



AVOIDING EMPLOYEE LAWSUITS: MANAGING SEXUAL HARASSMENT, HIRING, AND FIRING ISSUES IN THE WORKPLACE

By: **Kristin R.B. White, Esq.**

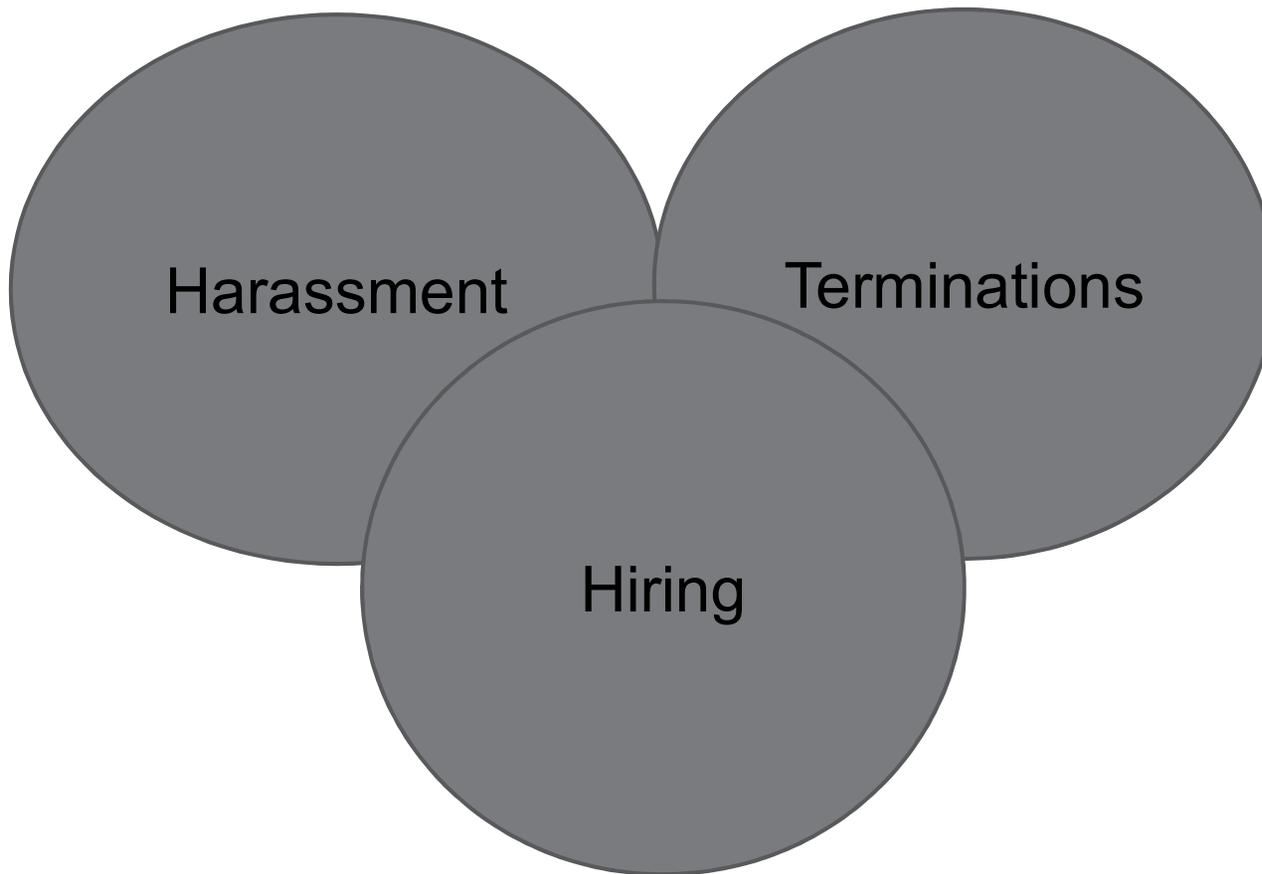
1099 18th Street, Suite 2150, Denver, CO 80202

