

CHAPTER 3

THE ADVANTAGES OF A MANAGEMENT INQUIRY POLICY

Major Topics

- Reasons for putting a management inquiry process into place
- How a management inquiry process can be used to defend against actions
- The need to act promptly and appropriately

So why do agencies need another process or policy? There are several reasons. They include:

- making fair decisions;
- protecting employees;
- getting information to improve agency processes;
- conveying a message;
- fulfilling a requirement of some agreements (i.e., negotiated labor agreements); and
- providing the foundation for a successful defense in a third party proceeding.

I. FAIR DECISIONS

In most instances, the initiation of a management inquiry means that there is a suspicion of wrongdoing. If that suspicion is borne out, the agency should then take action against the purported wrongdoer. If the inquirer has gathered credible information, then the agency will have a firm basis on which to both decide the nature of the misconduct and to seek to prove it in a third party action. Even a cursory review of some third party decisions reveals the importance of better groundwork before taking action. For example, *Cook v. Army*, 105 MSPR 178 (2007) (removal of a flight simulator training instructor for conduct unbecoming/racial comment/appellant acknowledged but said he was quoting a police officer who had been reported in the news media as using that term); *Slater v. DHS*, 108 MSPR 419 (2008) (removal of police officer for "inability to perform essential duties of...position"/not proven/evidence that he could perform job).

Of course, we do not want you to get the impression that the only successful management inquiry is where there is evidence of misconduct. It is just as valuable to get a credible recommendation of no misconduct. You—the agency—have then laid to rest the suspicions of and allegations against an employees, or done all that you can to do so.

II. PROTECTING EMPLOYEES

As we mentioned earlier, and as evidenced by recent statistics, the most common EEO claim (and in our experience the number one management inquiry claim) is harassment. A prompt and fair inquiry seeks to limit harm from credible claims of harassment or other misconduct.

III. GETTING INFORMATION TO IMPROVE AGENCY PROCESSES

While learning how to improve agency processes is certainly not the principal objective of a misconduct management inquiry, although a management inquiry can be used outside the misconduct context, it is common, in our view, to uncover related information that can be valuable in assisting the agency to better manage its resources. You may come across information that reveals conflicts between employees that does not constitute misconduct but should be addressed.

IV. CONVEYING A MESSAGE

You want to communicate the message that you address serious matters promptly, and that you do not tolerate breaking the rules by supervisors, managers, or employees. A respectfully conducted, timely, fair, and consistently applied management inquiry seeks to make that point.

V. SOMETIMES REQUIRED BY AGREEMENTS

Occasionally, the agency's agreement with the union will require a pre-action investigation.

To the extent that any agency action is taken to arbitration, arbitrators sometimes apply what is known as the "just cause" standard or "7 questions." This test is used in discipline cases carrying a suspension of 14 days or less, but is not as applicable in adverse actions, which involve discipline of more than 14 days.

A test for judging disciplinary action, pronounced by an arbitrator in *Enterprise Wire* (46 LA 359, 1966 and 50 LA 83), asks the following:

1. Did management adequately warn the employee of the consequences of his conduct?
2. Was management's rule or order reasonably related to efficient and safe operations?
3. Did management investigate before administering the discipline?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. Were the rules, orders and penalties applied evenhandedly and without discrimination to all employees?
7. Was the penalty reasonably related to the seriousness of the offense and the past record?

Evidencing the importance of a pre-action inquiry, three of these "just cause" questions concern a management inquiry or investigation.

VI. PROVIDING THE FOUNDATION FOR A SUCCESSFUL DEFENSE

As we have suggested, many of the cases that warrant a management inquiry spin out of harassment allegations. Often these allegations have also been—or will be—raised with EEO. That is why we want to now spend some time describing the harassment principles that illustrate the importance of a management inquiry—principles that could provide a defense to EEO harassment claims.

A. COWORKER HARASSMENT

We must distinguish between harassment committed by a coworker and harassment committed by an employee's manager or supervisor. As to coworker harassment, an agency is responsible for acts of harassment in the workplace where the employer (i.e., supervisory and management employees) knew or should have known of the conduct unless it can show that it took immediate and appropriate corrective action. *Tom v. DHHS*, 01966875 (Oct. 1, 1998), 99 FEOR 3045 (quoting from 29 CFR 1604.11(d)). Stated another way, in order to avoid liability in coworker hostile environment harassment cases, the employer must show that it neither knew nor should have known of the alleged misconduct. Further, the employer must demonstrate that upon learning of the misconduct, prompt and effective remedial action was taken.

B. KNEW OR SHOULD HAVE KNOWN

Typically, an agency or employer will acquire direct knowledge (i.e., will be deemed to know) of sexual harassment through first-hand observation, by the employee's internal complaint to supervisors or managers, or by a charge of discrimination. Additionally, an employer will have constructive knowledge of any harassment if it "knew, or upon reasonably diligent inquiry should have known" of the harassment.

