

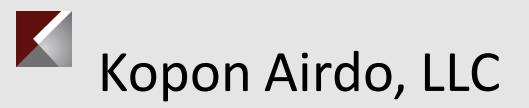
#### HOW TO CONDUCT A WORKPLACE INVESTIGATION

#### Investigating Allegations of Discrimination and Harassment

#### Webinar April 26, 2011







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#### INTRODUCTION



#### Federal Law: Title VII

#### > Title VII of the Civil Rights Act of 1964:

- Applies to employers with 15 or more employees
- Protected categories: race; color; religion; sex (including pregnancy); national origin; ethnicity; and genetic information
- Prohibits discrimination, harassment, retaliation, failure to accommodate (religion)



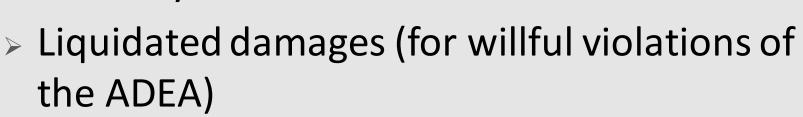
#### **Other Statutes**

- > Americans with Disabilities Act (ADA)
- > Age Discrimination in Employment Act (ADEA)
- > The Fair Labor Standards Act of 1938
- > State and local laws



#### Damages

- > Injunctive relief
- Back pay
- Front pay
- > Punitive
- > Attorney's fees







#### **EEOC Statistics**

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922
Race	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238	30,510	33,937	33,579	35,890
	36.2%	36.2%	37.3%	36.2%	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%	37.0%	35.6%	36.0%	35.9%
Sex	24,728	24,454	23,907	25,194	25,140	25,536	24,362	24,249	23,094	23,247	24,826	28,372	28,028	29,029
	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%	30.1%	29.7%	30.0%	29.1%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327	9,396	10,601	11,134	11,304
	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%	11.4%	11.1%	11.9%	11.3%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541	2,880	3,273	3,386	3,790
	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%	3.5%	3.4%	3.6%	3.8%
Retaliation — All Statutes	18,198	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555	26,663	32,690	33,613	36,258
	22.6%	24.0%	25.4%	27.1%	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%	32.3%	34.3%	36.0%	36.3%
Retaliation — Title VII only	16,394	17,246	17,883	19,753	20,407	20,814	20,615	20,240	19,429	19,560	23,371	28,698	28,948	30,948
	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%	28.3%	30.1%	31.0%	31.0%
Age	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548	19,103	24,582	22,778	23,264
	19.6%	19.1%	18.3%	20.0%	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%	23.2%	25.8%	24.4%	23.3%
Disability	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,893	15,575	17,734	19,453	21,451	25,165
	22.4%	22.4%	22.0%	19.9%	20.4%	18.9%	18.9%	19.4%	19.7%	20.6%	21.4%	20.4%	23.0%	25.2%
Equal Pay Act	1,134	1,071	1,044	1,270	1,251	1,256	1,167	1,011	970	861	818	954	942	1,044
	1.4%	1.3%	1.3%	1.6%	1.5%	1.5%	1.4%	1.3%	1.3%	1.1%	1.0%	1.0%	1.0%	1.0%
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#### **Employment Law**

## CONDUCTING WORKPLACE INVESTIGATIONS



## When To Investigate?

- Oral and written complaints.
- Supreme Court Decision March 22, 2011
  - Kasten v. Saint-Gobain Performance Plastics Corporation

## PART II: AFFIRMATIVE DUTY TO INVESTIGATE



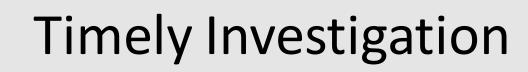
Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1998)

West v. Tyson Foods, Inc., 2010 WL 1507629 (6<sup>th</sup> Cir. 2010)

 Allegations or observations of discrimination/harassment *must* be investigated

# What triggers affirmative duty?

- > What to look for in employee complaints:
  - Bullying members of a particular class
  - Negative stereotypes
  - Slurs
  - Innuendos
  - Inequality



 Timeliness is crucial to avoid or limit liability



- Failure to investigate or delay in investigating could result in punitive damages
- > Deter further harassment/discrimination

## PART III: POLICY IN PLACE



## Policy in Place

- > Establish written policy
- > Policy must provide reporting mechanism
- > Must include anti-retaliation language
- > Circulate policy to all employees
- > Signed acknowledgement



## Policy Should Include

- General prohibitions
- Protected classes under state or local law
- > Specific sexual harassment prohibitions
- Employees' rights and responsibilities
- > Managers' responsibilities to report harassment



## PART IV: CONDUCTING THE INVESTIGATION



- > Identify individual to conduct investigation
  - Unbiased: HR person or supervisor who does not work directly with the parties
  - May not want to ask your attorney to investigate





### Scope of the Investigation

- Make conclusions regarding veracity of the complaint
- Determine whether there was a policy violation
- Make recommendations regarding discipline or other corrective action



## First Step of Investigation

> Interview complaining employee

- Complete lists of acts complained of
- Whether isolated incident or pattern
- Demeanor of employee
- Identify witnesses
- Corroborating evidence





#### Interviewing Witnesses

- > Consider interviewing witnesses prior to interviewing accused – get a full picture
- > Interview witnesses individually
- Maintain confidentiality to extent possible



#### Interviewing Accused

- Confront with general allegations
- Note response to allegations
- > Give accused opportunity to respond
- Extent and nature of interactions with complainant
- If denial of allegations, ask for facts suggesting motive for fabrication



#### **Gather Additional Evidence**

#### Search for supporting documentation or other evidence to corroborate allegations





## Making Conclusions

- > Things to consider:
  - Credibility of parties and witnesses
  - Strength of evidence
  - Factual conclusions
  - Unresolved factual issues
  - Whether violation of company policy occurred

### PART V: DOCUMENTATION

Document Document Document!

> Document each step of the investigation

- If you receive a complaint orally, draft a memo
- Draft memos of interviews of each party and witnesses





## **Draft Report of Findings**

- Factual findings regarding each issue
- Dates of interviews and other steps taken
- Critical information from interviews
- Focus on policy violations
- Actions taken





 Document any and all disciplinary action and maintain in employee's personnel file

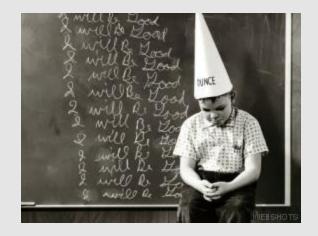


#### PART VI: REMEDIAL MEASURES



## **Types of Discipline**

- Apology
- Verbal reprimand
- Written reprimand
- Suspension
- Discharge



## Discipline

- Factors to consider in determining appropriate discipline
  - Egregiousness of conduct
  - Prior complaints
  - Prior discipline
  - Prevent harassment from recurring

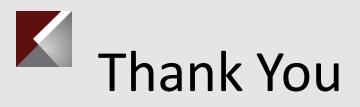


- Re-circulating policies
- Separate complainant and accused
- Training for accused employee
- Training for all employees
- Employee Assistance Program



#### Questions





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