Phone: (303) 390-0006 • Fax: (303) 390-0177

E-mail: KWhite@jacksonkelly.com • www.jacksonkelly.com

Client Focus | Industry Insight | National Reputation

EMPLOYEE LAWSUITS





Managing Sexual Harassment Issues

COMMON TYPES OF HARASSMENT

- Quid Pro Quo (meaning, “this for that”)
 - ▣ Using the power of your position to obtain sex
- Hostile Environment
 - ▣ Making the workplace hostile to women or another protected class like race, religion, age or disability
- Third-party sexual harassment
 - ▣ Vendors, contractors, customers

HOSTILE ENVIRONMENT HARASSMENT

- unwelcome conduct
- that unreasonably interferes with an individual's job performance
- or creates an intimidating, hostile or offensive working environment
- for a protected class



HOSTILE ENVIRONMENT HARASSMENT

- Must be “sufficiently **severe** or **pervasive** to alter the conditions of the victim’s employment and create an abusive working environment.”
 - ▣ If more severe (e.g. sexual assault), need not be as pervasive
 - ▣ If less severe (e.g. ethnic jokes), must be more pervasive
- Must be **unwelcome**.



WHAT IS WELCOME CAN CHANGE

- What is welcome to you may not be welcome to others
- What is welcome from someone else may not be welcome from you
- What was welcome yesterday may not be welcome today
- What is welcome in one setting may not be welcome in another setting

IT'S NOT JUST ABOUT WOMEN ANYMORE

- Heterosexual harassment is not the only form of sexual harassment
 - ▣ Homosexual harassment
 - ▣ Bisexual harassment
 - ▣ Non-sexual harassment (if based on gender)
- The accusers are not always women—and the accused are not always men
 - ▣ Just the most common scenario



KEYS TO DEFENSE

1. A good harassment policy
2. Employee training
3. A thorough investigation of all complaints



WHAT MAKES A GOOD SEXUAL HARASSMENT POLICY?



- It is in your handbook and was reviewed at the time of hire
- Prohibits discrimination and harassment on the basis of race, color, sex, religion, age, national origin, disability, gender identity, sexual orientation, or any other legally protected status under federal, state or local law.
- Defines harassment and gives specific examples.
- Provides ways to report harassment.
- Requires supervisors who receive a complaint to report it to HR immediately.

WHAT TO INCLUDE IN SEXUAL HARASSMENT TRAINING?

- Perform regularly
- Make sure to include supervisors
- Review policy
- Document training



HOW TO CONDUCT A SEXUAL HARASSMENT INVESTIGATION

- Ensure no retaliation for honest participation
- Ensure confidentiality to the extent possible
- Select Investigator
- Create a plan and develop questions
- Interview all relevant witnesses including accused
- Decision
- Document

THERE IS MORE THAN JUST SEXUAL HARASSMENT

- Sexual harassment is not the only unlawful harassment
 - ▣ Race/color
 - ▣ National origin
 - ▣ Disability/blindness
 - ▣ Religion
 - ▣ Age
 - ▣ Sexual orientation
 - ▣ Veteran status
 - ▣ Pregnancy



AND ONE MORE THING...RETALIATION

- Retaliation: 42,018 (45.9 percent of all charges filed)
- Race: 32,309 (35.3 percent)
- Disability: 28,073 (30.7 percent)
- Sex: 26,934 (29.4 percent)
- Age: 20,857 (22.8 percent)
- National Origin: 9,840 (10.8 percent)
- Color: 3,102 (3.4 percent)
- Equal Pay Act: 1,075 (1.2 percent)
- Genetic Information Non-Discrimination Act: 238 (.3 percent)

These percentages add up to more than 100 because some charges allege multiple bases.



