LHRMA
Lincoln Human Resource Management Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PO Box 81066, Lincoln, NE 68501-1066
www.lincolnhr.org

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PROGRAM: What to Do About Workplace Bullying
Presented by Kathleen A. Nicolini, SPHR, MBA
WORKSHOP: How to Properly Conduct Workplace Investigations
Presented by George E. Martin, III

WHEN:

Tuesday, June 9th, 2015
11:00 – 11:30 Registration
11:30 – 12:00 Lunch & Announcements
12:00 – 1:00 Keynote Session
1:15 – 3:30 Workshop

WHERE:

Cornhusker Hotel
333 S. 13th Street, Lincoln, NE
Parking in a city garage will be validated

COST:

Program Registration Fee: LHRMA members—$15
All Other Attendees—$25
College Student Chapter Members—FREE (You must register with Jenessa Keiser, College Relations Chair)
Workshop Registration Fee: All Attendees—$35

MENU: Grilled Flat Iron steak thinly sliced with pepper bacon, chopped egg, blue cheese and roma tomato wedges resting on fresh greens with a rich gorgonzola vinaigrette and dessert.

DEADLINE: Register/cancel your registration by **12:00 noon, Friday, June 5th.**

REMINDER: There is a $10 fee for late registrations and for no-shows. This $10 fee is in addition to the regular registration fee. Please try your hardest to register on time, as late registrations and no-shows make it difficult on everyone involved.

About Our Program:

Luncheon Program: What to Do About Workplace Bullying?
What identifies a workplace bully? What do you do when you have a bully in the workplace? How does it affect your culture? Where does the law stand regarding workplace bullies? Join Kathleen Nicolini to learn the answers to all of these questions plus explore tools and solutions to managing workplace bullies. Kathleen will send us home with tools to set workplace policy and tackle this culture killing problem. Items covered will include:

- What is workplace bullying?

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- Why is bullying prevalent in the workplace?
- What is the impact to business?
- What is the impact on employee performance?
- How can HR identify workplace bullies?
- How can HR deal with or prevent workplace bullying?
- What are the legal liabilities?

Workshop: How to Properly Conduct Workplace Investigations

Do you know how to effectively interview an employee who reports workplace harassment? Do you know how to plan an effective workplace investigation thereafter? While seasoned human resource professionals often believe they are proficient investigators, employment litigators continue to encounter cases that they "could have won prior to trial" if only the employer had provided better facts from the outset. This workshop will provide participants and audience members with an employment attorney's view of a harassment investigation's early stages, with special emphases on interview techniques, overall investigation strategies, and the exposure created when employers mishandle the initial approach.

About our Speakers:

Kathleen A. Nicolini, SPHR, MBA is currently employed as a Manager, EEO/AA for a Fortune 500 employer based in Omaha, and teaching a graduate class at Bellevue University. Kathleen holds a Bachelors' in Criminal Justice and a Masters of Business Administration from the University of Nebraska. She is a current member of SHRM and holds a SPHR.

Her career track has been very diverse. She began working in the Juvenile Court and a short stint working with the Domestic Violence Program out of Council Bluffs. She returned to graduate school to obtain a dual Master's in Public Administration and Criminal Justice when she launched her career in civil rights. From the Nebraska Equal Opportunity Commission she went on to head Human Resources programs including the creation of a enterprise HR system. She served 3 years in a Chief Officer role in operation as well. She owned her own HR consulting firm and currently is serving as an EEO/AA Manager. She volunteers with the Domestic Violence Council supporting their HR needs.

George E. Martin III practices employment and workers' compensation litigation, governmental litigation and relations, general civil litigation, and provides human resources training and counselling. The core of his practice consists of representing employers facing legal challenges filed by employees. Specifically, George defends public and private employers facing administrative charges and lawsuits filed by employees alleging discrimination, breach of contract, retaliation, wage and hour violations, and workplace injuries. His broad experience enables him to defend employers facing multiple, diverse claims simultaneously filed by a single employee. George has also successfully represented a number of the state's public corporations, county governments, and municipalities against a variety of unique legal challenges, including First and Fourteenth Amendment lawsuits, taxpayer standing challenges, writs of mandamus, and claims premised upon federal and state statutes. He proactively advises public entities on intergovernmental relations, regulatory compliance, and statutory interpretation. George's litigation background enables him to assess the legal exposure created by workplace policies and procedures. He frequently speaks on employment-related issues to employers, trade groups, and professional organizations.

