MANAGEMENT'S ROLE IN DIMINISHING
THE RISK OF DISCRIMINATION CHARGES

BY

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MANAGEMENT:

As we all know, the media tends to report what is newsworthy, the unusual, the bizarre, and what sells. On a regular basis, the media reports claims of discrimination, but these cases are only the tip of the iceberg. No organization is immune to claims of discrimination; therefore, it is important for management to be proactive in minimizing the level of risk. This can be accomplished by having a strong commitment to Equal Employment Opportunity/Affirmative Action (EEO/AA) programs, a fair labor relation's policy, and by following and enforcing programs and policies that are in place.

In both formal and informal trainings, the writer has learned that management’s challenge is to create an environment that stimulates people in their jobs, fosters success, and meets organizational goals. From experience, the writer has found that it’s the competent, savvy supervisor who looks at problems as opportunities to make things better. The supervisor, who is prepared to deal with whatever problems come along, is one who uses his/her knowledge, training and experience to settle problems at the lowest level. "Things usually go right, notwithstanding the complex nature of the job because our good people think quickly, and rely on their experience and training to do the job right." \(^1\) I agree with this statement, and believe that for things to go right, the supervisor needs to follow and enforce established policies, practices, programs, and make timely use of expert resources in the organization. To do this the supervisor needs to maintain composure, while using good communication and negotiation skills to get the right information to the right people at the right times. All of these things combined give the supervisor power, and he/she needs to make timely and wise use of that power to minimize risk to the organization.

As a member of management (working in both generalist and specialized areas), in the public and private sectors, it has been the writer’s experience that when a supervisor takes a cavalier attitude about problems, the organization’s level of risk exposure increases. Why? Because, like a minor wound that can be controlled with basic first aid, when left unattended, it will fester to the point where the infection manifests itself in different forms that must be treated with something other than basic first aid. For example, if an employee repeatedly complains to the supervisor that

he/she doesn’t like to be referred to by endearing terms such as dear, honey, babe, and it continues, the supervisor can be held liable for harassment even though the intent was not to be offensive. Anyone can claim discrimination, even a straight, white male under 40. In the latter example, the employee has a sexual preference, he is a male, and he is white; therefore he has membership in at least three protected classes!

Squeamish supervisors who fail to document performance problems in performance evaluation reports or confirming memos, often do so because they don’t want to make waves for whatever reason. It’s these supervisors that knowingly or unknowingly raise the level of risk for the organization. Not surprisingly, when the supervisor wants to take adverse action against the employee, it immediately comes out that there is no documentation in the personnel file of any type of performance problem. At that point the personnel analyst will need to aggressively work to assist the supervisor in cleaning up the problem he has allowed to flourish by his/her failure to follow the organization’s policy on counseling, and proper documentation.

The writer has also been guilty of unintentionally putting off problems. For example, even though she had a problem that was in her office and she was subjected to the problem for almost three months, she failed to act until it was almost too late. When the writer walks into her office each morning, the first thing she does is turn on the lights, the computer, and the fan. A few months ago, her fan started to make a squeaking sound when she first turned it on, and after a minute or so, it would work just fine. Over the months, it became a challenge for the writer to turn the fan on as she tried to eliminate the noise. What she discovered, was that if she tilted the fan, it would lessen the time it squeaked. However, after a time, even this failed and the squeaking noise began to go on for five minutes or longer and it was getting louder, as if it were crying out for help. At about this time, others began to complain about the irritating squeaks emanating from the fan, and the writer was thinking of replacing the fan with a new one. However, as she was somewhat attached to the fan, she went to the expert in her building to ask whether she had any WD40 that might help eliminate the squeak. The writer’s expert replied that she did have WD40, but before she could add the lubricant she had to remove the protective basket to be able to properly examine the fan to investigate where the noise was coming from. As she took the fan apart, she noticed that one of the components was loose. She then added the lubricant and tightened and fastened everything, reattaching the protective basket covering to the front of the fan. Needless to say, the fan is once again purring happily and silently in the writer’s office. Had she taken the time to listen and investigate the first time she heard her fan make out-of-the-ordinary squeaking sounds, she would not have increased the risk of almost rushing to judgment to throw out a perfectly good fan! As managers, when we don’t make the effort to identify the real problem is, we run the risk of rushing to judgment.

