Public Employer Damage Control: Critical Components of Harassment Procedures, and Conducting Internal Investigations to Limit Liability

By Barry H. Uhrman and Erin E. Byrne



Workplace discrimination charges with the Equal Employment Opportunity Commission (EEOC) hit an unprecedented level of 99,922 during fiscal year 2010, which ended Sept. 30, 2010.[1] All major categories of charge filings increased, including charges filed against state and local governments. The EEOC filed 250 lawsuits, resolved 285 lawsuits and 104,999 charges, and secured more than $404 million in monetary benefits from employers – the highest level of monetary relief ever obtained by the Commission at the time.[2]

During fiscal year 2010, the EEOC also resolved a total of 7,213 requests for hearings involving federal agencies, securing more than $63 million in relief for parties who requested hearings.[3] The agency also resolved more than 4,600 federal sector appeals—400 more than in FY 2009.[4]

Employers paid an even higher price in fiscal year 2011. The EEOC received a record 99,947 charges of employment discrimination and obtained $455.6 million in relief for private sector and state and local government employees and applicants.[5] For claims against federal agencies, the EEOC secured more than $58 million in relief for parties who requested hearings.[6]

The evidence indicates these numbers are trending upward. Continued economic stress as a result of a sluggish economy has some experts predicting an additional uptick.

The key to preventing liability is a thorough system of training and policies that enables an employer to promptly and thoroughly respond to complaints when they arise. Training and educating employees is absolutely critical in limiting corporate exposure to workplace harassment claims. Absent clear evidence that employers have adequately trained employees to be conversant with the entity's harassment policy, a public employer has little or no chance of creating an affirmative defense to harassment claims that would allow the employer to avoid liability.

To have comprehensive and effective equal employment opportunity program, managers, supervisors, equal employment opportunity officials, and personnel officers must be accountable for the effective implementation and management of the employer's policies and procedures. As part of this accountability, state and local governments and federal agencies should ensure, *inter alia*, that: (1) regular internal audits are conducted of the equal employment opportunity program; (2) equal employment opportunity procedures are established; (3) managers and supervisors are evaluated on equal employment opportunity management; (4) personnel policies and administrative regulations are clear, and consistently implemented; (5) a comprehensive anti-harassment policy has been issued; and (6) findings of discrimination and harassment are reviewed.

Harassment Policies—An Employer's First Line of Defense

The key to preventing harassment complaints or to successfully navigate through them is through conducting swift investigations and taking appropriate corrective actions. This begins with a comprehensive anti-harassment policy that has been issued and distributed to all employees. Effective workplace harassment policies should contain a number of key provisions, including:

Identification of Protected Categories. State and local governments and federal agencies can be held liable for harassment based on race, color, sex, religion, national origin, age (40 and over), disability, or protected activity (e.g., opposition to discrimination or

participation in proceedings covered by the anti-discrimination statutes),[7] and liability is not limited to harassment that is of a sexual nature.

In addition, the EEOC recently ruled that a complaint based on "gender identity, change of sex, and/or transgender status" is cognizable under Title VII of the Civil Rights Act of 1964.[8] The decision will apply to all EEOC enforcement and litigation activities at the Commission and in its 53 field offices throughout the country. It also will be binding on all federal agencies and departments.

The EEOC, however, does not enforce laws that prohibit discrimination and harassment based on sexual orientation, status as a parent, marital status, or political affiliation. Nevertheless, other federal agencies and many states and municipalities do. As a result, employers should establish written anti-harassment policies and complaint procedures covering unlawful harassment on all bases protected by federal, state, and local laws and ordinances.[9]

Employee Understanding. All employers should adopt a strong policy that clearly defines "harassment" and provides examples of verbal, nonverbal, physical, and visual harassment that will not be tolerated. Employer policies must encourage employees to report harassment and prohibit retaliation against them for coming forward and participating in an investigation. An effective policy must also emphasize the importance of immediately reporting concerns or complaints, whether an employee is a potential victim or witnessed potentially harassing conduct. Employees must be explicitly warned of the range of possible punishments for those who have engaged in any form of harassment.

Grievance Procedures. An effective policy must also provide a clear path for anyone who wants to file a grievance or complaint. The complaint procedure should clearly define whom an employee should contact (a supervisor, human resources representative or a personnel officer) with a harassment concern. The procedure should also list the contact information for these persons, charged with handling harassment claims, and offer several options for employees to report harassment or ask questions about the policy. Any complaint procedure must also include the ability to bypass a supervisor, in case the supervisor is the alleged harasser.

