

NEUTRAL NOTES

THE JACOBS CENTER FOR
JUSTICE AND ALTERNATIVE
DISPUTE RESOLUTION™

***** SPECIAL JUNE ISSUE ON ***** WORKPLACE INVESTIGATIONS

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TEN TIPS ON INTERNAL INVESTIGATIONS

Sexual harassment? Corporate overreaching? Theft of trade secrets? The list goes on.

Public and private employers are faced with these issues daily. Should normal channels be used or should you employ outside experts to conduct an investigation? Based on 30 years of experience as a labor and employment lawyer for public and private employers, my recommendation is that independent counsel be retained. Why?

Tip #1

Interview notes are generally subject to discovery. In other words, if the investigation is done by outside counsel, he/she is likely to be conflicted out of further representation. As a consequence, it may be prudent to engage an independent fact finder with no other relationship to the employer. In this way, your representation is intact and you have skillfully and objectively investigated a workplace problem.

Tip #2

The focus of the investigation should be on facts and witnesses. It must be a neutral investigation of facts. A skillful and experienced investigator must be able to assess all of the individuals with actual – not anecdotal – information.

Tip #3

Interviews should be conducted as close in time to the event as possible.

Tip #4

Individual witnesses should be accommodated whether it means an off-site meeting with the investigator or simply a meeting before or after the shift. In other words, 9-5 does not necessarily apply.

Tip #5

A truly independent investigator should be more credible to all parties concerned. While negative results are always difficult, ultimate acceptance of the findings, if necessary, in court must be your goal.

Tip #6

Part of any affirmative defense in employment litigation is to provide legitimate anti-discrimination employment policies that call for timely investigations of complaints. Very few complaints should require external expertise. Your HR team can do the job. Whether it is a conflict or just a concern, certain situations require the attention of a seasoned expert who will get the job done – objectively – and leave your professional relationships intact.

Tip #7

Fact finding can be cost saving. Yes – let me repeat that – fact finding can be cost saving. If there is a serious workplace problem it is more likely to be remedied with the assistance of an objective assessment. Such a route should be faster and cheaper than litigation.

Tip #8

Employee satisfaction can be greatly enhanced when people feel they are getting a fair shake. Using an outside neutral with no business connections to any party should promote a belief in the integrity and fairness of the process – regardless of result.

Tip #9

The investigator should be given the cooperation and tools needed to do an efficient investigation. Depending on the size and scope of the problem, the investigation could be done in a few hours or more. Your commitment at the outset must be to insure integration in the process and the result.

Tip #10

Investigations can be used internally as a decision making tool. In other words, if the facts and assessment by an independent investigator suggest there is potential exposure, it might be an opportunity to engage a mediation to resolve the issues before lawyers are involved. Efficiency and economy in the workplace can be protected by using outside experts to streamline legal budgets and to avoid big judgments.

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

A SIMPLE GUIDE TO WORKPLACE INVESTIGATIONS

I. INTRODUCTION

Discrimination and harassment undermine the integrity of the employment relationship, compromise equal employment opportunities, debilitate morale and interfere with work productivity.

EEO personnel must develop an objective, fair and efficient means of conducting investigations into allegations of wrongful conduct. They must also develop a system of creating defensible records for every investigation that support their recommendations. The role of the EEO investigator is to be a neutral party focusing on violations of the policies. An investigation should begin promptly after notice of potentially impermissible conduct is received.

There are three objectives of an investigation:

- (1) identify, remedy and/or prevent unlawful conduct;
- (2) maintain and/or improve employee morale and productivity; and
- (3) minimize employer liability.

II. OVERVIEW: POTENTIAL CLAIMS

Personality disputes between two employees, unless the dispute was based upon an employee's membership in a protected class, should not be an EEO matter. However, it may develop into a problem where mediation could effectively be used to resolve conflict.

The most common types of unlawful workplace conduct that prompt investigations are allegations of disparate treatment because of discrimination. Discrimination, from a legal perspective, is any form of differential treatment based on membership in a legally protected class or category. It is important to note that any differential treatment based on membership in a legally protected class or category is unlawful, regardless of whether it is directed toward a member of a group that has historically suffered discrimination or a member of a group that has not historically suffered discrimination. Protected classes are identified below:

Legally Protected Classes/ Categories
Race
Color/Creed
Religion
Gender/Sex (Including Pregnancy)
National Origin (Immigrant Status)
Age
Disability
Ancestry (Ethnicity)
Nationality (Citizenship)
Marital Status
Sexual Orientation
Liability for Service in the Armed Forces
Genetic Traits
Domestic Partnership
Gender Identity and Expression
Hereditary Traits