For example, if sexual harassment is openly practiced in the workplace or well known among employees, knowledge will be imputed to the employer. E.g., *Calunas v. USPS*, 01970547, 101 FEOR 1051 (Sept. 28, 2000) (even though employee did not complain, employer knew or should have known of harassment—sanitary napkin left at employee's work station and thrown away by supervisor—supervisor also gave employee nude cartoon and derogatory statements about women prevalent in workplace); *Campos v. Dept. of Justice*, 01943337, 96 FEOR 3200 (July 8, 1996) (Commission made finding of hostile environment sexual harassment, determining that the agency was aware of a possible problem and knew that "something was not right," even though complaints had not been made directly by the allegedly harassed employees). See also 29 CFR 1604.11(d).

C. PROMPT AND APPROPRIATE RELIEF

In a coworker hostile environment case, once an agency has knowledge (or should have had knowledge) of the harassment, it can avoid liability only if it takes prompt and appropriate action.

1. It Must Be Prompt

In terms of the promptness requirement, EEOC regulatory guidelines provide that the employer must "immediate[ly]" take remedial measures. 29 CFR Section 1604.11(d). Emphasis on the appropriate "immediate" nature of the agency response is reflected in EEOC cases.

***Strombeck v. USPS, 0120054349, 107 FEOR 216 (Jan. 30, 2007),
recons. den. 0520070346 (Apr. 10, 2007)***

The complainant, a distribution/window clerk, proved sexual harassment by a postal inspector. The complainant alleged (and proved) that the inspector called her into his office and began to hug, kiss, grope, and then pin her to the wall, despite her protests and demands that he stop, until she finally broke free and fled his office.

She complained the next day, September 4, 2003. Her supervisor immediately informed his manager who took immediate steps to separate complainant from the inspector and to obtain a written statement from complainant. That manager directed the inspection service to begin an investigation into the incident, and informed the postmaster of the situation. Shortly after that, the manager met with the accused postal inspector, advised him of the allegations, and ordered him to stay off the station's workroom floor until the investigation was complete.

A week after the incident, the agency's Workplace Intervention Analyst interviewed complainant, a co-worker, and the accused. The postal inspector initially denied the allegations, but when interviewed again by the Internal Affairs division on October 1, "he admitted that he had hugged complainant and grabbed her buttocks." Three months later, he was given a notice of proposed removal, which was to be effective on February 21, 2004. He resigned effective February 17, 2004. Except for a single attempt to contact the complainant, which occurred soon after the incident, there was no further contact between the accused and the complainant. Because of the prompt and effective action by the Postal Service, the EEOC imposed no liability against the agency.

***Roberts v. O'Neill, Secretary, Dept. of Treasury, Bureau of Engraving
and Printing, 01A12377 (June 11, 2002)***

In alleging race harassment, the complainant cited the following specific incidents. In October 1998, a coworker referred to the complainant as a "stupid f___ guard," in front of approximately 15 coworkers. During a safety meeting in April 1999, the coworker yelled, "get a damn supervisor who can speak English." It was apparent that the comment was being made in reference to an Asian supervisor. Finally, in July 1999, the coworker stated to others while holding a shoeshine box and pointing to complainant that, "black boys like [complainant] should be shining shoes for a living."

Among other findings, the EEOC determined that the agency took prompt and appropriate action. The supervisor, when the matter was brought to his attention, immediately reprimanded the coworker who had made the discriminatory remarks and recommended a 14-day suspension to his superiors. The coworker in question was suspended for seven days.

There was no evidence that the harassing comments against complainant recurred after the discipline was imposed.

Posey v. Potter, Postmaster General, USPS, 01986619
(July 10, 2001)

The complainant, a maintenance mechanic and an African-American, found a hangman's noose near his toolbox. The complainant's fellow maintenance workers, who were also present at the time of the discovery, commented negatively on the noose. One of the coworkers cut it down and threw it into the garbage. The complainant immediately went to the union office where he discussed the incident with his supervisor who recommended that he go to the Employee Assistance Office to see a counselor because he seemed upset. The supervisor advised the complainant to file an incident report. The supervisor checked up on the complainant later in the day, and finding that he was still upset, granted him administrative leave. The complainant then went home.

The next day, Employee Assistance Counselors met with the maintenance staff to discuss the inappropriateness of the noose.

After the complainant's supervisor was notified of the noose, he informed his chain of command. The maintenance manager ordered an investigation, which was conducted by managers on all three shifts. During the investigation, a Caucasian coworker on a different shift than complainant admitted that he tied the hangman's noose, explaining that he saw the rope tied into a slipknot and decided that he could tie the knot better. He claimed that he had did not think he did anything wrong, and that when he finished the knot, he simply placed the rope back where he found it, near the toolboxes. Three days after the incident, the coworker was issued a seven-day suspension. About three weeks later, the agency posted a notice explaining the agency's zero tolerance for violence.

Based on the above facts, the Commission agreed with the Administrative Judge that the agency had taken prompt remedial action.

In contrast, there are many EEOC cases that illustrate the failure of an agency to act promptly. Consider the following case.