President's Message

Melissa Price, LHRMA President

Signs show that spring is here…the weather is rainy but warm and LHRMA hosted its annual May Basket Raffle fundraiser in support of the SHRM Foundation.

Thank you to all of the companies who donated baskets and to the individuals that purchased raffle tickets. We raised $550 that will go directly to the SHRM Foundation. The SHRM Foundation supports Human Resource Professionals through scholarships, education and research. You can learn more about the SHRM Foundation and specific benefits it can offer you by visiting http://www.shrm.org/about/foundation/pages/foundationhome.aspx. Again, thank you so much for those who supported the fundraiser.

I read a great article the other day that was published on Harvard Business Review's website called "Managing Performance When It's Hard to Measure". The piece of this article that I loved isn't their systems on performance but their philosophy about "career achievement" vs. "career advancement". When an employee is a top performer we typically promote them to a managerial role which often just creates ineffective and unengaged managers. This article discusses that the most influential leaders are not necessarily leaders of teams or have fancy titles. They can be individual contributors who are experts in their area and help influence the direction of the organization. They have "career achievement" instead of "career advancement" which is just as or more impactful.

The author, Jim Whitehurst, the CEO of Red Hat, gave a great example of an employee to illustrate the difference between career achievement and career advancement. This employee made exceptional contributions to the company and had a great reputation throughout the company and in the community. Senior Leaders went to her for her opinion on projects and strategies as she had a good perspective and could influence the success of the new project throughout the company. She had career achievement.

If you are interested in reading this article, you can find it at https://hbr.org/2015/05/managing-performance-when-its-hard-to-measure.

— Melissa Price

Legal Update

Avoiding the Boomerang Effect: Minimizing Exposure to Discrimination or Retaliation Claims Following Workplace Investigations and Discipline

by Tara A. Stingley and Cristin McGarry Berkhausen[1]
Cline Williams Wright Johnson & Old Father Law Firm

Most employment law practitioners are familiar with the following scenario: the phone rings and an employer needs advice regarding suspected employee wrongdoing. The employer may have received an employee complaint or even an external charge, such as a complaint lodged with the Nebraska Equal Opportunity Commission or other administrative agency. The employer is uncertain how to proceed and, in some instances, may not even be certain of the specific allegations or extent of the suspected wrongdoing.

Employee complaints may mean more than unhappy employees or an unstable or unproductive work environment. Employers may find themselves directly or vicariously liable for the wrongdoing at issue. Internal investigations are a key component of any employer's legal strategy when it comes to addressing allegations of employee wrongdoing or other improper conduct. In some circumstances, a prompt investigation can help establish an affirmative defense to employment law claims.[2] A prompt response to employee complaints is also an essential employee relations tool and may reduce the likelihood of future legal recourse by employees.

However, internal investigations are not without some risk. Missteps during and after the investigation may increase the perception of unfair treatment and, in turn, the employer's exposure to discrimination or retaliation claims. An employee may claim he or she was unfairly targeted during an internal investigation or disciplined thereafter in comparison to other workers who were not members of the employee's protected class. Employees may also allege a retaliation claim against the employer related to either the internal investigation or the discipline imposed upon the employee as a result of the employee's complaint. Indeed, in 2013, more than 40% of charges filed with the U.S. Equal Employment Opportunity Commission claimed some form of retaliation.[3]

To minimize liability in this arena, practitioners must be equipped to advise employers regarding internal workplace investigations. This article will address the applicable legal standards governing discrimination and retaliation claims, as well as best practices for conducting internal investigations and avoiding discrimination and retaliation claims in response.

