



RECREATION LAW GROUP

Not All Staff Complaints Are Treated Equal: How to Properly Conduct and Document Employee Misconduct

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About



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Disclaimer



We are attorneys licensed in several states, including New Mexico, Colorado, North Carolina, Alaska.

That said, we are providing legal information, not legal advice.

*We gratefully acknowledge
the Native Peoples on whose
ancestral homelands we
gather, as well as the diverse
and vibrant Native
communities who make their
home here today.*

National Museum of the American Indian

Portland Area Tribes

- Multnomah
- Wasco
- Cowlitz
- Kathlamet
- Clackamas
- Bands of Chinook
- Tualatin
- Kalapuya
- Molalla

Consider experientially enhancing land acknowledgments in the field by observing and discussing with your students, clients, or participants the Native culture and history specific to the areas where you are travelling.

Scope of Session



- Reports and Complaints of Employee Misconduct, e.g.,
- Violation of an employment policy
 - Employee to employee
 - Employee to client



Who's in the room?

Foundational Elements

- Onboarding and Hiring Policies
- Staff policies
- Ongoing training/education
- Experienced HR manager
- A clear understanding of your investigation process and documentation
- Grasp of difference between poor performance vs. misconduct
- Relationship with employment attorney
- Appropriate employment-related insurance (EPLI and D&O)



Common Principles

Common principles for all responses, regardless of (perceived) seriousness of incident or complaint:

1. Receive all complaints seriously and with compassion and empathy.
2. Timeliness – don't dilly dally.
3. Commit to getting to the facts.
4. Listen to both sides and/or all directly involved.
5. Document, document, document (even complaints that seem minor).
6. Review alleged conduct against employment policies.
7. Do not rely on the internet for information or solutions!

Employee Policies

- At-will employment
- Equal opportunity employment and anti-discrimination
- Employee conduct expectations
- Anti-Harassment and sexual relations
- Complaint procedure and follow-up
- Investigation procedure
- Potential disciplinary responses

Spectrum of Complaints

Lesser: A “rule” violation; repeated violations



Greater: Policy violation or work environment issue



Greatest: A violation of the law, e.g., discrimination, harassment, retaliation, potentially criminal conduct

Harassment and Discrimination

- State and federal laws
- Protected classes
- EEOC = Equal Employment Opportunity Commission
- Administrative Procedure v. Court Procedure (i.e., lawsuit)
- Deadlines, statutes of limitations
- Employer policies and procedures





Why are investigations
important?



Beware the tacit endorsement:
Just because something seems
to occur “all the time” doesn’t
make it okay.

Culture check.

Investigating and Documenting a Complaint of Serious Misconduct

1. Internal v. External Investigation
2. Fact finder v. HR decision maker
3. The Investigation Process
4. The Documentation Process



Considerations for conducting internal or external investigation?

- Seriousness of the alleged conduct.
- Potential legal exposure.
- Protecting the Investigation from disclosure.
- Actual and perceived bias.
- Advice of qualified legal counsel.
- Capacity to perform sufficient/thorough investigation.
- Cost
- Insurance??

Fact Finder v. HR Decision-Maker: Who investigates and who decides?

- HR Decision Maker can, but does not have to, conduct the fact-finding part of the investigation.
- Very important consideration: Protection of the Investigation.
- Role of the Fact Finder: Collect and document the evidence
- Role of the Decision-Maker: Determine whether the alleged conduct violates policy or law and determine appropriate action.

The Investigation Process.

- Interviews: who, what, where, when?
- Be thorough and follow up when necessary
- Texts and other written communications
- Photos/Physical Evidence
- Don't fill in gaps that may be missing
- Assess credibility
- Taking and Protecting Notes

Documenting the investigation.

- The more serious the alleged misconduct, the more attention to documentation.
- All writings (notes, emails, texts, etc.), unless protected will be discoverable.
- Protecting your notes.
- Draft Report v. Final Report

Practical Concerns

1. Complaint arising from conduct out in the field
2. Third-party complaints
3. Overheard issues
4. Complaint from perceived unreliable source
5. Other?



Managing a claim of abuse by a minor

- The same general principles apply
- Policies specific to working with minors
 - 1 v 1 policy
 - Mandated reporting
 - Training and education
 - Understanding grooming and patterns
 - Background checks
 - Confidentiality and its limits
- Do I inform parents of the minor?



Pitfalls

- Make claims of misconduct a priority.
- Plan out the investigation needed.
- Be familiar with the policies you have.
- Seek legal advice
- Document and protect your documentation.





Action Steps

1. Develop a relationship with an employment attorney.
2. Periodically review your employee policies.
3. Develop and conduct a proper HR investigation when faced with a legally consequential complaint or misconduct.
4. Prepare and finalize documentation of an HR Investigation.

Questions?

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