The writer has observed that when an employee perceives that his/her concerns, are not being heard or not taken seriously, the organization ends up spending increased time, effort and expense to defend, or solve resultant bigger problems that often manifest themselves as increased absenteeism, Workers’ Compensation Claims, loss of production, low morale, divisiveness in the complainant’s work group, loss of respect for the supervisor, responding to a grievance and possibly going through an arbitration, as well as defending against allegations of discrimination, etc. In some cases where the supervisor has allowed the problem to needlessly escalate, it is not unusual to find that the organization is busy defending itself in all or most of these areas!
As the Diversity Services Coordinator for approximately 1,500 employees, the writer’s duties are to write, implement and monitor the Employment and Human Services Department’s EEO/AA Implementation Plan, and other EEO/AA programs. The writer advises and provides guidance to supervisors and managers and personnel staff regarding EEO/AA matters; she investigates and responds to internal and external complaints; she reviews, approves and monitors appointments, promotions, lateral reassignments for AA purposes; and she promotes diversity throughout the Department. The writer recently read an article about Jeremy Wu, the new Diversity Ombudsman for the Energy Department. In a recent visit to the Bay Area, he said, “I want to advance a workplace that is diverse, hospitable and productive. I’m not an advocate of the administration or an advocate for employees. I’m an advocate of the workplace.” The writer agrees that this should be the role of the Diversity/AA coordinator within the organization.

Whether Federal or State charges, the writer’s responsibilities are basically the same in the investigation process. Each investigation is time consuming and expensive for the organization. It has been the writer’s experience in both the private and public sectors that formal complaints usually occur after there has been an intentional or non-intentional breakdown in the communication process that causes the complainant to seek relief outside of the organization. Of course, some complaints, on the surface, appear to have no merit, but it takes thorough investigations, nonetheless, to ferret out those cases. A comprehensive, objective investigation is very important because a poor investigation may lead the organization to make the wrong decisions by rushing to judgment.

During the fall of 1999, the Equal Employment Opportunity Commission (EEOC) advised the County that with the increase of their response time to complaints (from 21 to 30 days), the EEOC would no longer grant extensions of time. Initially the writer had concern because up until then, she had routinely requested, and was granted, extensions to file her formal response.

Also as a direct result of the extended response deadline, the EEOC began to strongly promote their new mediation service: Alternate Dispute Resolution (ADR). Unlike the EEOC, the DFEH does not have a formal ADR process at this time. The writer underwent a crash course beginning the fall of 1999, via her active participation in four ADRs. As a result this year, both the writer and the Department’s attorney from County Counsel’s office presented a training to all of the County’s AA Coordinators to give them a first hand account of the ADR process, in preparation for the time they may be faced with such a process.

The ADR is promoted as an alternative to the traditional investigative or litigation process. The EEOC determines which cases are eligible for mediation; however, both parties must agree to the ADR mediation process. The ADR is free to both parties. If it

Andrea Widener, "Labs meet new diversity ombudsman," Contra Costa Times, 1 Apr. 2000, p. 3, cols. 4-6, and p. 4, col. 6.
is successfully mediated, then a Settlement Agreement is prepared and signed by both parties, and the case is closed.

It has been the writer's experience to take a diskette to the mediation with a shell of the Settlement Agreement with known information, in addition to legal sections and wording required by County Counsel's office. Once the Settlement Agreement is reached, the particulars of the settlement are added to the master document, and it's then printed and presented for signatures. In the three successful ADRs, the writer was allowed to use the EEOC staff’s computer and printer to prepare and print the Settlement Agreement documents.

When mediations are not successful, the writer's formal response deadline is tolled until 30 days after the ADR ends in impasse. If either side does not wish to participate in this process, the claim is investigated in the regular manner and the formal response deadline of 30 days is imposed.