Firing Process

ANATOMY OF A DISCHARGE

- Investigation
- Decision
- Documentation



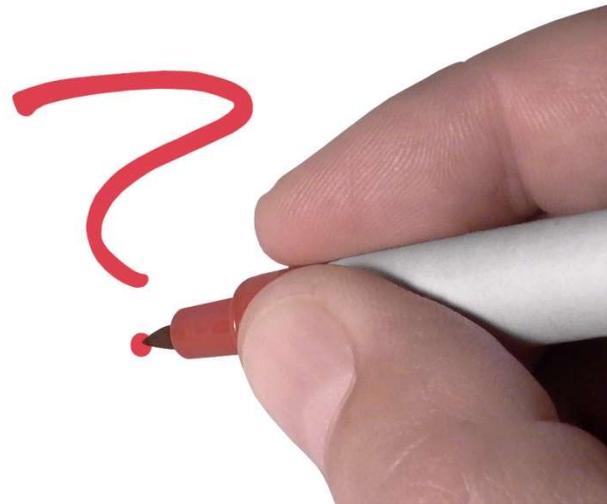
THE DECISION MAKING PROCESS

- Who needs to be involved in the decision to terminate the employee's employment and what is the role of each person?
- Does each person have all the information he or she needs to make an decision?
- Is there a consensus that discharge is appropriate?



SOME BASIC CONSIDERATIONS

- What is the employee's length of employment?
- What do the employee's past performance appraisals show?
- Is there any record of discipline or counseling?



ADDITIONAL CONSIDERATIONS

- What is the timing, especially as to workers' compensation, FMLA and other claims?
- Is the employee temporarily totally disabled under the Workers' Compensation Act or seeking reinstatement after such disability?
- Is the employee returning from leave under the FMLA?
- Are any absences at issue covered under the FMLA or workers' compensation?



ANYTHING ELSE?

- ❑ Is the investigation complete, including written statements from witnesses?
- ❑ Was the employee given chance to explain the problem?
- ❑ Is the proposed action consistent with personnel policies?
- ❑ Was the employee aware of the rules or standards he or she is charged with violating?

THERE'S MORE?

- Does the punishment fit the crime?
- Are there mitigating circumstances?
 - ▣ Has the employee been given recent merit increases, awards or promotions?
 - ▣ Is his past record otherwise exemplary?
- Is a progressive disciplinary policy or a collective bargaining provision relevant?



WHY NOW?

- Why did you decide to terminate the employee now?
- What triggered the decision to discharge the employee?
- How long have you tolerated the behavior?
- What is the difference this time?



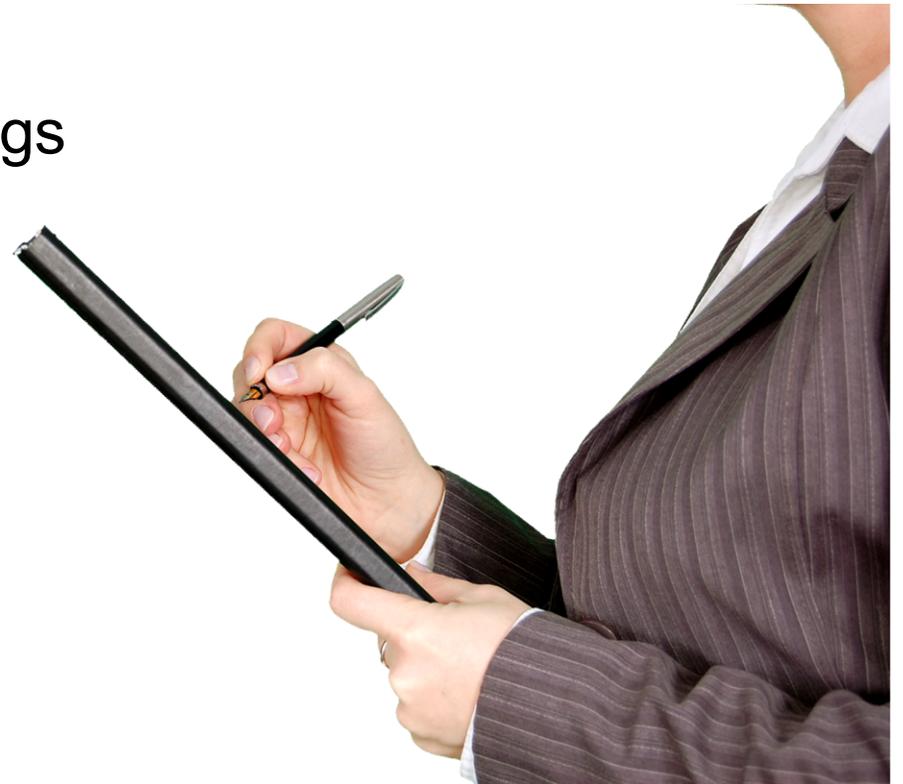
THE BIG PICTURE

- Make sure that you understand all the factual circumstances leading up to the decision and all the issues surrounding the decision.
- Always put everything in context.



