

Investigating Staff Sexual Misconduct with Offenders

Module 14:

HUMAN RESOURCES ISSUES IN INVESTIGATIONS OF STAFF SEXUAL MISCONDUCT

Developed by the NIC/WCL Project under NIC
Cooperative Agreement #06S20GJJ1

Possible Focus Topics

- Reference checks for employees who leave voluntarily rather than wait for results of investigation into alleged sexual misconduct
- Searches of employees' persons and bags, etc.
- Video surveillance of employees
- Off-duty conduct rules

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REFERENCE CHECKS

The "On the record" vs. "Off the record" Distinction

Relevant Legal Standards: Defamation

- Making of false and unprivileged statements that injure reputation
- There is a qualified privilege for employment references
 - Applies as long as no bad faith or bad intent in giving the reference
- However, still end up in court engaged in expensive litigation, because bad faith and truthfulness of statement end up getting connected

Former Employers' Duty of Care

- Employers owe a duty of care (to clients and possibly others) for *current* employees, who are agents, but not for former employees
- Therefore, there is no recognized obligation (yet) on the part of former employers to warn future employers about “bad apples”
 - This may start to change through legislation and case law

Combination of these Legal Rules Push to Following Conclusion

- Best not to give bad references for former employees
- Failure to give good reference to some employees may also create defamation claim, so
- HR counsel often tell employers to do no more than confirm dates and positions of employment through official channels

Reference Checks: Waivers

- Employers increasingly are using waiver forms in which job applicant agrees to waive all legal rights based on reference given; applicant must present this to former employer
- Blanket waivers are less likely to be upheld than ones applying to a particular job prospect

Non-official Reference Checks

- Nonofficial, back channel communications preferred but these cannot be written down or invoked later in explaining why an applicant did not get the job, which raises its own set of problems

The Legal Squeeze: Negligent Hiring Doctrine

- Employer may be held liable for negligence in failing to discover dangerous propensities of an employee
- Must check available public records for problems before hiring and must *attempt* to check former references

EMPLOYEE SEARCHES AND SURVEILLANCE

The Balancing Test

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Public Employer Issues

- Provisions of federal and state Constitution apply
 - [1st Amendment - freedom of association]
 - 4th Amendment – privacy, surveillance
 - 5th, 14th Amendment – due process, equal protection
- Balancing test – courts will weigh intrusion on employee's constitutional rights against weight of employer's interest

Employee Surveillance

- Key issues under balancing test is "reasonableness":
 - Notice
 - Methods
 - Random vs. targeted
 - Objective cause
 - Balance between intrusiveness and employer need

Privacy

- “Reasonable expectation of privacy”
- Depends heavily on work context
 - Corrections officers working in secured areas have low expectations of privacy
 - Probation officers and others working in the community may have higher expectations of privacy
 - E.g., Personal or apparently “personal” cars
 - Extremely intrusive searches such as body cavity searches need more justification
 - Urine drug tests okay

Proactive Steps: Employee Surveillance

- Provide general notice about employee surveillance methods
- Restrict surveillance methods to those reasonably necessary
- Use even-handed procedures for selecting surveillance targets

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Employer Interests that Can Support Off-Duty Conduct Rules

- Interests in on-the-job performance
- Interests in off-the-job conduct that implicates officer's fitness for duty
- Interests in public reputation of correctional institution

Litigation Results

- Off Duty Conduct Rules Generally
 - Many court cases involving police and corrections officers uphold policies regulating off-duty conduct
 - E.g., disorderly conduct, association with criminal activities, places or persons, etc.

QUIZ: WHAT'S OKAY?

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What's Okay #1?

- Termination of a state corrections officer who was married to a man who was subsequently incarcerated in the state prison system for a felony

No

Yes

What's Okay #1?

- Termination of a state corrections officer who was married to a man who was subsequently incarcerated in the state prison system for a felony

No

Yes



What's Okay #2?

- Termination of probation officer for buying a car at a dealership where probationer under her supervision worked (though he was not involved in the sale?)

No

Yes

What's Okay #2?

- Termination of probation officer for buying a car at a dealership where probationer under her supervision worked (though he was not involved in the sale?)

No

Yes



What's Okay #3?

- Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction?

No

Yes

What's Okay #3?

- Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction?

No

Yes



What's Okay #4?

- Denial of probation officer's request to attend baptism of child of longstanding friend whose older son had been placed on probation?

