Warm-Up Investigation Questions

- » Did you and _____ (the accused) ever get along?
- » How is your working relationship with _____ ?
- » Any disagreements between you and _____ (the accused)?
- » Any friction between you and _____ (the accused)?
- » Anything you feel is unfair between you and _____ (the accused)?
- » Did _____ (the accused) do anything that you feel was inappropriate?
- » How has your performance been over the last _____ ?
- » Has any part of your job changed since _____



New Retaliation Standard

- » Plaintiff's lawyers will be focusing on retaliation issues.
 - › *Burlington N & S.F.R. Co. v. White*, --- U.S. ---, 126 S. Ct. 2405, 2006 WL 1698953 (June 22, 2006)
- » Prior to June 22, 2006 the prima facie case for retaliation in the 4th Cir: (1) he/she engaged in protected activity, (2) the employer took an adverse employment action against him/her, and (3) a causal connection exists between the two.



New Retaliation Standard cont.

- » Prior to June 22, 2006, an adverse employment action was not limited to ultimate employment actions such as hiring and firing, but the action must rise to a level that shows that the terms, conditions, or benefits of plaintiff's employment were adversely affected.
- » Before *Burlington*, retaliation cases made up 13% of all Charges of Discrimination filed with the EEOC
- » After June 22, 2006, retaliation cases have increased substantially.



New Retaliation Standard cont.

- » In *Burlington N. & S.F.R. Co. v. White*, the U.S. Supreme Court held that a plaintiff does not need to show that he/she suffered an adverse employment action.
- » Now, a plaintiff can show that the employer's action "would have been materially adverse to a reasonable employee" such that it "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. --- U.S. ---, 126 S. Ct. 2405, 2006 WL 1698953, slip op. at * 10 (June 22, 2006) (internal citations omitted).



New Retaliation Standard cont.

- » For the first time, the Court rejected the idea that Title VII is limited to actions that directly impact employees' terms and conditions of employment. Instead, the Court held that an employer breaks the law when it takes *any* action - in the workplace or elsewhere - that would deter a reasonable employee from opposing or complaining about unlawful discrimination.



New Retaliation Standard cont.

- » Employers have a real challenge based on *White*. If there is going to be compliance that is defensible, employers need to do the following:
 - › Train workplace investigators in all aspects of proper investigation techniques, including how to follow up with employees after the investigation is closed.
 - › Develop a checklist that provides for weekly follow up with employees after the workplace investigation.
 - › Develop a checklist that provides weekly follow up with the manager in the employee's department.



New Retaliation Standard cont.

- › Train managers on employment and retaliation law;
- › Develop policies and practices that require supervisors and managers to get approval from HR before taking any action (making changes in work or workplace social matters) toward an employee that has complained of retaliation; and
- › Amend current harassment policies to deal specifically with the investigation of retaliation claims. Provide detail in the policy about what retaliation is under the law and how the employee should provide notice to the employer so the retaliation can be cured.



How to Conduct an Effective Investigation

Step One

» Take Immediate Action

- › Schedule changes?
- › Harasser on leave?
- › Victim on leave?

Step Two

- ### » Take any complaint seriously and treat it confidentially



How to Conduct an Effective Investigation cont.

Step Three

- » Take good notes of the initial complaint and turn it over to HR
- » But be careful - your notes are discoverable

Step Four - Investigate (even if no formal complaint is filed)

- » Document, document, document



How to Conduct an Effective Investigation cont.

- » Interview the alleged victim first
 - › Remind the victim to keep it confidential
 - › Talk about retaliation
 - › Qualified confidentiality
 - › Open ended questions
 - › Get documents, including electronic versions
 - › Statement or affidavit



How to Conduct an Effective Investigation cont.

- » Interview the alleged harasser
 - › Warn the alleged harasser about retaliation against alleged victim during and after the investigation
 - › Remind the harasser about confidentiality and retaliation.
 - › Questions and demands for documents



How to Conduct an Effective Investigation cont.

- » Interview third parties
 - › Warn them about retaliation against the alleged victim during and after the investigation
 - › Remind the witnesses about confidentiality
 - › Same questions and demand for documents

Step Five

- » Disclose facts to others only on a need to know basis



How to Conduct an Effective Investigation cont.

Step Six

- » Conduct an independent review

Step Seven

- » Analyze the credibility of your witnesses

Step Eight

- » Make a determination



How to Conduct an Effective Investigation cont.

- » Reports are discoverable
 - › Your HR people should not be making legal determinations. They need to be deciding if the conduct at issue violates the company's policy or not.
- » The Cardinal Rule - “punishment must fit the crime”

Step Nine

- » Follow up with the victim, the harasser and the manager to make sure there is not retaliation.



Investigation Overview

- » Everything you say or do during an investigation is subject to disclosure.
- » Pick the words you say and write carefully.
- » There is no such thing as confidential memos between various managers.
- » Not every complaint made to a supervisor or to HR has legal ramifications—most do not.



Investigation Overview cont.

- » The accused may not be guilty of discrimination, harassment or retaliation but he/she may be guilty of using poor judgment or acting in a way that is not appropriate for the organization's workplace.
 - › Conduct unbecoming a manager.





WILLIAMS MULLEN

Where Every Client is a Partnersm

Questions/Discussion



WILLIAMS MULLEN

Where Every Client is a Partnersm

© 2007 Steven D. Brown
Williams Mullen

Two James Center, 1021 East Cary Street
P.O. Box 1320 (23218-1320)
Richmond, VA 23219
(804) 783-6914
sbrown@williamsmullen.com