



Investigating Harassment and Discrimination Claims

Association of County Commissioners of Oklahoma

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McAfee & Taft

ACCO's policies

Harassment and Discrimination Complaint Procedure

- *The County prohibits discrimination and/or harassment that is sexual, racial, or religious in nature or is related to anyone's gender, national origin, age, disability, or any other basis protected by federal, state, or local law.*

Complaint procedure *(cont'd)*

- *...[I]f an employee feels he/she has been subjected to any form of harassment, discrimination and/or unfair treatment, the employee should report that conduct to his/her immediate supervisor, another member of supervision, or a member of the Board of Commissioners.*
- *The person the harassment or discrimination is reported to will take the necessary steps to initiate an investigation of the discrimination and/or harassment claim.*

Complaint procedure *(cont'd)*

- *The County prohibits retaliation of any kind against employees, who, in good faith, report harassment, discrimination and/or unfair treatment or assist in investigating such complaints.*

Complaint resolution procedure (Open Door Policy)

- *The County believes it is in the best interest of both the County and its employees to promote free and open communication between employees and all levels of management. The County encourages employees to discuss work-related concerns with their supervisor, other management personnel, and elected officials.*
 - ✓ **We encourage people to report concerns**
 - ✓ **Complaints may be oral or in writing**

Where do complaints come from?

- An employee
- A co-worker
- Discovered by a supervisor
- Outside sources
- Anonymous
 - ✓ **Record who/what/when of initial complaint**
 - ✓ **Do not reject complaints as “frivolous” or “not believable”**

Objectives of an investigation

- Prompt
- Thorough and fair
- Determining facts and making well-informed decision
- Record the investigation and the facts established
 - ✓ **Demonstrates to employees the County takes these issues seriously and will take action, when appropriate**
 - ✓ **Employees more likely to report problems in the future**

Advantages of good investigations

- Solves a problem or issue before it escalates
- Preempt or prepare for later inquiry by an outside agency
- Defense to claims or lawsuits

Dangers of a poor or no investigation

- Problem becomes more difficult to address
- Failure to investigate or poor investigation used against employer in lawsuit
- Dissuades employees from discussing concerns in the future

Initial planning of the investigation

- ✓ **It's all about accurate fact-finding**
- ✓ **How the investigation is conducted is as important as its ultimate outcome**
- Who involved or affected – locations or departments?
- Dates of events
- Probable interviewees

Initial planning of the investigation

(cont'd)

- Obtain and preserve records
 - Applicable policies
 - Personnel files and material
 - Supervisor documentation
 - Emails, texts, messaging
 - Past practice – similar instances or events
 - ✓ **Keep the investigation process moving – avoid employees coordinating or changing their stories**
 - ✓ **Stay flexible**
 - ✓ **Retain all records and notes**

Selecting the investigator(s)

✓ **If the County's investigation or decision is challenged, the investigator will be the key witness**

- Knowledgeable (operations, policies, HR concepts)
- Organized when gathering and analyzing facts
- Impartial
- Ability to express themselves

✓ **Possibility of a team of 2 investigators (HR experience and operational knowledge)**

✓ **"Second set of eyes"**

Basics of employee interviews

- Prepare an outline to conduct interviews
- Two interviewers present
- Taped versus written record of interviews
- After interview, compare notes
- Employee being investigated is interviewed last
 - More complete picture
 - Ability to respond to all issues

What to cover in interviews

- What the investigation is about
- Complaints taken seriously – we'll proceed professionally and appropriately
- Complete and accurate information is important
- Retaliation not tolerated
- Commitment to confidentiality - "As confidential as possible"
- Do not discuss your interview with other employees

Interview tips

- Move from general to more specific subjects
- Ask open-ended questions
- Get specifics
 - “Tell me everything that happened”
 - “Where were you when this happened?”
 - “Who else was present?”

Interview tips *(cont'd)*

- Get facts – not impressions or conclusions
 - “Why do you feel that way?”
 - “On what do you base that?”
 - “What do you mean?”
 - “Can you give me some examples?”