No

Yes

What's Okay #4?

- Denial of probation officer's request to attend baptism of child of longstanding friend whose older son had been placed on probation?

No

Yes



Litigation Results for No Contact Policies

- Courts of appeals have tended to uphold policies that prohibit corrections officers from contact with current or former clients in light of the security interests involved
 - There are a few contrary trial court decisions with specific facts
 - This is an evolving area of the law
 - Good, sound, well thought out-policies are best protection
 - Think through the connection between rules and policies and the goals or interests being enforced

Union Issues

- Contractual obligations created through collective bargaining agreements (CBAs)
- Proactive: review CBAs for inconsistent provisions and work to reconcile

Modifying Inconsistent CBA Provisions

- Best option: Rely on Management Rights clauses
 - If new or expanded policy is presented to union reps and they don't object, good argument exists that the policy change was within the scope of management rights

Modifying Inconsistent CBA Provisions

- Second best options
 - Request mid term modification
 - Bargain for changes at contract renewal
- Both are less ideal options because they require trading

Investigations

- Union representation – Weingarten rights
 - Employee has right to have union rep. present during interview
 - Role of the union rep. is to facilitate the process and help the employee understand what is going on

Investigations

- Union rep. may not obstruct proceedings and may be asked to leave if he or she is doing so
- Good, well trained union rep. can facilitate the process; it is worth investing energy in developing good relationships with union reps.

Arbitration

- Both sides have the right to legal representation and to present evidence
- Employer may not interfere with right of employees to testify at arbitration hearing
- Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court

Union Duty of Fair Representation

- Unions are legally required to represent all of their members fairly (even if they think the member is guilty of misconduct, and even if they think the misconduct is reprehensible)
- Unions have an interest in eliminating “bad apples” from their midst, just as management does
- Vigorous union advocacy on behalf of an accused employee does not mean the union believes the employee does not deserve discipline or termination

Key Issues in the Union Context

■ Proactive

- Dealing with the Union in making policy changes and collective bargaining agreement modifications

■ Reactive

- Dealing with the Union in investigations
- Dealing with the Union in grievance and arbitration proceedings concerning employee discipline/termination

Proactive Steps in Union Context

- Run training sessions, which include clear statement of disciplinary rules
- Give union policy statements on disciplinary procedures for staff sexual misconduct
- Review collective bargaining agreement for inconsistent terms; request modifications if necessary
- Assume and expect professionalism by union reps.; understand their constraints and duties

CONCLUSIONS AND GENERAL CONSIDERATIONS

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Proactive vs. Reactive Thinking

- Proactive: What is Ideal
 - Designing policies
 - Screening at hiring stage
- Reactive: Dealing with the here and now
 - Investigations
 - Discipline and termination of employees

Employment Context

- Different legal considerations apply depending on whether you are:
 - Public or private
 - Public (government) employer has many issues to think about arising from constitution and federal/state law
 - But for private facility or private sub-contractor, “employment at will” is the norm
 - Union or nonunion
 - Union environments lessen employer flexibility, but there are ways to work *with* unions on these issues
 - In all contexts, anti-discrimination laws apply

Sex/Race Discrimination Charges

- Can be based on sex, race, nationality, religion, or disability or age (for over 40 y.o.)
- Plaintiff must show that employer treated him or her differently than others similarly situated but of a different sex, race, national origin, or religious category
- This is hard to do; most discrimination cases are lost and most lawyers hesitate to file beyond administrative level without very strong evidence
- Pretext: is the employer's stated reason the REAL reason?

To Protect Against Successful Discrimination Cases

- Maintain consistency in treatment across cases, incidents, and employees, and review cases for consistency
 - Individual discretion by varying supervisors can be problematic
 - Unstated rules – e.g., credit for longstanding clean record – can also be problematic; either make the rule an explicit one or don't use it
- Contemporaneous and clear articulation of reasons for employment actions

To Protect Against Successful Discrimination Cases

- Maintenance of detailed personnel files that include contemporaneous documentation of problems, even relatively minor ones
- These files should be treated as confidential (secured access) with access rights limited to those with real reason to need them

Consistency Makes Good Policy Proactively

- Training supervisors
- Minimizing managerial discretion
- Treat like cases alike
- Consistently enforce disciplinary rules

Consistency Makes Good Policy Proactively

- Maintain up-to-date personnel files
- Keep contemporaneous documentation of all infractions, even minor ones
- Protect employment information from general discussion

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