Confidentiality Provisions. An effective policy will assure employees of a prompt, thorough, and objective investigation. Do not promise confidentiality, but, to the extent possible, maintain it. Explain that complaints of harassment cannot be completely confidential, because a thorough investigation will require interviewing the alleged harasser.

Planned Policy Communication. Communicate and distribute the policy to all employees and post it prominently throughout the workplace. Additionally, obtain a written, signed acknowledgement from each employee, which states that they have read and understand the policy and against harassment, and the complaint procedures.

Ongoing Training. Provide annual anti-harassment training to all employees. This should cover the basic policy and include updates reflecting any changes in the law or employer procedures. Maintain attendance and participation records for all training sessions.

Conducting an Internal Investigation & Handling Interviews

Even the best and most comprehensively administered harassment policies can fall short and the inevitable will happen—an employee will file a harassment complaint against another employee.

The first and critical step is to promptly investigate the claim and try to resolve matters internally. Such prompt action can, in some cases, eliminate the potential for claims being made to state and federal agencies and the need for costly and damaging litigation. Employers must take all harassment allegations seriously, regardless of how trivial they may at first appear: employees often understate matters, due to embarrassment and a fear of retribution. Cultural differences may also affect the manner in which an employee alleges harassment.

It is prudent to have the employee put the complaint in writing. This step will assist the employer in the event the matter is litigated by "corralling" the employee's claims up front. Follow up by investigating each complaint as soon as it emerges. Swift action demonstrates to employees that your governmental entity does not tolerate harassment in any form and at any level. It is critical that an employer's actions be fair and consistent. Take disciplinary action when necessary.

In launching an internal investigation, picking the right investigator is critical to ensuring the process is objective, and is viewed as such by your employees. Your investigator should be someone who is not involved in day-to-day activities, such as your Human Resources Director. The investigator should demon-

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strate sensitivity not only to the employee who raises the harassment allegation, but also to the alleged harasser. Harassment has a ripple effect and impacts all employees, so any investigation should also consider the allegation's impact on other parties involved or affected.

The investigator should have the demonstrated ability to exercise appropriate discretion. Harassment claims are emotionally charged and employees must be assured that when they make complaints, they will not be subject to ridicule or retaliation from other employees. Moreover, to the extent confidentiality can be maintained, it minimizes any legal exposure of the governmental employer by ensuring that only the appropriate people are privy to an investigation and its details.

It is also wise to involve counsel—either in-house counsel or outside counsel specializing in employment law—before launching an investigation. Your attorney can assist in the process and determine if disciplinary action is warranted.

Interviewing the Alleged Harasser

After interviewing the employee who made the complaint, the next step for employers is to interview the alleged harasser. Begin by explaining that the employer will thoroughly analyze the claims and that the investigator is a neutral party. Emphasize, however, the importance of being truthful, regardless of any discomfort that may arise regarding the subject matter discussed. Remind the employee that anything less than candor may result in discipline.

Start the discussion with broad questions. Investigators might ask the alleged harasser if he or she has ever engaged in the generally-described conduct with any employee. Then, move on to more detailed questions. Be vigilant in how you construct your questions to avoid leading questions. Open-ended questions allow for an open-ended dialogue, which should be the goal of the investigation. Inquire about each instance of unwelcome conduct the victim has alleged, and note the areas of agreement and disagreement. Ask the accused employee for names of any witnesses he or she believes can either corroborate his or her version of events or disclose additional facts that offer explanation for the conduct that may come to mind later.

In the event the accused claims the accuser is lying, ask why he or she believes this. This will help ascertain the motives the complaining employee may have. If the alleged harasser admits any misconduct, he or she should be advised that the governmental entity will not tolerate it, and, pending the outcome of the investigation, he or she may face disciplinary action.

Be sure to consult any administrative regulations, Memorandum of Understanding, Memorandum of Agreement, or other applicable labor/management agreement before interviewing the alleged harasser. Certain union/management agreements require a "Notice of Investigation" to be issued before conducting an interview in situations that could lead to disciplinary action may be imposed. In addition, the alleged harasser may be entitled to have an attorney or a union representative present during any investigatory interview.

Handling Witnesses

In dealing with witnesses, it is vital that they be told, from the outset, that their cooperation is appreciated. These employees may be as nervous about being interviewed as the complaining employee and alleged harasser. Review the employer's anti-harassment policy with each witness and remind them the interview is part of enforcing this policy. Also, emphasize the sensitivity and confidentiality of the situation. Witnesses should be clearly instructed not to discuss the investigation with anyone else other than the investigator. Often, witnesses will want information about how the investigation has been resolved, but they should be told that, due to privacy concerns, the employer is unable to advise them of the outcome of the investigation. Remind employees that they may be disciplined for failing to maintain confidentiality.