Forms of Discrimination

Discrimination is not always obvious and may at times be hard to detect or uncover. Each situation is fact specific, delicate and unique. However, there are some common forms of discrimination outlined below:

- **Disparate Treatment** is conduct that on its face discriminates on the basis of a legally protected class or category. An example of disparate treatment would be a situation where one protected individual or class of individuals is treated less favorably solely based upon membership in that protected class.
- **Disparate Impact** is conduct that seems neutral on its face but has a discriminatory impact on members of a legally protected class or category. Examples include employment decisions such as hiring, firing, promotions, demotions, and discipline. Where, for example, an employer decides to demote all employees who have a tattoo on

their bodies and that seemingly neutral act results in the demotion of all Native American employees because, as a group, Native Americans are more likely to have tattoos than other groups, the seemingly neutral act raises a question of disparate impact discrimination.

- **Hostile Work Environment** exists when an employee is subjected to adverse treatment that would not have occurred but for the employee's membership in a protected class. To have a successful claim, the adverse treatment must be either severe or pervasive enough that a reasonable person in the same circumstances would believe that the terms or conditions of employment have been altered to create an abusive working environment. This can include physical, verbal, and/or non-verbal misconduct. The misconduct can be actionable even if it takes place outside the physical bounds of the workplace or the regular hours of the workday.
- **Retaliation** is treating an employee differently because the employee has engaged in certain protected activities. Such conduct is prohibited.

Activities Protected From Retaliation
Filing A Discrimination Complaint or Supporting a Complaint
Family or Medical Leave
Filing for Workers Compensation
Whistleblowing

- Examples of retaliation may include:
 - terminating or demoting someone for asserting a grievance or filing a complaint or assisting another in

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NEW FEATURE!



As a new feature of *Neutral Notes* we will interview an important person in ADR in our community. We hope to make this a regular feature. We look forward to your suggestions and may be calling you to participate.

INTERVIEW WITH CHRISTOPHER LIONETTE, Common Ground Mediation Manager at Johnson & Johnson

Christopher Lionette heads the Common Ground Mediation Program at Johnson & Johnson. Chris had spent 8 years at Wilentz, Goldman & Spitzer as a litigation paralegal before joining J&J. His position requires him to travel extensively to handle the claims brought against the company. When he is not seeking common ground, Chris enjoys spending time as a soccer referee with two of his high school age sons.

Common Ground is a national program administered out of the New Brunswick, NJ Headquarters of J&J. Claims may only be brought by individuals employed in the United States. Common Ground handles primarily employment claims including discrimination and other workplace issues.

Chris said that numbers of cases going to mediation have generally declined over the last several years. However, he was proud to report a 73% success rate.

Is there a cost saving to the company by creating such a program? Without being specific Chris stated that Common Ground has been a terrific success at J&J by helping to provide a benefit to its employees and cost saving and litigation avoidance for the company.

How long does it take to get a case brought forward? Approximately 120 days after a notice of claim is received Chris moves the matter forward and schedules mediation. Mediation will take place in a location most convenient to where the employee lives. Chris and his colleagues will travel to that location to make sure that the mediation is as meaningful as possible.

What are some of the difficult issues in administering the program? Chris said the business units are the decision makers in the process. Thus, making sure that there is buy in, not just from the employee or former employee but from the individual business units, is critical. Since their bottom line is impacted by the results of Common Ground, Chris said he tries to make it a business decision when talking to the divisions and relies upon them to use sound business judgment.

What issues do you think need to be dealt with regularly in mediation? It is not just “monetary” said Chris. Chris made clear that the non-monetary issues in terms of presenting an employee’s point of view regarding a termination, a discrimination issue, or even an evaluation, are critical in laying a positive format for communications, problem solving, and, ultimately, success.

Is there resistance to Common Ground? Chris said he is very clear when talking to employees and counsel. J&J considers Common Ground to be a three-part benefit to its employees. However, Chris explains that he works for the company and will be at mediation on behalf of the company. Nonetheless, he was passionate in describing the three-pronged approach of Common Ground as follows:

- The first part of the program is the open door/HR approach at J&J permitting employees to come forward with problems, issues, and concerns.

- The next step is facilitation. J&J engages an experienced HR professional to attempt to facilitate each of the workplace disputes prior to mediation. I asked Chris what that meant and he said that they hope to both discern the problem and diffuse it prior to getting to mediation. Often, he said, the facilitation process works without need for actually going to mediation.

