Legal Issues in Human Resources Management

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Overview

• Five basic steps to remember
• Evolving legal principles
• Settlements
Five Steps To Remember

- Ask basic questions
- Spot issues
- Develop the facts in context
- Call on resources
- Follow through

Ask Basic Questions

- Is this a UC employee?
- Has the matter been resolved?
- How long ago did this happen?
- Has anyone else been notified?
- Is this employee disabled?
- Does this employee qualify for leave?
Ask Basic Questions

• Is there a Whistleblower/False Claims Act issue?
• Is there a Workers’ Compensation claim?
• Should we do a formal investigation?
• Is there a simple way to fix this?

Spot Issues

• Is there a possibility of workplace violence or a security issue?
  – Review security and safety procedures
  – Reiterate and reinforce policies about discrimination, harassment and retaliation
  – Review leave policies
Spot Issues

• References
  – Must you disclose information?
  – Five things to remember:
    • T is for Truth
    • E is for Evidence
    • R is for Respond to a request
    • M is for Malice: not allowed
    • S is for Scope

• References
  – Noel v. River Hills Wilsons, Inc. (2003). 113 Cal. App. 4th 1363 Incorrect information given in a reference check is not actionable where the mistake was inadvertent error and there was no evidence of malice
Spot Issues

• Disability rights laws
  – Federal Americans with Disabilities Act (ADA)
  – Cal. Fair Employment and Housing Act (FEHA)
  – Workers’ Compensation
  – Privacy Interest

Spot Issues

• Disability rights laws
  – General principle: Employer may not discriminate against a qualified individual with a physical or mental disability
  – AB 2222 dramatically changed FEHA to liberalize the standards for disability rights under state law
Spot Issues

• Disability rights laws
  – Mental/physical disability need only “limit” a major life activity, not “substantially limit”
  – Major life activities include working, (including a “particular employment”), studying and even social activities

• Disability rights laws
  – California legislature intended to eliminate the duration element to qualify a condition as a disability under AB 2222
  • Diaz v. Federal Express
Spot Issues

• Disability rights laws
  – Pre-placement medical exams
  – Fitness for duty

• Disability rights laws
  – Is individual disabled?
  – Is individual qualified to perform essential functions of the job?
  – Did individual request an accommodation or do we know that one is needed?
Spot Issues

• Interactive Process:
  – Direct communication with employee (representative) to explore possible accommodations
  – Consideration of any accommodation requested by the employee
  – Offer of a reasonable and effective accommodation, if one exists, without causing the employer undue hardship

• Interactive Process:
  – Identify barriers to equal opportunity, identifying and distinguishing between essential and nonessential job tasks
  – Assess the reasonableness of each in terms of effectiveness and equal opportunity
Spot Issues

• Interactive Process:
  – Implement the accommodation that is most appropriate for the employee and the employer under all the circumstances. The decision is the employer’s ultimately

Humphrey v. Memorial Hospitals
(9th Cir. 2001) 39 F.3d 1128.
Spot Issues

• Interactive Process:
  – Reassignment to a “vacant position” is considered a reasonable accommodation. The employer must make an active effort, not just give the employee a list of vacant positions and tell the employee to apply.

Spot Issues

• Interactive Process:
  – Leaves of absence may be a reasonable accommodation
  – FAMILY AND MEDICAL LEAVE ACT (FMLA) AND CALIFORNIA FAMILY RIGHTS ACT (CFRA):
    • Threshold issues and notice - 1250 hours for eligibility

Spot Issues

First Amendment

• Statement made by public employees pursuant to their official duties are not protected under the First Amendment and such communications are not insulated from employer discipline
  – Carcetti v. Ceballos
First Amendment – Religious Speech

• Regulation of speech in the workplace by a governmental employer, religious or otherwise, is subject to the same balancing test under the First Amendment

**Berry v. Dept. Of Social Services**
(9th Cir. 2006) 447 F.3d 642

Spot Issues

• Harassment, Discrimination and Retaliation
  – Race, color, national origin, ancestry, sex, sexual orientation, physical and mental disability, age (over 40), gender identity and religious creed
Spot Issues

• Harassment, Discrimination and Retaliation
  – Under FEHA, the University is strictly liable for unlawful harassment by supervisors
  – No defense to liability
  – Possible defense to damages only under doctrine of “avoidable consequences.”
    *State Dept. of Health Services v. Superior Court*

Harassment

• Hospital can be liable for harassing conduct of independent contractor

• AB 1825 regulations adopted by the FEHC
Sex Discrimination

• With “Friends” like that . . . Cal. Supreme Court acknowledges that “talking dirty” in a creative environment can be an acceptable workplace practice
  38 Cal. 4th 264 (2006).

• 9th Cir. upholds makeup requirement for female employees
  Jesperson v. Harrah’s Operating Co.
  444 F.3d 1104 (2006)

Retaliation

• Retaliatory harassment by coworkers is actionable under Title VII.
  Jenson v. Potter, 485 F.3d 444 (3rd Cir. 2006)

• New standard for “adverse employment action”: Actions that are sufficiently harmful that they might “dissuade a reasonable worker from making or supporting a charge of discrimination”
  Burlington Northern and Santa Fe Railroad Co. v. White, 126 S. Ct. 2405;
Releases/Waivers

• Confusing release and covenant not to sue did not satisfy the requirement of a knowing and voluntary waiver under the OWBPA.
  
  Syverson v. IBM, (8/31/2006 – 9th Cir.)
  2006 U.S. App. Lexis 22504

• Cannot waive right to file EEOC Charge
  – May waive right to recover damages
  Tolbert v. Follett Higher Ed. Group, Inc.
  2006 U.S. Dist Lexis 11770

Releases/Waivers

• 10th Cir. broadens requirements for waiver of age discrimination claims – failure to conform to statutory requirements can make release ineffective as matter of law
  Kruchowski v. Weyerhaeuser
  446 F.3d 1090 (10th Cir. 2006)
Develop the Facts in Context

• Investigate
• Longevity is important!
• Look at the complete picture
• Analyze operational impact on your unit

Resources

• HR
• Risk Management/EHS
• Internal Audit
• AA/EEO Office – Title IX Officers
• Employee Relations
• Labor Relations
• OGC
Follow Through

• Inaction is a decision!
  – Candidly evaluate performance annually
  – Use progressive discipline

Settlements and Post-Mortems

• Why settle cases?
  – Are you right? Can you win? How will it play in Peoria?
  – In context, is the case worth the cost of litigation?
  – New Regents’ policy
Spot Issues

• HEERA
• CBA applicable to the unit employees
• Unfair labor practices
• Status Quo
• Strikes (Protected conduct)
• Fair Labor Standards Act

Labor

• Nurses who “assign” work to other employees may be “supervisors”
• Such supervisors do not have right to union representation or collective bargaining

Oakwood Healthcare, Inc.
348 NLRB No. 37