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By: D. Michael Reilly

A "Bad Day at the Construction Project"

The Deposition of a Human Resource Manager

The engineering and construction industry experiences more than its share of employee harassment and discrimination complaints. In this day and age, you need protection. The way to protect yourself from these suits is to perform good investigations of employee complaints, act upon the investigations in a corrective way, and be ready to answer the hard questions you may face later.

If you perform investigations concerning employee complaints or make decisions based on the results of harassment investigations (i.e., discrimination, wrongful discharge, race, sex, religion, retaliation and disability), it's inevitable you will be a witness in an employment lawsuit brought against the company. The attorney representing the former employee will challenge your investigation and the decisions you made. Prepare now for the tough questions later.

1. Are your documents in order and do your notes clearly state the context?

Plaintiff's attorney will ask for documents. These documents may include plaintiff's personnel file, including all documents which may have been maintained outside that file; the alleged harasser's personnel file; the alleged harasser's supervisor's personnel file; the personnel file of the human resource manager; all harassment, equal employment opportunity commission (EEOC) and affirmative action policies and procedures for the entire period of time the plaintiff was employed; any complaint-resolution policies and procedures; all disciplinary policies and procedures for the relevant time period; all records of harassment complaints and investigations made before, during and after plaintiff's employment; all records of training given to supervisory and nonsupervisory employees on harassment, including copies of materials used in the training or given to attendees; all records of information concerning complaints allegedly made against plaintiff during their employment; all documents relevant to any investigation conducted by the human resource manager or anyone else in the company upon notice of the harassment; and all records of disciplinary action taken against anyone as a result of the investigation.

Transcribe interview notes to make sure the "jottings" taken during an interview clearly state relevant information. Plaintiffs' attorneys are pretty good at taking innocent notes out of context. Have witnesses sign sworn statements to "lock in" facts and information. Plaintiff's attorney may want to see original documents to assess whether notations had been made in different colored ink (which suggests the manager had later revised statements). Changes in ink color have been used in an attempt to impeach an investigation.

2. Are you qualified to handle the investigation and/or administer the company's employment policies? Your qualifications will be questioned by plaintiff's attorney. Survey

and develop your list of qualifications so you are prepared to answer this question. Review your training, education and experience. If you need more, look for human resource training sessions held by law firms and companies, and keep the training materials. Attending these can further "qualify" you. If you identify the EEOC or a similar state-based agency as a source of your qualifications, plaintiff's attorney will immediately resort to detailed questions to assess whether you followed these guidelines and procedures suggested (be aware, the EEOC publishes materials to specifically guide employers in sex discrimination and sexual harassment issues).

3. What was your investigation process, and did you follow that process? Plaintiff's attorney will inquire about your knowledge of the investigative process. You may be asked to describe, step by step, how you "typically" conduct, or would conduct, an investigation into an employee complaint. You may be asked exactly how and when you learned this process and what documents you relied upon in the adoption or development of that process. Anticipate a trick question or two. For example, you may be asked if you agree that the EEOC Compliance Manual is "authoritative." You should not agree to this, as an affirmative answer creates challenges for you (Sections 602 and 26 of the manual address investigations conducted by the EEOC, not by a private company). Plaintiff's attorney will attempt to assess whether the manager's investigation matches the guidelines exhibited in these documents. For example, the EEOC encourages the investigator to search out all evidence that may corroborate a charging party's claims. If you concede the EEOC guidelines are authoritative, then plaintiff's counsel will have you judged either under your own approach, or the approach suggested by the EEOC.

4. Do you know company policies, and have you reviewed the company handbook? You should have a good understanding of what conduct constitutes harassment and should be aware of legal definitions and requirements. Plaintiff's counsel may try to pose "hypothetical questions" and ask how these legal standards apply to certain factual issues. Talk to your attorney about how to respond. If you refer to the company policy, there will be questions concerning whether you know the company policy by heart. You may be asked where, when and how you learned the definitions and policies.

(a) Do you know definitions/examples of harassment? Plaintiff's attorneys will try to elicit incomplete and possibly inaccurate definitions of the employer's harassment policy. They may use this to unfairly demonstrate that it was highly unlikely the plaintiff knew about the policy. They may argue that the accompanying definitions failed to alert workers about unlawful conduct in the workplace. Expect hypothetical questions about whether possible bad acts constitute harassment, particularly the specific conduct involved in the case. Expect questions on whether you agree that such conduct is "harassment."

(b) Given what you know now: Was there harassment? You may be asked whether supplemental information coming into your possession, even after a decision on a charge has been made, should be considered. If you agree this information should be considered, you may be asked whether a decision, given that information, can or should be reversed.

(c) Have you compared company policies to EEOC guidelines? Expect to be questioned at length concerning EEOC published guidelines on what factors constitute an effective policy against harassment. The next step for plaintiff's attorney may be questioning you on ways in which the company's policy departs from the norm established by the EEOC.

(d) Can you confirm employee training and where policies were posted or provided to employees? Expect to be quizzed at length concerning company policies and procedures. You may be questioned about when each was created, how it was posted or disseminated, and whether there had been any revisions. There will be questions whether employees acknowledge receiving information on harassment.

5. What did you do in this investigation? There undoubtedly will be a thorough examination of documents in the file. Expect to be confronted with any significant omissions in the investigation materials or investigator notes.

Plaintiff's attorney may try to pin you down that you used only the most narrow of questions and did not give the charging party a full opportunity to explain the offensive conduct or their reaction to it. Plaintiff's attorney might ask whether the human resource manager asked the complaining party what their understanding of "harassment" is. Without asking this question and explaining the correct definition of harassment to the complaining party

(or witnesses), plaintiff’s attorney will argue that you failed to elicit all of the information outlining the offensive conduct.

Plaintiff’s attorney will ask if you know the relationships between the complaining party, the harasser and the various alleged other victims. Sometimes derogatory information might be elicited from people close to the alleged harasser. Yet when confronted by this fact, the investigator may state that he or she didn’t know about the relationship between the witnesses and the harasser.

Plaintiff’s attorney undoubtedly will explore the investigative avenues that you did not follow up on. You will be questioned about why you failed to interview other witnesses or question people about other issues. The completeness of the investigation, including the number of witnesses and the number and substance of questions, will be challenged.

6. You will get the ultimate hypothetical question. During the final part of the deposition, the plaintiff’s attorney may use information gathered from other witnesses. Expect to be confronted with information that may not have been available to you during the investigation months or years earlier. You may be asked why you did not have such information, and whether this information could or would have had an impact on your conclusions. You may be asked to consider this new information and to reconsider and change your decision. The purpose of this line of questioning is to attempt to place you in a bad light. If you admit that the corroborative statements would affect the investigation, then there is some argument that you are admitting the investigation is incomplete. If you answer that this information would not change your earlier decision, that evidence may be used at trial unfairly to contend that you lacked good faith in the investigation.