A mediator (i.e., an EEOC staff member or a contractor employed by the EEOC) assists the parties to come to a resolution. The ADR process allows both sides to discuss the issues of the charge, clear up misunderstandings, identify the underlying interests and/or concerns, find areas of agreement, and ultimately to find a mutually acceptable resolution. This process is confidential. At the beginning of the mediation, the mediator tells all present that the information disclosed during mediation cannot be revealed to anyone, including other EEOC employees. An interesting sideline to this process is that while the EEOC takes the position that ADR sessions are not to be tape recorded or transcribed, and that notes taken during the mediation are to be discarded, in the four ADRs the writer has participated in since the Fall of 1999, she has yet to be requested to hand over her notes to the Mediator. Instead, both she and others who took notes were allowed to take their notes with them at the completion of each mediation. Each of the ADRs lasted approximately one day, whereas the time spent by the writer in conducting her investigation was time consuming. However, because the writer had already completed her informal investigation of each of those cases prior to finding out that charges had been filed with the EEOC, most of hard work was done, and it was simply a matter of being able respond to each formal charge, and attempting to work out a resolution that was satisfactory to both sides. Of the four ADRs, one ended in impasse, and the remaining three were settled.

The writer has found the ADR process to be satisfactory. To succeed, however, it is important that the person(s) representing the employer be familiar with the case (this means it is still necessary to investigate before the ADR takes place) and that the individual(s) have authority to resolve the dispute. Either side is allowed to bring an attorney to the ADR. In cases where the ADR does not succeed, the charge is investigated like any other charge; therefore nothing has been lost. To the contrary, time has been gained since the formal response time will be tolled until 30 days after the mediation ends in an impasse. In effect, this gives the employer the opportunity to gain a better understanding of the charge and to finalize the formal response. Until such time as a better method is found, the writer hopes that there will not be funding cutbacks that affect the established ADR mediation process in the years to come.
INVESTIGATIONS:

It’s important to understand that unfair treatment and discriminatory treatment is not the same thing: While an action may be unfair, it may not necessarily constitute illegal discrimination. “To prove that an employer discriminated against an employee, an employee must establish a causal connection between the employer's adverse action and the employee's membership in a protected class of individuals. A causal connection may result from either the employer's disparate treatment of the employee or the adverse impact of the employer's employment practices.”

While conducting investigations, the investigator must be polite, remain calm, and have a good understanding of employment laws, the organization’s agreements, past practices, policies and procedures, rules and regulations, and culture. Today, the cost of defending against a law suit involving an employee’s claim of employment discrimination can cost an employer well over $100,000 in legal and administrative fees, and this cost can quickly multiply upwards if the court finds the employer has discriminated. When a thorough, objective investigation is conducted, the organization’s chances for making the right decision is increased, as opposed to a poor investigation that may very well result in a faulty decision.

The writer has observed that when some employees begin to receive special attention from their supervisor regarding poor performance, or when they are undergoing progressive discipline, they sometimes claim unfair treatment and hint at discrimination, especially when they come to the realization that their jobs are in jeopardy. It is these employees that begin looking for ways to stop whatever process is leading them down the road to discipline, and perhaps termination. These employees will do whatever they can to stop from being disciplined. In these cases, the person responsible for monitoring and administering the progressive discipline should be consulting with experts within the organization who will be able to advise and guide them through the process.

There are also some employees who just want a sounding board and tell the writer that while they don’t like what's going on, they do not believe that it's happening because of who/what they are. During these discussions with the complaining employee, the writer listens and helps the employee to consider available options. The time taken with these employees is well spent, because often the employee just wants to vent while finding out what options he/she might want to consider (e.g., seeking assistance from the Employee Assistance Plan or from the HMO provider, talking to the supervisor about the problem, talking to their Union Representative, etc.). And, in some instances, even if the writer determines there is no basis for a discrimination complaint, the writer intercedes by helping the employee get past obstacles.

In all instances that come to the writer's attention, including those who initially only appear to want a sounding board, the writer nonetheless screens the complaint to

determine whether the complainant has identified and/or linked membership in a protected group; whether there is an employment decision which the complainant views as adverse, and whether the adverse decision came about because of the complainant's membership in one or more protected groups.

