




Turning Stones...

Solidifying Your Workplace Investigations

June 1, 2016

Presented by
Christina L. Corl
Brian T. McGorisk

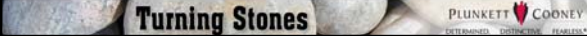
Featured Speakers



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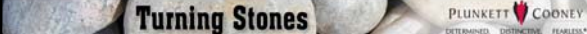


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First, Your Policies

- Five important policies to protect your employees and your company that may trigger or facilitate an investigation.



Equal Employment Opportunity Policy

- [Company] is an equal employment opportunity employer and provides employment and advancement opportunities to its employees without discrimination on the basis of race, color, religion, sex, age, national origin, disability, or any other protected characteristic as established by law. This policy of equal employment opportunity applies to all policies and procedures relating to the recruitment and hiring, compensation, benefits, termination and all other terms and conditions of employment.

Continued

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Equal Employment Opportunity Policy

- If an employee believes that he or she has been the victim of discrimination, he/she should report that fact immediately to his/her supervisor or office manager. After receiving such a complaint, the company will undertake a full and complete investigation of charges. If it is determined that discrimination has occurred, the company will take steps to eliminate that discrimination and take disciplinary action against any employee whom it determines engaged in discriminatory behavior. [Company] prohibits retaliation against any employee who reports discrimination or harassment, or participates in an investigation of such reports.

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Employees With Disabilities

- The Americans With Disabilities Act prohibits discrimination against persons with disabilities. This company does not discriminate against qualified individuals with a disability with regard to compensation, benefits, recruitment, hiring, termination, or any other terms and conditions of employment. We endorse the goals of the Act and attempt to provide reasonable accommodations to ensure equal access to all employment opportunities within the company.

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Employees With Disabilities

- Therefore, if you have a disability that affects your ability to perform the essential functions of your job, you should make a request for accommodation in writing to the company's office manager as soon as possible.
- In Michigan, this request must be made, in writing, within 182 days after the need for accommodation is known.

Continued

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Non-Discrimination & Anti-Harassment Policy

- [Company] is committed to a workplace that is free of discrimination or harassment. All employees have the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment.

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Non-Discrimination & Anti-Harassment Policy

- Definitions of harassment
 - Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or communication of a sexual nature when:

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Harassment

- Submission to such conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment.
- Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment.

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Harassment

- Such conduct or communication has the purpose or effect of substantially interfering with individual's employment or creating an intimidating, hostile or offensive employment environment.

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Harassment on Basis of Other Protected Characteristics

- Under this policy, harassment constitutes verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her race, color, religion, national origin, age, disability, marital status, or any other characteristic protected by law and that:

Continued

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Harassment on Basis of Other Protected Characteristics

- Has purpose or effect of creating an intimidating, hostile or offensive work environment
- Has purpose or effect of substantially interfering with individual's work performance
- Otherwise adversely affects individual's employment opportunities

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Harassment on Basis of Other Protected Characteristics

- [Company] prohibits any sexual or other discriminatory, harassing behavior. This behavior is a serious violation of the company's policies and procedures.
- This policy applies to all applicants and employees and prohibits harassment, whether engaged in by fellow employees, by a supervisor, manager, or by a customer or vendor.

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Retaliation

- [Company] prohibits retaliation against any employee who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against individuals for reporting harassment or discrimination or for participating in an investigation of harassment or discrimination claim is a serious violation of this policy, and, like harassment or discrimination itself, will be subject to disciplinary action.

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Reporting

- [Company] strongly urges the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Early reporting and intervention have proven to be the most effective methods of resolving actual or perceived incidents of harassment, so that rapid and constructive action can be taken. The company will make every effort to stop alleged harassment before it becomes severe or pervasive, but can only do so with the cooperation of its employees. *Continued*

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Reporting

- Individuals who believe they have experienced conduct that they believe is contrary to the company's policy, or who have concerns about such matters, should file their complaints with their regional manager, the office manager or a company executive as soon as possible.
- Employees are not obligated to bring their complaints to their immediate supervisor before bringing the matter to the attention of the office manager or their regional manager. *Continued*

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Reporting

- Any reported allegations of harassment, discrimination or retaliation will be investigated promptly, thoroughly and impartially. Misconduct constituting harassment, discrimination or retaliation will be dealt with promptly and appropriately.