I. DISCRIMINATION AND RETALIATION CLAIMS UNDER TITLE VII

A. Discrimination under Title VII

The elements of a claim for discrimination under Title VII of the Civil Rights Act of 1964 (and its state law equivalent[4]) are well established. To establish a prima facie case of discrimination, a plaintiff must be a member of a protected class and qualified for the job, and must show an employer took an adverse action against him or her as a result of membership in that class.[5]

Once the plaintiff has proven those elements, an employer must provide a legitimate, non-discriminatory basis for the adverse action.[6] If the defendant employer provides such a reason, the plaintiff may still prevail by proving that the offered reason is merely a pretext for discrimination.[7]

When it comes to employee discipline, a plaintiff may claim that disciplinary action was pretext for discrimination because another similarly situated employee (who was not a member of a protected class) behaved similarly but was not disciplined in the same manner.[8] Employees may also claim they are being unfairly targeted or harassed by an internal investigation because they are members of a protected class.[9]

B. Retaliation Claims under Title VII

In contrast to "pretext" claims where protection is based on class membership, retaliation claims allege discrimination because the employee engaged in some protected act. Under Title VII[10], a plaintiff must establish a statutorily protected activity, an adverse employment action, and a causal connection between the activity and the adverse action.[11] If the employer rebuts this showing with a non-retaliatory reason for the adverse action, the plaintiff must show that the given reason is a pretext for retaliation in order to prevail.[12]

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1. Statutorily Protected Activity

Title VII covers two types of protected activities: participating in investigations and related proceedings, and opposing unlawful practices.[13] The "participation clause" of Title VII makes it unlawful to discriminate against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[14] Participation includes formal charges filed with the U.S. Equal Employment Opportunity Commission (or equivalent state administrative agency), as well as less formal measures. In the Eighth Circuit, participation in an internal investigation of sexual harassment is protected conduct.[15]

The United States Supreme Court has construed "opposition" under Title VII to include reporting unlawful activity on one's own initiative, as well as describing unlawful activity in an interview prompted by someone else's complaint.[16] Notably for employers, to prevail on an opposition claim, an employee need have only a *reasonable, good faith belief* that the conduct opposed is discriminatory.[17] In other words, a plaintiff can prevail on a retaliation claim without having to prove that the underlying discrimination in fact existed.

In *Crawford v. Metro Government of Nashville & Davidson County, Tennessee.*,[18] the Supreme Court noted that "opposition" may include merely disclosing a position that an activity is unlawful.[19] Under this expansive interpretation, an employee could engage in protected oppositional activity in a multitude of circumstances:

- filing an internal complaint about racially offensive conduct, whether or not the conduct itself would be actionable;[20]
- asking a supervisor to stop offensive, harassing behavior;[21]
- reporting racial harassment to a supervisor and then to a CEO, followed by filing formal charges;[22]
- substantiating claims in an internal investigation;[23]
- stating a belief that a particular practice being attempted is illegal;[24]
- asking whether race played a role in an employment decision;[25] and
- filing a police complaint related to inappropriate touching.[26]

Who is protected from retaliation? Protection from retaliation under Title VII extends beyond the employee engaged in the conduct to those within the "zone of interests" sought to be protected by Title VII.[27] Other third parties who may be protected include a close family member;[28] those in a dating relationship with the party who engaged in protected conduct;[29] and even a best friend.[30] However, to fall within the zone of interests test, a third party has to be more than an "accidental victim" or "collateral damage."[31]

2. Adverse Employment Action

Title VII's anti-retaliation provision protects only against "discrimination" based on retaliation.[32] In *Burlington Northern & Santa Fe Railway, Co. v. White ("Burlington Northern"),*[33] the Supreme Court clarified that anti-retaliation protection extends to actions that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[34] *Burlington Northern* does not, however, make Title VII into a "general civility code for the American workplace."[35] The alleged retaliatory conduct must be sufficient to generate material adversity, and must rise above the level of petty slights and minor annoyances.[36] Further, the "reasonable employee" standard is an objective one; a subjective perception of retaliation is not enough.[37] In addition, the retaliatory act must also produce some injury or harm: a mere warning notice, without more, is not sufficient.[38] Nor are threats to job security;[39] a reclassification not accompanied by a reduction in pay, benefits, or prestige;[40] extended duration of employer-mandated counseling;[41] failure to provide training and orientation;[42] or letters directing an employee to improve performance.[43]

3. Causal Connection Between Protected Activity and Adverse Action

Plaintiffs making retaliation claims must show a causal link between their protected conduct and an adverse employment action.[44] The alleged retaliatory act must take place after the protected conduct, and the employer must be aware of the protected conduct.[45] So-called "mixed motive" cases are particularly relevant to situations involving internal investigations. In an ordinary discrimination claim, a plaintiff must prove only that protected status is a "motivating factor" for an employment practice.[46] However, retaliation claims must be proven under a higher standard: "but-for" causation. In other words, an employer is not liable for taking an action it would have taken in the absence of any protected activity.[47]

Please click here to access the entire article, and authors' bios.

