

Expert details how to conduct lawful employee misconduct investigation

Running a college human resources department is a constant balancing act, and nowhere is this more true than employee misconduct investigations.

HR must protect the rights of the victim and the accused and go to great lengths to avoid lawsuits.

The good news is, there are lawful ways to investigate harassment and discrimination complaints, according to **Michael Johnson**. You could reduce harassment on your campus — and avoid liability — if you follow Johnson's advice. Johnson is a former **Justice Department** attorney and a managing director of **Brightline Compliance LLC**, a Washington-based firm that provides online and in-person training and public seminars on employment law topics.

"The most important thing is for employers to know when an investigation has been triggered," said Johnson, a former trial attorney in the **Justice Department's** Civil Rights Division. And when is that?

"As soon as the employer learns of harassment, and the law says that occurs whenever any supervisor learns of it," Johnson said.

HR professionals should investigate all claims and train all supervisors to report harassing behaviors "even if the victim doesn't file a complaint or the conduct does not meet the legal threshold for unlawful harassment," according to Johnson.

You should assure complainants that while the institution cannot promise to keep the matter completely confidential, it can promise to keep it as private as possible, he said. "Once a supervisor learns of harassment, the employer has a legal duty to stop it."

The next step is to choose an investigator who is unbiased; not in the chain of command of the complainant or the accused; and trained in investigative techniques.

Private employees have the right to have a coworker present during interviews. Some states and collective bargaining agreements extend this privilege to public employees, Johnson continued.

Many employers mistakenly believe they cannot conclude

Comprehensive policies deter liability

Former **Justice Department** attorney **Michael Johnson** said colleges could avoid litigation by:

- Implementing policies to cover all types of harassment. This includes harassment based on gender, race, color, national origin, religion, age, disability and sexual orientation.
- Ensuring policies include discipline for any harassing behaviors, even if those behaviors do not reach the "severe or pervasive" standard that is used in court.
- Training supervisors and employees to identify and report harassment. Employers who fail to provide training may lose their ability to raise an affirmative defense to harassment lawsuits and expose themselves to punitive damages. ■

Be sure you follow these steps

Michael Johnson, managing director of **Brightline Compliance LLC**, said there are seven steps college human resources professionals should take when investigating employee misconduct charges including:

1. Decide if "duty to investigate" has been triggered. Promptly respond to all harassment allegations.

2. Ensure that further harassment and retaliation do not occur. You may transfer parties to avoid contact, but don't involuntarily transfer accusers. You may place the alleged harasser on nondisciplinary leave with pay.

3. Choose the appropriate investigator. Choose someone unbiased and experienced who would be a credible court witness. Use an outside investigator when dealing with serious charges against high-ranking officials.

4. Conduct the investigation. Interview witnesses and warn against retaliation. Generally, the accused has no right to have an attorney present, but consider allowing it. The accused may have a coworker present in some circumstances.

5. Reach a conclusion. Assess credibility. Give the accused details of the allegations and a chance to respond.

6. Take corrective action. Choose discipline that will end harassment and keep it from recurring. Discipline imposed should be proportional to the offense.

7. Avoid a lawsuit from the alleged harasser. Provide due process, apply discipline consistently. Give information only to people with a need to know. Inform all involved about defamation lawsuit risks if they talk about the case outside of the confines of the investigation. ■

what happened with no eyewitnesses. But you should make credibility determinations by considering each person's logical consistency of story, demeanor when interviewed, motive to lie, and past record. "If you conclude harassment has occurred, take corrective action to stop the harassment and deter future harassment," Johnson said.

Brightline will host seminars on the seven steps for misconduct investigations on Nov. 18 in Houston, Nov. 19 in Dallas, and Nov. 20 in Phoenix.

More information on Johnson's training and public seminars is available at www.brightlinecompliance.com. ■

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