WHY YOU SHOULD DOCUMENT

- Provides defense in litigation
- Prevents later denials
- Aids your memory
- Minimizes misunderstandings
- Reveals patterns



TIPS FOR DOCUMENTING DISCHARGE

- Complete in timely manner
- Define the problem
- Explain how it affected the company
- Be accurate
- Use explicit time frames
- Be consistent
- Be objective

BE SPECIFIC

- ❑ Bad behavior generally manifests itself in specific examples—identify and include them
- ❑ Absenteeism generally has a pattern
- ❑ Poor performance almost always can be documented chronologically—go through all the steps
- ❑ Date and sign



FAIRNESS IS THE KEY

- “At will” becomes something more when you are defending a lawsuit
- Bottom line: you need a reason to discipline or discharge an employee
- At the end of the day, a jury or judge will look at an employment decision and ask, “was it fair?”



TEN-STEP CHECKLIST FOR A GOOD FIRING

- ❑ 1. Employee violated reasonable expectation?
- ❑ 2. Employee aware of expectation?
- ❑ 3. Heard employee's side of the story?
- ❑ 4. Considered aggravating/mitigating circumstances?
- ❑ 5. Consistent with past treatment of similar conduct?
- ❑ 6. Considered "red flags" (protected class/protected activity)
- ❑ 7. Gotten second opinion / checked with HR?
- ❑ 8. Underlying facts can be proved?
- ❑ 9. Everything documented?
- ❑ 10. Does it seem fair and reasonable?



Hiring Process

HIRING PROCESS: GETTING A GOOD EMPLOYEE

- Thorough interviews
- Background check
- Post-offer, pre-employment physical
- Drug/alcohol testing



HIRING PROCESS: AVOIDING CLAIMS

Six Steps:

1. No solo interviews
2. No “forbidden” questions
 - prior workplace injuries
 - marital status
 - age
 - care for young children
 - disabilities



HIRING PROCESS: AVOIDING CLAIMS

3. No improper comments
 - Race, sex, national origin, religion, age, disability, etc.
4. No promises
 - “We’ll never have a layoff”
 - “You can work here as long as you want to”
 - “The benefits we have now are here to stay”

HIRING PROCESS: AVOIDING CLAIMS

5. Criminal convictions can't be absolute bar
 - Must be job-related
6. HR does its part
 - Clear disclaimer in application and handbook
 - Signed acknowledgment of handbook





