

## **Investigation and Defense of Employment Claims Against Municipalities and Public Officials**

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### **EMPLOYMENT DISCRIMINATION LAWS OVERVIEW**

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, applies to private sector; federal, state and local governments; and certain education institutions.

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, applies to private sector, federal, state and local governments (including school districts).

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 *et seq.*, applies to private sector; state and local governments; and certain education institutions.

The Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, applies to federal government and certain federal contractors and subcontractors.

The Civil Rights Act of 1871, 42 U.S.C. §1983, can be invoked whenever a state or local government official violates a federally guaranteed right, such as the prohibition of public sector employment discrimination based on race, color, national origin, sex and religion.

Article 15 of the New York Executive Law, known as the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 296(1)(a).

The New York City Human Rights Law (“NYCHRL”), N.Y.C. Admin. Code § 8-107(1)(a).

### **TYPES OF UNLAWFUL HARASSMENT**

- A. Quid Pro Quo Sexual Harassment
- B. Hostile Work Environment Sexual Harassment
  - 1. Managers/Supervisors
  - 2. Co-Workers
  - 3. Outside Contractors
  - 4. Clients

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C. Other Types of Unlawful Harassment

1. Race/Color
2. National Origin
3. Religion
4. Age
5. Disability

**LIABILITY FOR UNLAWFUL HARASSMENT**

- A. Employer Liability
- B. Individual Liability
- C. Doctrine of Qualified Immunity

**PREVENTATIVE MEASURES**

- A. Anti-Harassment Policies and Complaint Procedures
- B. Managerial and Employee Training Programs
- C. Anti-Retaliation Policy

**CONDUCTING THE INVESTIGATION: TIMING**

- A. Employer has an obligation to respond “promptly”
- B. Any reasons for delay should be documented

**SELECTING THE INVESTIGATOR**

- A. Internal v. External Investigators
- B. Attorney as Investigator
- C. Co-investigators

**ESTABLISHING AN INVESTIGATION AGENDA**

- A. Outline areas of investigation fact-finding
- B. Identify “material” and secondary witnesses
- C. Obtain and review available documentary evidence

**PLANNING THE WITNESS INTERVIEWS**

- A. Outline the allegations based on Complainant’s version of the facts
- B. Identify major issues to be investigated
- C. Prepare introductory comments to use for reference/uniformity
- D. Prepare outline of issues and questions for each witness
- E. Do not prejudge either party’s position based on prior experiences, potential liability, etc.
- F. Consider representational issues: attorneys, union, other representatives

## **CONDUCTING THE INTERVIEWS**

- A. Advise witnesses that they are protected from retaliation
- B. Use open-ended questions followed by specific questioning
- C. Get as much detail as possible
- D. Be careful of hearsay and rumors
- E. Limit number of people who are kept informed of investigation findings

## **INVESTIGATION DOCUMENTATION**

- A. Take notes throughout the interview process
- B. Finalize notes for investigation file as soon as possible after interview
- C. Maintain outline of allegations and defenses and supplement as necessary
- D. Keep track of any unsubstantiated allegations and facts in dispute for follow-up

## **FOLLOW-UP INVESTIGATION**

- A. Identify outstanding issues and factual allegations
- B. Determine if any additional witness interviews are needed
- C. Determine if additional fact-finding needs to be conducted (*i.e.*, review of documents, computer hard drives, e-mails, etc.)

## **INVESTIGATION REPORTS**

- A. Summarize Complainant's allegations and Target's responses/defenses
- B. List witnesses, dates of interviews, findings, documents reviewed
- C. Identify any corroborating evidence for Complainant or Target
- D. Identify fact-finding ambiguities and unresolved issues
- E. Draft neutral, objective, and thorough fact-finding report
- F. Do not include privileged conversations or documents
- G. Bear in mind that the report will be discoverable should litigation arise

## **POST-INVESTIGATION RECORDKEEPING**

- A. Assemble final investigation file
- B. Follow any record-retention rules
- C. Maintain appropriate confidentiality file and report

## **ANALYSIS AND CONCLUSIONS**

- A. Make final determination re Complainant's allegations and Target's responses/defenses (avoid he said/she said conclusions, if possible)
- B. Analyze potential liability and defenses, including any claims by Target
- C. Review appropriate remedies, if any, such as discharge, discipline, training
- D. Communicate with Complainant and Target as to the investigation's outcome