Be conscious of—and document—any motivations or biases a witness may bring to the table. Employees who are

HANDLE WITH CARE

In a harassment investigation, begin by promptly interviewing the employee lodging the complaint. This interview should instill confidence that the employee's concerns are being taken seriously and that confidentiality will be maintained to the extent possible. Remind the employee there will not be any retaliation for filing the complaint.

Prior to the investigation, determine who will be involved and the impact on any other issue involving employer-employee relationships. Then, review all relevant personnel policies and define the scope of the investigation.

The following questions and issues should be addressed with the employee alleging harassment:

1. What happened?
2. Where/when did it happen?
3. How did it make you feel?
4. Who was there?
5. What did they see?
6. What have they told you?
7. What have you told them?
8. Has it ever happened before?
9. Who have you told this to and what did they say?
10. Have you kept any written records relevant to the issues?
11. Are there any employer documents related to a claim such as personnel file memos, payroll records, or the like?
12. Are there any witnesses whom you believe can corroborate your version of events?
13. Are there any other issues that you wish to discuss? Any other matters that may be important?
14. Make sure that you have a list of every allegation before adjourning the interview.
15. Explain how long you expect the investigation to take, and *let the employee know the employer will apprise him/her of the outcome.*

called in to be interviewed may have their own axe to grind, and those issues may color their reporting. Carefully consider if witnesses are providing hearsay or gossip as opposed to actual relevant information. Investigators should stick only to the facts.

Where the accused provides relevant information that he or she states may be corroborated by a witness, make sure to follow up on that information with the relevant parties. Last, consider obtaining written statements from employees with critical information. This may be particularly important where the investigator suspects the employee may be leaving his or her employment relatively soon.

Concluding the Investigation

Once the investigator has interviewed all necessary parties, a report or summary memo should be prepared for the employer. The report can be used later, if necessary, to show that an independent investigation was conducted. It also assures the complaining and accused employees that the matter has been handled appropriately and that due process has been followed. Know, however, that any written material generated during the investigation or at its conclusion will likely be discoverable should litigation ensue. If the material is prepared by an attorney, this may give you the opportunity to claim it is protected from disclosure. Ultimately, however, if a report is prepared properly, an employer will want it to be discoverable, as it will support any affirmative defenses the employer asserts.

At the close of the investigation, the investigator will have to determine if any alleged conduct violates the governmental entity's policies and procedures. However, the investigator should refrain from speculating whether the law has been broken, both with the employees involved and with management. The investigator should also keep detailed notes of each and every interview he or she conducted. Remember, all materials generated during the investigation are likely to become evidence if the employee pursues the matter administratively with the EEOC, the appropriate state civil rights division, or in litigation. If the interviewer is the employer's attorney, notes taken during the investigation will likely be protected from discovery by virtue of the work-product privilege. Regardless, the employer must preserve these materials.

Is Disciplinary Action Warranted?

In the event the investigator determines no harassment occurred, this should be clearly stated in the report. If the investigator believes a violation has occurred, then each violation should be identified, as well as the policy provision that the conduct violated. The report should summarize the key facts the investigator uncovered. In identifying the key facts, the investigator should note any inconsistencies, and describe the credibility of the witnesses. Any such action must be taken consistent with the employer's anti-harassment and disciplinary policies. The results should be provided to both the complaining employee and the alleged harasser. Remember, this document is likely to wind up as an exhibit if any litigation results (by the victim or the harasser), so it should be drafted with utmost care. It is often wise and prudent to seek legal advice in finalizing this document.

Harassment has a ripple effect and impacts all employees, so any investigation should also consider the allegation's impact on other parties involved or affected.

The employer must determine what discipline is warranted in the event the original complaint is well-founded. *Discipline must be implemented consistent with any written policies or administrative regulations.* Appropriate discipline may involve any of the following: supervisory counseling, a written reprimand, suspension with or without pay, attendance at a training session, employer-wide retraining, transfer, relocation, or termination.

Additional Notes & Practice Pointers

Employers may also wish to offer remedies directly to the victim, including offers to transfer the victim to a different department or another office. Any such change in this regard must be made *with the complainant's consent*; otherwise, employers risk a retaliation claim. The complaining employee should not face anything that could be viewed as punishment in rectifying the situation.

