

A How-To Guide for Employee Discipline and Discharge

Pittsburgh Employment Law Conference

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THE RELUCTANT COMPLAINANT

- Employer should not agree to a Complainant's request for an "off-the-record" discussion
- Employer should not agree to a Complainant's request that no investigation be conducted
- Employer should not agree to a Complainant's request that his/her identity not be revealed to the accused
- Employer should not agree to a Complainant's request that the employer will not take disciplinary action against the accused
- Employer should attempt to put the Complainant at ease

INTERVIEWING THE COMPLAINANT

- Take any complaint seriously
- Ask specific questions to elicit specific details
- Slow the witness down
- Take each specific factual allegation, and obtain details relating to
 - Who?
 - When?
 - Where?
 - Who was present?
 - What was said/observed?
 - Is there any documentation?

INTERVIEWING THE COMPLAINANT (CONT.)

- Ask the Complainant to identify witnesses or other persons with knowledge
- Make sure to exhaust the witness's recollection; ask if there is anything else
- Ask for, but do not require, a written statement
- Ask the Complainant to contact HR again, if he or she remembers any additional relevant information

INTERVIEWING THE COMPLAINANT (CONT.)

- Inform the Complainant of the employer's policy against retaliation
- Ask, but do not require, the Complainant to maintain the confidentiality of the investigation
- Inform the Complainant that the employer will inform him/her of the results of the investigation

PREPARING FOR FURTHER INVESTIGATION AFTER INTERVIEWING THE COMPLAINANT

- Investigate promptly
- Determine who should participate in the investigation
- Don't "wing it"
- Review the allegations
- Review relevant policies
- Review relevant personnel files
- Create a consistent opening statement for use with witnesses
- Prepare an outline of questions to be asked
- Select a private and quiet interview space

OPENING STATEMENT FOR WITNESS INTERVIEWS

- Attempt to put witness at ease
- Explain reason for interview
- Explain importance of truthful and complete information
- Explain confidentiality rules that apply
- Explain employer's rules against retaliating and procedure for reporting retaliation

INTERVIEWING THE COOPERATIVE WITNESS

- Interview witnesses, before interviewing the accused
- Explain interview rules: reason for interview; importance of truthful and complete information; confidentiality rules; rules and procedures relating to retaliation
- Do disclose the specific allegations
- Initially, ask general questions designed to elicit information related to what the witness may know

INTERVIEWING THE COOPERATIVE WITNESS (CONT.)

- Proceed to more specific questions, to obtain information relating to the complainant's specific allegations
- Ask for facts underlying conclusory statements (e.g. – “she seemed uncomfortable”)
- Inquire regarding whether the witness is aware of any motives to lie
- Ask if there is anything else

INTERVIEWING THE UNCOOPERATIVE WITNESS

- Be persistent, when witness attempts to evade a question
- Inform the witness that he/she has an obligation to cooperate
- Inform the witness that he/she could be subject to discipline or discharge for failing to cooperate

INTERVIEWING THE ACCUSED

- Do not allow the accused to sidetrack the interview, by raising extraneous issues; stay on point
- The accused has the right to union representation, if the accused is represented by a union
- The accused has no right to legal representation
- The accused has no right to assert a Fifth Amendment privilege
- The accused has no right to be informed of the specific allegations against him/her

INTERVIEWING THE ACCUSED (CONT.)

- Start with general questions
- Proceed to specific questions
- Be persistent; do not allow the accused to avoid questions
- Ask about whether the complainant has motives to lie
- Warn against retaliation

MAKING THE DISCIPLINARY DECISION

- Conduct any follow-up interviews
- Obtain tangible evidence suggested by the interviews
- Review all of the evidence
- Consider the type and quality of the evidence (e.g. – personal observations v. mere rumor or gossip)
- Consider the quantity of the evidence

MAKING THE DISCIPLINARY DECISION (CONT.)

- Assess witness credibility
- Consider biases and motives of the witnesses
- Proof to an absolute certainty or beyond a reasonable doubt is not required
- Make the best judgment that you can based on the information obtained and on your experience and intuition

RULES OF DISCIPLINE

- Does the Company have a rule prohibiting the type of conduct in which the employee engaged?
- Does the Company inform employees of the existence of the rule?
- Do you believe that the accused has violated the rule?
- Was the investigation fair?
- Is the discipline that will be imposed consistent with the discipline imposed in the past on other employees who have violated the rule under similar circumstances?
- Does the discipline fit the offense?

LAST RULE OF DISCIPLINE

- The Ultimate Question – Would the employee have been discharged even if the employee was not
 - Active in the union?
 - In a protected category (race, color, religion, sex, national origin, age, disability, etc.)?
 - Someone who complained about discrimination or harassment?
 - Returning from FMLA leave?
 - A “whistleblower?”

REMEDIES

- Determine corrective action or remedial measures
- Consider policies and practices
- If issuing corrective action, remember that the purpose of that action is to
 - Deter the employee and others from engaging in similar conduct in the future
 - Establish a basis for more severe discipline, if the employee engages in further misconduct
 - Communicate to employees that certain types of conduct are unacceptable
 - Help the employer avoid liability, if the employee should engage in further misconduct

ARRANGING FOR THE TERMINATION

- Review and comply with any employer policies relating to termination
- Review any employment contracts that may restrict the right to terminate, or that may require the payment of severance pay in the event of termination
- Consider whether a separation agreement should be offered
- Consider whether a termination letter should be provided
- Late in the workday is usually preferable

ARRANGING FOR THE TERMINATION (CONT.)

- Consider whether to conduct on-site, off-site, or by telephone
- Arrange for one or two witnesses
- Terminate the employee's access to the Company's computer system
- Terminate any cards providing access to the Company's facilities
- Arrange for security, if there is a concern for any violence or other disturbance

TERMINATION MEETING

- Be direct
- Provide reason
- Rely only on the real reasons for termination
- Rely only on reasons that can be substantiated
- Do not “pile on” with trivial reasons
- Do not debate the employee as to the propriety of the discharge
- Deny any unlawful basis for the discharge, if the employee asserts an unlawful basis

TERMINATION MEETING (CONT.)

- Respond professionally to any hostile or abusive comments from the employee
- If the employee threatens to sue, advise the employee that the Company has the right to terminate the employee's employment, but that the employee has the right to seek legal representation regarding the employee's termination
- Do not commiserate with the employee
- Avoid humiliating the employee; allow him/her to leave with dignity
- Retrieve any Company property and business documents from the employee

TERMINATION MEETING (CONT.)

- Remind the employee of any confidentiality, non-competition, or other post-employment obligations
- Thank the employee for his/her service and wish the employee well
- Allow the employee to retrieve his/her personal belongings, or arrange for them to be delivered to the employee

QUESTIONS?

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THANK YOU

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