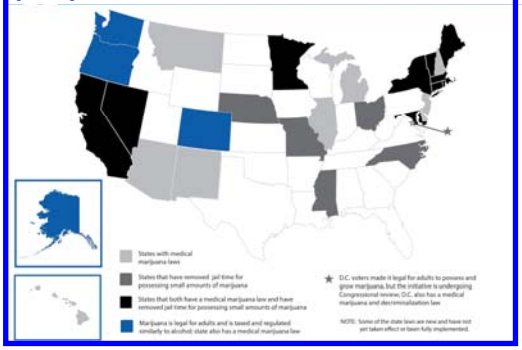
EAP Corner

Marijuana in the Workplace—What You Need to Know

Gail Sutter, Executive Director
Continuum EAP

Organizations are dealing with difficult new challenges as many states have legalized or decriminalized marijuana or have established laws allowing the use of medical marijuana. Currently 25 states have approved the use of medical marijuana and five states have approved recreational use. Several more states are considering the approval of medical marijuana use including the state of Nebraska.

Click link below to see the marijuana policy in each state of the USA



For now, most employers continue to look to federal law for guidance in crafting employment policy, and under federal law, possession and use of marijuana is still illegal. It is classified as a controlled substance and nowhere is it fully legal the way alcohol or tobacco is legal. Companies with employees in federally regulated occupations such as the Department of Transportation or organizations that receive federal grant money are clearly prohibited from its use. For organizations that aren't governed by federal mandates, it is important to have a clearly stated policy and to inform workers of the consequences of violations.

Determining "Impairment" in the Age of Legalized Marijuana

If you suspect a worker is abusing the drug in the workplace, be aware that safety terminology such as "impaired" and "under the influence" is increasingly vulnerable to court challenge. Because, unlike alcohol, there is currently no accurate test to determine impairment due to marijuana use. The most common testing methods now available, notably urine tests, detect metabolites, marijuana's active ingredient, weeks after its use and long after any impairment effects can be determined. The U.S. Dept. of Justice has already affirmed that a positive test for metabolites "does not indicate recency, frequency, amount of use or impairment." Alternative language under consideration by employers reads, "any detectable amounts above the cutoff level of illegal drugs (state and/or federal) in the system while at work is considered a positive test or violation."

Medical Marijuana and Employment Policies

Most state laws with respect to medically-sanctioned marijuana use are silent on workplace policies such as pre-employment, testing, accommodation, workers' compensation and insurance liability. But with employers continuing to rely on marijuana's status as a Schedule I federally-prohibited drug, there are gray areas that supervisors need to be aware of or face possible trouble. Among them are:

Medical Marijuana and Testing

Even when impaired performance is not in doubt, states that protect card-carrying medical marijuana users--like Minnesota, Delaware, New York, Arizona and Maine--prohibit supervisors from taking disciplinary action based on a positive drug test. In these states employers must determine the implications of a positive drug test in view of their state laws.

Accommodation and the Americans with Disabilities Act (ADA)

If you have a state-permitted medical marijuana user in your workforce, you may also have an ADA-protected individual, even though marijuana is unlawful under federal regulations. The underlying medical condition may trump a prohibition against medical marijuana use. Under New York's Human Rights law, for example, medical marijuana users are considered to be "disabled." As a result, under the state ADA, employers must engage in an interactive process to determine reasonable accommodation.

Workers Compensation

Because medical marijuana is not an approved medication by the FDA, employers' and workers' compensation insurers are generally prohibited from reimbursing employees for medical marijuana. However, in two recent cases in New Mexico, a court found that the employer had to accommodate and reimburse an employee for their medical marijuana

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use through their insurance carrier. Colorado, Michigan, Montana, Oregon and Vermont specifically prohibit workers' compensation insurers from paying for medical marijuana.