Place a memorandum in both the complaining employee's and the alleged harasser's personnel files. As to the complaining employee, make sure any such document does the following: thanks the employee for bringing forward the complaint; states that the matter has been investigated and documents the outcome; informs the employee that the governmental entity will continue to enforce its policies in the future, including the anti-harassment policy; advises the employee to *immediately* inform the employer if any future harassing conduct occurs; and reminds the employee to bring forward any issues that appear to involve retaliation for making the harassment complaint.

Notes

1. Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010*, Jan. 11, 2011, at http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm (last visited July 16, 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. Press Release, U.S. Equal Employment Opportunity Commission, *Private Sector Bias Charges Hit All-Time High*, Jan. 25, 2012, at http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm (last visited July 16, 2012).
6. *Id.*
7. *See, e.g.*, Title I of the Americans with Disabilities Act of 1990 (illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments; illegal to retaliate

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Occupy Movement *Cont'd from page 9*

lives/2011/12/27/gIQAwCtNRP_story.html (last accessed May 8, 2012).
31. Meghan Barr, *Occupy Wall Street: 6 Months Later, What Has Occupy Protest Movement Achieved?*, The Huffington Post, Mar. 16, 2012, at http://www.huffingtonpost.com/2012/03/16/occupy-wall-street-6-months-later_n_1352752.html (last accessed May 8, 2012).
32. Colin Moynihan, *Evicted From Park, Occupy Protestors Take to the Sidewalks*, The New York Times, Apr. 12, 2012, at http://www.nytimes.com/2012/04/13/nyregion/evicted-from-park-occupy-protesters-take-to-the-sidewalks.html (last accessed May 8, 2012).
33. Gene Policinski, *Government must be careful with tactics against Occupy camps*, First Amendment Center, Mar. 02, 2012, at http://www.firstamendmentcenter.org/government-must-be-careful-with-tactics-against-occupy-camps (last accessed May 13, 2012).
34. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650, (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). ML

Public Employer *Cont'd from page 13*

against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Age Discrimination in Employment Act of 1967 (prohibits age discrimination against workers 40 or older and also makes it illegal to retaliate against a person because the person complained about age discrimination), Title VII of the Civil Rights Act of 1964 (discrimination on the basis of race, color, religion, national origin, or sex prohbited; the law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Genetic Information Nondiscrimination Act of 2008 (this makes it illegal to discriminate against employees or applicants because of genetic information).
8. Macy v. Holder, Appeal No. 0120120821, April 20, 2012 at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (transgender complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status held cognizable under Title VII).
9. As an example, the Civil Service Reform Act of 1978, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. *See* U.S. Office of Personnel Management, Addressing Sexual Orientation Discrimination In Federal Civilian Employment, A Guide to Employee's Rights, at http://www.opm.gov/er/address2/Guide01.asp (last visited July 22, 2012) and U.S. Equal Employment Opportunity Commission, Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, at http://www.eeoc.gov/federal/otherprotections.cfm (last visited July 22, 2012). ML

Supreme Court *Cont'd from page 23*

rantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment.

The Florida court granted the motion to suppress. "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected." Instead, it was a "public spectacle," "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." Accordingly, given the special status accorded a citizen's home under the Fourth Amendment, the "sniff test" was a "substantial government intrusion into the sanctity of the home" and constituted a search within the meaning of the Fourth Amendment. As such, the search had to be preceded by an evidentiary showing of probable cause. ML

Code Enforcement *Cont'd from page 31*

I do believe in making the penalties as stiff as possible. The penalty provision should also include attacking municipally-issued licenses, such as a tobacco dealer's license. This provision would allow pursuing businesses, such as gas stations and convenience stores selling these substances, which would be the likely places for teens and young adults to purchase the drugs.

Folks, the war on drugs just got bigger and more problematic. If the thinking on the previous version of the war on drugs is that it is unwinnable, what position are we in now as we deal with synthetic drugs, a moving target? We all need to work in concert to wage this war, as best we can. ML

Ordinances *Cont'd from page 29*

"Legislature's intent to allow not only local regulation of the geographic placement of collectives and the manner in which they conduct operations, but also local regulation of the creation of collectives. The local power to regulate creation, by definition, carries with it the power to regulate the number of collectives in existence." The trial court's order granting the preliminary injunction was therefore reversed. *420 Caregivers, LLC v. City of Los Angeles*, No. B230436, 2012 Cal. App. LEXIS 780 (Cal. Ct. App. July 03, 2012). The League of California Cities and California State Association of Counties participated as Amici Curiae on behalf of the City in this case. ML

Cases *Cont'd from page 35*

intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement."

Regarding the reasonableness of the use of force, Nelson and his friends did not