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Violence in Workplace Policy

- Our company is committed to providing a safe environment for its employees, customers and visitors. In order to provide a safe workplace, we require:



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Zero Tolerance for Violence

- “Violence” is defined to include physically harming another in any way; shoving or pushing; physical intimidation or coercion; brandishing weapons and/or threatening or talking of violence toward another. Any display or threat of violence in the workplace may subject an employee to disciplinary action up to and including immediate termination.

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Reporting Potential Problems

- It is each employee’s responsibility to prevent violence in the workplace. Employees can help by reporting to management their observations in the workplace. In keeping with our “Open Door Policy,” we urge immediate reporting of any violent activity.

Continued

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Reporting Potential Problems

- Employees can help maintain the violence free environment that the company seeks through communication and cooperation.
- In the event of a violent incident, follow company procedures regarding emergency situations to ensure the safety of co-workers, customers and visitors.

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Zero Tolerance for Weapons

- Weapons of any kind, including, but not limited to guns, brass knuckles, nunchaku, knives, clubs, or any other objects that are intended to be used as a weapon, are prohibited and are not permitted on company premises.
- Possession of weapons on company property, regardless of whether the employee obtained a permit to carry such weapon, will subject that employee to disciplinary action up to and including immediate termination.

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Open Door Policy

- [Company] encourages all employees, regardless of position, to discuss their problems and concerns with management.
- If you have a concern at work, management will review the concern with you and attempt to resolve it according to the following procedure:

Continued

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Open Door Policy

- Explain your problem or concern to your office manager. Generally, your manager should be able to resolve the issue.
- Your problem may be such that you prefer to discuss it with your regional manager or operations manager. Always feel free to do so.

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Open Door Policy

- It is policy of [Company] that all employee suggestions and complaints shall be given consideration.
- There will be no discrimination or retaliation against any employee because that employee has presented a complaint or problem.

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Open Door Policy

- [Company] is committed to this Open Door Policy and is confident that it will work to resolve your problem or concern.



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Beyond Your Policies

- Complaints made pursuant to any of these policies will trigger a duty to investigate.
- However, there are other reasons for investigations, such as an employee who appears to be “blowing the whistle” under Michigan Whistleblowers’ Protections Act.

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Michigan Whistleblowers’ Protection Act, MCL 15.361 et seq.

- Sec. 2. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, or person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or suspected violation of law or regulation or rule promulgated pursuant to a law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because the employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

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Additional Reasons for Investigations

- Suspected theft
- Time card abuse
- Other violation of employer’s policies and procedures



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What Triggers Need to Investigate?

- Only complaints made pursuant to policies through proper channels?
- Complaints made by others?
- Anonymous complaints?
- Unexplained changes in behavior or productivity?
- Loss of money or company assets?
- EEOC or MDCR complaint or receipt of a lawsuit?



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Initial Steps

- Is an investigation necessary?
 - If so, are intermediate measures necessary?
 - Making changes to avoid contact between the parties
 - Identify individuals to conduct the investigation.
 - Individuals trained in skills required for interviewing witnesses and evaluating credibility; and that are not directly under the supervision of anyone who is accused of wrongdoing.

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Interviews

- Investigator and second person, who will act as a witness, should interview complaining party, individual complained about and any third parties who can reasonably be expected to have relevant information.
 - Confidentiality
 - Non-retaliation



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Questions to ask Complainant (Assuming Sexual Harassment)

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?

Continued



Questions to ask Complainant (Assuming Sexual Harassment)

- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after the episode(s) of alleged harassment?