In summary. In most states, employers are free to discipline employees who use marijuana as it affects the safety and welfare of the workplace. And for now, employers can continue to rely on the drug's federal classification as a Schedule I controlled substance. However, the speed and complexity with which states have begun to legalize its use suggests that employment policies will need to adjust, and to steer clear of legal issues, they should be clearly stated and enforced in a uniform manner.

If you'd like more information about this topic, or would like to consult with one of our certified Substance Abuse Program (SAP) professionals, please contact Continuum EAP at 800-755-7636.

Continuum EAP has over 40 years of providing EAP and Work/Life services to our member companies. For more information, contact Gail Sutter at 402-476-0186 or 800-755-7636 or gsutter@4continuum.com.

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If you are an employer with an employee that is a current LHRMA member, then you can post your HR-related job opening on our website for **FREE**! Just email Kathy Harper at lhrma0048@yahoo.com.

If you are looking for a human resource position, then check it out!
Go to http://lincolnhr.org/blog/hr-job-openings/

This is also an excellent resource for students who are seeking an HR position or for companies to advertise if they have summer internships available. Take advantage of this great resource—you can't beat the price!

Wellness

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Dr. Randy McCracken
McCracken Chiropractic Clinic

A ten year study yielded:

#1. 24% decreased disability. Fewer people were experiencing debilitating on-the-job injuries that kept them out of work for a short period of time. This resulted in lower disability costs, but more importantly greater productivity and heightened efficiency.

#2. 55% enrolled participant's costs reduced by 55%. Where most healthcare costs stem from a reactionary approach to wellness (i.e., you're hurt, you seek treatment), a proactive approach becomes preventative. With fewer injuries, there is less need for treatment - and as a result, a sizable reduction in overall healthcare costs. They say an ounce of prevention is worth a pound of cure.

#3. Employee participation rose to 97%. One of the most important features for any wellness program to have is employee buy-in. The more invested your employees are, the greater the results. One of the most important features for any wellness program to have is employee buy-in. The more invested your employees are, the greater the results.

#4. Spousal costs decreased by 18%. Not only was the wellness offering beneficial to employees, but to the families of employees as well. With spousal costs having decreased by 18%, it goes to show health and wellness extends far beyond the walls of any organization, into the homes and lives of those involved.

The combination of a corporate wellness program and chiropractic has yielded significant costs benefits. Especially when combined with back injury reduction program and utilizing chiropractic as the first choice in treatment has demonstrated a significant decrease in lower back surgery. The Washington State study as mentioned in the March newsletter noted 42.7% of the workers who initially visited a surgeon underwent surgery, in contrast to only 1.5% of those who consulted a chiropractor first. The utilization of chiropractic treatment for lower back pain resulted in significant cost reductions as revealed in a BlueCross BlueShield study that found for low back pain, care initiated with a chiropractor (DC) is less costly than care initiated through a Medical Doctor (MD). Paid costs for episodes of care initiated with a DC are almost 40% less then episodes initiated with an MD.

For more information on reducing your company's health care costs, on-site chiropractic care, wellness programs, stress reduction call Dr. Randy McCracken at 402-421-2277 or e-mail: drmccracken@windstream.net. Dr. McCracken offers over 39 years of experience in healthcare.

Congratulations to our May Basket Raffle Winners!

Advanced Service Inc. – Angela Caldwell
Baylor Evnen - Sheila Cain
Molex - Chris Tran
LHRMA/Brian Mefford – Jenny Seamans
Nature's Variety – Angela Caldwell
Let's Talk Dirt – Amy Spellman
Lincoln Surgical Hospital – Michelle Spadt
Aureus Group – Todd Hoppe
Corky Canvas – Amy Spellman
UNICO Midlands – Jamie Mohrman
Artisan Salon & Spa – Kelly White
Nature's Variety – Chris Tran
Madonna – Chris Tran
LHRMA – Veda Armstrong

Drawing Winner

Who Says There's No Such Thing as a Free Lunch?

Congratulations to **Gabby Quezada** with Midwest Holding, Inc. Gabby will receive free registration for the June program.

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