Interview tips *(cont'd)*

- Wrap-up questions
 - “Anything else you want me to know or that you think might be helpful or relevant?”
 - “Anyone else I should talk with?”
 - “Any documents, emails, texts or other information that is relevant?”
 - “Let me know if you think of anything else”

The investigation report – “Exhibit A”

- Co-written or reviewed by another
- “A road map of the investigation”
 - How and when the issue first arose
 - What were the allegations
 - Factual conclusions
- The course of the investigation
 - Who was interviewed
 - Documents and information reviewed

The investigation report – “Exhibit A” *(cont’d)*

- Applicable policy or handbook provisions
- Comparable past instances involving other employees
- Relevant history of employee at issue
- Factual conclusions – not legal conclusions
 - Substantiated, unsubstantiated, partially substantiated or unable to determine
 - Can include summaries of interviews
 - Timeline of events
 - Why credibility decisions were made

Informing employees of the investigation's results

- To the complaining employee
 - Summary of findings
 - Remedial action taken
 - Appreciation for reporting; re-emphasize no retaliation
 - Keep investigation and results confidential
 - Notify if similar concerns arise in the future

Informing employees of the investigation's results *(cont'd)*

- To employee investigated
 - Summary of findings
 - Remedial actions being taken
 - Will be monitoring the situation

Medical Marijuana: Next steps for Oklahoma employers

**Association of County Commissioners
of Oklahoma**

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Employment protections for license holders

- Employers may not **discriminate** against or **penalize** an employee or applicant based upon their medical marijuana license status
- Employers may not take any action against a license holder based solely on a positive drug test for marijuana



Exceptions to employment protections

- **Exception:** These employment protections do not apply to employees who are subject to federally mandated substance testing requirements
- **Exception:** May discriminate if employer would “imminently lose a monetary or licensing related benefit under federal law or regulations”



Lawful workplace restrictions

- May not **possess** marijuana while at work or “during the hours of employment”
- May not **use** marijuana while at work or “during the hours of employment”
- May not be **impaired** while working

Challenge for employers:
Establishing or testing for “impairment”



Updating drug and alcohol testing programs

- Need to continue to test for all substances, including marijuana
- May not know what particular substance contributed to behavior or accident
- If not a valid medical marijuana license holder, a positive test for marijuana for an employee or applicant can result in employment action



Marijuana testing

- MROs will report positive marijuana tests and leave it up to employer
- Do not ask applicants or employees if they are license holders unless/until they test positive
- Ability to take employment action after a positive test will be determined on a case-by-case basis



Strengthen workplace policies

- Do not ask whether an individual is a license holder unless/until they test positive for marijuana
- An absolute prohibition of **possession** of any prohibited substances **while working**
 - Includes license holders
 - Covers areas outside the employer's building
 - Covers off-premises possession while working



Strengthen workplace policies *(cont'd)*

- An absolute prohibition of **use** of any prohibited substances **while working**
 - Includes license holders
 - Covers areas outside the employer's building
 - Covers off-premises possession while working



Strengthen workplace policies *(cont'd)*

- An absolute prohibition of working while **impaired or under the influence** of an prohibited substances
 - Includes impairment of license holders from marijuana use
 - Covers impairment observable from appearance, behavior or conduct



Strengthen workplace policies *(cont'd)*

- Shifts from relying upon a positive test result to making decisions based upon an employee's appearance, behavior and conduct
- Stress that violation of these policies may result in termination
- Important that your policies are direct and clear, so as to deflect claims of "no notice" or misunderstanding



Educate your workforce

- Employees have received misinformation about how the new law works
 - What rights are granted
 - What prohibitions still apply
- An opportunity to review with employees your new, more robust possession, use and impairment policies
- Walk through your drug testing policy – how it works and how it still applies



Train your supervisors

- Dealing with medical marijuana issues on a daily basis
- Likely to get questions from employees about marijuana use in the workplace
- How SQ 788 works – and doesn't work – particularly in conjunction with your new workplace policies and drug testing program
- Responsible for applying and executing these policies
- Training that increases their skills at recognizing and documenting impairment



Takeaways

- Update and make more robust your possession, use and impairment policies
- Fine tune your drug and alcohol testing program
- Tell your employees what they can and cannot do, when it comes to medical marijuana
- Train your supervisors to help you keep your workplace safe



Questions?

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