PRE-EMPLOYMENT CHECKS

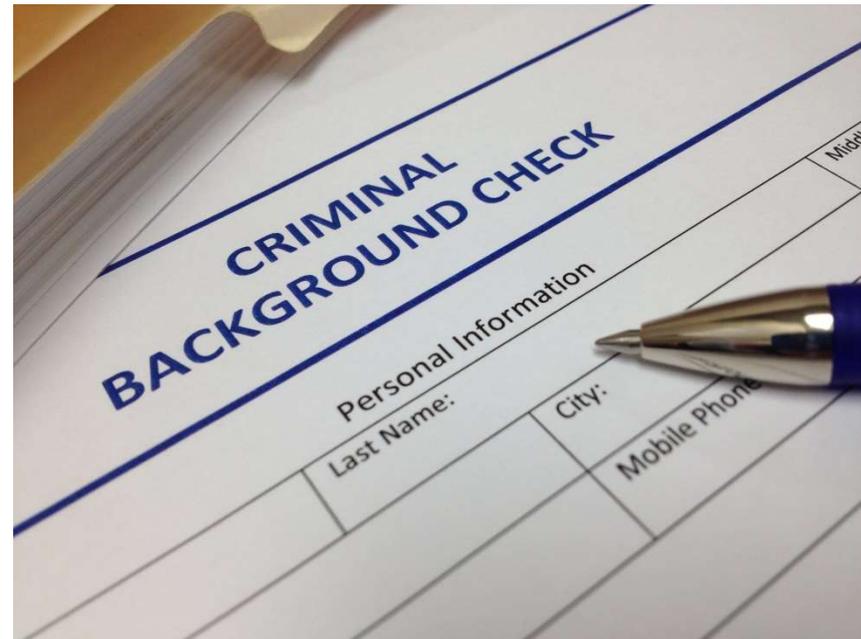
FAIR CREDIT REPORTING ACT

- Outlines procedures that must be followed when credit reports and criminal background checks are used for employment or other purposes
- Regulates collection, disclosure, and use of “consumer reports”
- Covers third-party background checks: reference checks, credit checks, and criminal record checks
- Statutory damages of \$100 to \$1,000 for each willful violation of the statute



EEOC GUIDANCE – WHY THE FUSS?

EEOC believes the use of criminal records to screen out applicants is a form of Disparate Impact Discrimination under Title VII



EEOC GUIDANCE

Two circumstances in which employers can meet the “job related and consistent with business necessity” standard:

- ❑ Employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards
- ❑ Employer develops a targeted screen
 - Considering at least the nature of the crime, the time elapsed, and the nature of the job
 - *Then* provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity

EEOC GUIDANCE – BEST PRACTICES

- Eliminate practices that exclude people from employment based on any criminal record
- Develop narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct



EEOC GUIDANCE – BEST PRACTICES

- Limit questions about criminal record to those for which exclusion would be job related for the position in question and consistent with business necessity
- Keep information about all criminal records confidential and only use for the purpose intended



INTERNET / SOCIAL MEDIA INVESTIGATIONS

- Employers often investigate the social media profiles of job applicants
 - Google search
 - Require applicants to “friend” them or give passwords to Facebook and other accounts
 - Hire a third-party to perform search



INTERNET / SOCIAL MEDIA INVESTIGATIONS

- Designate and train one individual in the company to conduct the internal social media searches and provide only applicable and relevant information to the decision-makers
 - ▣ Isolate the decision-makers from inappropriate information
- Do not request social media usernames and passwords
 - ▣ 21 States now prohibit employers from asking for this information, including Colorado

MEDICAL TESTS

- Medical examination = procedure or test that seeks information about an individual's physical or mental impairments or health
- Tests not considered a medical examination include:
 - Drug tests;
 - Physical agility tests and physical fitness tests
 - Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions
 - Voluntary medical exam as part of an employee health program
 - Psychological tests that measure personality traits such as honesty, preferences, and habits



MEDICAL TESTS

- Employer may require an applicant to undergo a medical exam which is job-related and consistent with business necessity
- Under ADA, employer cannot require an applicant to undergo an exam prior to making a conditional job offer
- However, employer can ask on application or in interview whether an applicant can perform the job functions with or without accommodation, and if so, how he or she would perform those duties



MEDICAL TESTS

- After an offer has been made, an employer can condition the offer on the successful completion of an exam if two conditions are met:
 1. Exam is applied uniformly to all entering employees in the same job category
 2. Medical info is kept confidential
- Keep private medical records separate from an employee's general personnel file to respect privacy and prevent inadvertent unlawful disclosure



DRUG TESTING

- Federal government requires testing by employers in a few safety-sensitive industries
 - ▣ Transportation, aviation, and contractors with NASA and the Department of Defense
 - ▣ Federal law does not otherwise require or prohibit drug tests.
- State and local laws govern whether an employer may test applicants and employees for drugs
- As a general rule, Colorado employers are permitted to require applicants and employees to take a drug test, and take adverse action against employees who test positive for illegal drugs.



For more information on these and other occupational safety and health topics, please visit:
<http://safety-health.jacksonkelly.com/>