Continued



Questions to ask Complainant (Assuming Sexual Harassment)

- Did person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?



Questions to ask the Alleged Harasser

- What is your response to the allegations?
- If harasser claims that allegations are false, ask why complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, any physical evidence or other documentation regarding incident(s)?
- Do you know of any other relevant information?



Questions to ask Third Parties

- What did you see or hear? When did this occur? Describe alleged harasser's behavior toward complainant and toward others in the workplace.
- What did complainant tell you? When did she/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?



Before Reviewing Evidence

- Make sure that you have interviewed all of the individuals who may have information and have reviewed all documents that may be helpful.
- If you have obtained information from interviews done after initial interview with complainant that raise additional questions, you should go back and ask those questions to the complainant and/or other witnesses to make sure that you have a full and complete understanding of the facts.



Documentation

- Summarize questions asked and answers given by each witness and have them sign those summaries as being true and accurate, with notation that if there is anything that is untrue or any additions that they want to make, to please do that before signing the statement.



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Credibility Determination

- If there are conflicting versions of what occurred, interviewers must make determinations regarding credibility, and in making those determinations, should consider:
 - Whether testimony was believable and made sense under all of the circumstances.

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Credibility Determination

- Whether person had reason to lie; whether they appeared to be telling the truth.
- Did alleged harasser have a history of similar behavior in the past?
- Is there witness testimony or physical evidence that corroborates individual's testimony?



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Reaching a Determination

- After reviewing all evidence, including interviews, documents and credibility issues, interviewers should make a determination as to whether or not harassment occurred.
- After making this determination, parties should be informed.



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Immediate & Appropriate Corrective Action

- Company must undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred and parties should be informed of those measures.



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Appropriate Disciplinary Measures

- Proportional to seriousness of offense
- Calculated to stop conduct
- No retaliation against complainant



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Aftermath

- #1 priority if claimant returns to work:
 - Prohibit retaliation!
 - Be very, very careful.
 - Even if the charge was frivolous, employee will truly believe that any adverse action taken against her later is retaliation.



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Aftermath

- Review anti-retaliation policies with all involved management personnel.



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Additional Consideration

- Conduct investigation using in-house human resources personnel or counsel

OR

- Retain outside counsel



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In-House or Outside Counsel

- Recent case: *Koumoulis v. Independent Financial Marketing Group*, 295 F.R.D. 28 aff'd in part 29 F. Supp. 3d 142 (E.D.N.Y. 2014)
- HELD: Communications between outside counsel and internal HR personnel were not protected by attorney/client privilege.



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In-House or Outside Counsel

- *Koumoulis*: Attorney/client privilege does not apply because, "the predominant purpose [of the communications] was to provide human resources and thus business advice, not legal advice."
- Court then ordered production of attorney/client communications which occurred during course of the internal investigation.

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In-House or Outside Counsel

- Considerations based upon *Koumoulis* case:
 - Clearly define roles of any internal investigator and outside counsel. Investigator is fact-finder and outside counsel is assisting in making legal decisions based upon the facts discovered in the investigation.
 - Additional bonus to this approach is being able to cite sufficiency of underlying investigation as a defense to any ...

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In-House or Outside Counsel

- subsequent lawsuit without waiving attorney/client privilege regarding final decision-making as to outcome of the investigation.
- If you wish to maintain attorney/client privilege, make sure your attorneys state explicitly in communications that the purpose is for providing of legal advice, outside day-to-day operations of business enterprise.

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In-House or Outside Counsel

- Communications should explicitly identify legal principles, case law and statutes that are guiding investigation and advice provided by outside counsel.
- Depending on seriousness or gravity of investigation, may want to consider hiring separate law firms to advise investigators looking into facts and management making the ultimate decisions.

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Questions?



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Presented by: DEBARRAS & EVENTS

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- Christine L. Carr
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POSTED BY CLARENCE D. OBER
MAY 28, 2016

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POSTED BY COURTNEY L. NICOLS
MAY 9, 2016

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Thank You!



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