

# INVESTIGATING EMPLOYEE DISPUTES

Association of County Administrators of Alabama  
Annual Conference  
May 12, 2016

Jamie H. Kidd  
Webb & Eley, P.C.  
Post Office Box 240909  
Montgomery, Alabama 36124  
Telephone: (334) 262-1850  
Email: [jkidd@webbeley.com](mailto:jkidd@webbeley.com)

# Investigating Employee Disputes: *Basic Philosophy*

- Don't borrow trouble.
- Don't be an ostrich.

# Investigating Employee Disputes:

## *Are there legal implications?*

- Does the subject matter of the dispute potentially implicate any federal laws?
- State laws?
- Ethics Commission or other administrative bodies?

# Federal Laws:

## *Anti-Discrimination Laws*

- May not harass or discriminate against an employee because of the employee's:
  - Age (ADEA)
  - Gender, including pregnancy (Title VII; EPA; 14<sup>th</sup> Amendment)
  - Race/Color (Title VII; 14<sup>th</sup> Amendment; 42 U.S.C. § 1981)

# Federal Laws:

## *Anti-Discrimination Laws*

- May not harass or discriminate against an employee because of the employee's:
  - Religion (Title VII; 14<sup>th</sup> Amendment)
  - Disability (ADA)
  - Genetic Conditions (GINA)
  - National Origin (Title VII)

# Federal Laws:

## *Anti-Discrimination Laws*

- In addition, public employers may not discriminate or harass employees who exercise their First Amendment rights of speech or association.

# Federal Laws:

## *Anti-Discrimination Laws*

- What is discrimination?
  - An “adverse employment action” is a negative change in the compensation, privileges, terms or conditions of employment.
  - Can also be a refusal to hire or promote somebody.
  - BUT not every negative change rises to the level of an adverse employment action.

# Federal Laws:

## *Anti-Discrimination Laws*

- Harassment
  - Words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.

# Federal Laws:

## *Anti-Discrimination Laws*

- Harassment
  - Quid Pro Quo
    - Submission to such conduct is made either an expressed or implied term or condition of an individual's employment; or,
    - Submission to or rejection of such conduct by any individual is used as the basis for employment decision affecting an individual.
  - Hostile Work Environment
    - Interferes with the individual's work performance or creates a hostile, intimidating, or offensive work environment.

# Federal Laws:

## *Anti-Discrimination Laws*

- Harassment can take a variety of forms: verbal, visual, written or physical.
- May include “jokes,” pictures, cartoons, statements, etc.
- May be done by supervisors, co-workers, other members of the public.
- Those forced to witness harassment may also be victims.

# Federal Laws:

## *Anti-Discrimination Laws*

- Retaliation claims may also be stated under the Family and Medical Leave Act ("FMLA"); the Fair Labor Standards Act ("FLSA"); and the Alabama Workers' Compensation Act.
- You cannot retaliate against somebody who exercises their right under these statutes.

# Federal Laws:

## *Anti-Discrimination Laws*

- Employers are forbidden from retaliating against an employee who makes a claim of discrimination.
  - Engaged in protected activity
  - Suffered an adverse employment action
  - Casual relationship between adverse action and protected activity

# Federal Laws:

## *Anti-Discrimination Laws*

- May not retaliate against an employee who reports alleged harassment or discrimination.
- Retaliatory behavior is broader than an adverse employment action and includes *any* behavior that would tend to discourage employees from reporting harassment or discrimination.

# Investigating Employee Disputes: *Initial Complaints*

- All complaints of harassment and discrimination must be taken seriously!
  - There is an affirmative defense to a claim of harassment available to employers who took reasonable care to prevent and correct the behavior, but the plaintiff unreasonably failed to take advantage of corrective opportunities.
- Do not wait for a complaint.

# Investigating Employee Disputes: *Before the Investigation*

- Make sure your policy sets up multiple avenues for receiving potential complaints.
- Do not pawn off an employee who uses the wrong avenue.
- Employees must be able to make good faith reports without fear of retaliation.
- Your policy must provide for follow-up.

# Investigating Employee Disputes: *Before the Investigation*

- Is immediate action warranted?
- Who will investigate?
- KEEP RECORDS!!!
  - Record interviews when possible
  - Date all notes
  - Written Findings

# Investigating Employee Disputes: *Conducting the Investigation*

- WHO?
- WHAT?
- WHEN?
- WHERE?
- WHY?

# Investigating Employee Disputes: *Conducting the Investigation*

- He said/She said situations:
  - This is not a CSI investigation requiring absolute proof.
  - Investigations often require credibility determinations – make sure yours are neutral and articulated.

# Investigating Employee Disputes: *Concluding the Investigation*

- Let all parties know your conclusions.
- If complaint of harassment or discrimination is sustained, **disciplinary action of some kind must be taken.**
- If all employees are guilty of a policy violation, all employees should be punished *appropriately.*

# Investigating Employee Disputes: *Concluding the Investigation*

- Appropriate punishment/correction is consistently applied on an “apples to apples” basis.
- If the dispute is primarily arising out of a personality conflict or other issue, try to minimize it *now*.

# Investigating Employee Disputes: *Concluding the Investigation*

- Suggestions for minimizing disputes:
  - Consider conducting a guided meeting between the employees to resolve their differences.
  - Get employee buy-in if possible.
  - Be creative about solutions. Can the employees be separated? Jobs switched?