- Finally, the third prong of the Common Ground program is the mediation program itself.

Where do you get your mediators from and what do you look for? Chris said he has often favored mediators from JAMS and uses experienced mediators that have produced results around the country. He said he does not hesitate to select a mediator, for example, from New York and fly them out of town if they have produced good results. Chris said he is not locked in to one provider and is open to using experienced, thoughtful, and skillful mediators who understand the law and the workplace. As a general rule he prefers to use attorneys or former judges as mediators. He finds that they provide a greater comfort level to the participants and are often more authoritative.

What kind of background do you look for? Chris said he wants individuals that have substantial experience in employment rather than employment as just part of a potpourri of past experience. He also wants individuals that will attempt to discuss and understand the various issues involved in the claim rather than immediately focus on “what is your number” or what is the most that you will pay on this matter.

Why do you even have a program such as Common Ground? Chris said it is part of the J&J credo of having a duty to its employees. He said it is about how they treat employees. Based upon his experience he found that it was a “better way to resolve disputes.”

Do you have a general suggestion for employers in approaching mediation? Chris said he always comes to mediation with authority. I asked him if he meant a literal check and he said not typically. However, he would be present with decision makers and individuals with authority and makes it a rule to

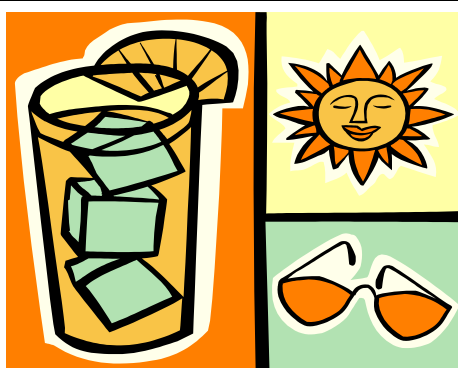
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A Simple Guide To Workplace Investigations *(Cont'd from pg. 2)*

- asserting a grievance or filing a complaint
- failing to promote an otherwise qualified candidate, despite the fact that they are the most qualified candidate
 - sudden alteration of work assignment for reasons other than legitimate business reasons
 - unwarranted disciplinary action or threatening unwarranted discipline
 - ostracizing someone for filing a complaint

Whether these actions indicate an act of retaliation is subjective and fact sensitive and all alleged occurrences of retaliation must be reviewed on a case-by-case basis. The actions listed above, however, are helpful indications of when an action could potentially be retaliatory and should be investigated.

So what do you do when you conclude there is a problem? One course is to investigate internally. Another option is to use an outside investigator that should be impartial. Fact-finding and workplace investigations can be discussed confidentially with Jacobs Center for Justice and Alternative Dispute Resolution (973-226-0499).



*HOPE YOU ARE ENJOYING
THE SUMMER SO FAR*

Interview With Christopher Lionette, Common Ground Mediation Manager at Johnson & Johnson

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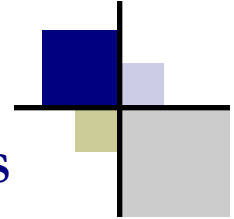
come to every mediation prepared to resolve the issues, including financial ones, to make his time and the employee's time productive.

Chris said that the workplace was changing and that J&J has undergone a global human resources transformation. In his own words, Chris said that "Common Ground makes common sense."

For more information the Common Ground program can be found on the J&J website at: <http://www.jnj.com/wps/wcm/connect/d7c16a804f5567a19f06bflbb31559c7/common-ground-employee-disagreements.pdf?MOD=AJPERES>.

Much thanks to Chris Lionette for being so generous with his time in sitting down with me at the New Brunswick Headquarters to discuss the Johnson & Johnson Common Ground Mediation Program. Look for further mediation tips in the next issue of "Neutral Notes."

NEWS AND NOTES



Roger Jacobs has been placed on the rosters of arbitrators for the Federal Mediation and Conciliation Service and the American Arbitration Association.

Roger Jacobs has joined the Board of Governors of Daughters of Israel Nursing Home in West Orange, NJ.

Roger Jacobs was recently re-elected as Chairman of the New Jersey Educational Facilities Authority.

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Roger B. Jacobs, Esq.
103 Eisenhower Parkway, Suite 103
Roseland, NJ 07068

973-226-0499 Phone
973-226-0110 Fax
866-720-8000 Toll Free
jacobsjustice@gmail.com E-mail

WWW.JACOBSJUSTICE.COM