The writer provides complainants with information on the complaint process and a complaint form. Some employees elect to complete the complaint form, while others elect to make verbal statements that the writer then reduces to writing on the complaint form. Either way, the completed complaint form is reviewed for correctness, then signed and dated by the complainant. The writer prefers to have the complaint in written form for clarity, and because she finds that when the complainant knows he/she will be signing off on the written complaint, this usually provides the incentive to be more accurate in the description of the facts.

As recommended by experts, "employees should be made aware that questioning others about their statements to the investigator is prohibited, as is the disclosure to other employees of one's own statements to the investigator. Such conduct may be perceived as threatening or as pressure to conform one's statements to match a particular story." Therefore, after interviewing the complainant, as a precaution, the writer admonishes the person(s) alleged to have discriminated against the complainant, that an investigation will be taking place, and that it is illegal to retaliate against the complainant for filing the complaint or to ask the complainant, or any witnesses who may be interviewed, any questions. All (complainant, witnesses, accused) are advised to treat each other in a professional manner, with dignity and respect, and not to discuss the complaint with others or with each other, so as not to exacerbate the problem. The writer also keeps the door open by advising all to immediately report to her, any problems or unusual occurrences related to the complaint or investigation. As appropriate, the writer also makes the employee's supervisor, Division Manager, Assistant Director, and Director aware of the impending investigation, so that they can monitor and take precautions not to unknowingly or knowingly make the problem worse. During the investigation, the writer may also request the aforementioned individuals to recommend viable options for consideration, or to provide assistance as necessary.

In the writer's Department, supervisors and managers are advised via training and written materials that while it is permissible to make employment decisions on factors such as job performance, education, job experience, time in class, seniority, attendance, punctuality, and specific job-related skills, it is not legal to make employment decisions just because of an employee's protected membership (e.g., race, color, religion, sex, national origin, pregnancy, use of family care leave, veteran status, disability, or age (over 40), sexual orientation, marital status, political orientation, retaliation, medical condition (Cancer, HIV & AIDS), FMLA, or National Guard service. In other words, while it's okay to discipline or terminate an employee who happens to have membership in one or more of protected areas, it is not legal to terminate them on the basis of such membership. The discrimination complaint form the writer uses actually lists each of the aforementioned memberships, and allows for the complainant

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to check off any of the memberships that he/she believes is the cause for the discriminatory action he/she is alleging.

When an employee files a discrimination charge, this should not cause a valid, on-going progressive disciplinary process to come to a halt. Instead, the writer recommends that the supervisor/manager consult with the experts in the organization (e.g., Personnel/Labor Relations staff, the individual responsible for investigation of the complaint) for guidance to enable the progressive discipline process to continue.

Managers and supervisors in the writer’s County have been advised via training and in writing that "**Immediate and higher level supervisors can be held personally liable in cases involving allegations of a hostile work environment under the Federal Employment and Housing Act.**" Previous to this, we operated under the premise that only the employer (i.e., the County and Department Head) could be found liable. Supervisors and managers in the writer’s organization are aware that they may be held personally liable if it can be demonstrated that they were aware of complaints and either condoned the behavior or failed to take corrective action and/or report the complaints to an appropriate party.

**Below is a summary of steps the writer takes following receipt of an informal discrimination complaint:**

1. Screens the complaint to become familiar with the alleged facts.

   Reviews to determine whether the complainant has identified and/or linked membership in a protected group, and whether there is a causal connection between the alleged adverse action based on the complainant’s membership in one or more protected areas.

2. Reviews applicable past practice, agreements, rules, regulations, employment laws, policies and procedures to determine if they were applied correctly.

3. Advises Department Head, Affirmative Action Officer, and County Counsel of the complaint, and consults as necessary with these parties during the investigation, and prior to issuance of findings.

4. Carefully prepares questions in advance to keep focused (not to prevent her from covering all bases or from asking follow-up questions as necessary).

   To prompt a specific answer, the writer uses short, clear, easy to understand questions, and she confines each question to one topic. To encourage talking, the writer uses general, open-ended questions. The majority of these questions are composed by using questions with who, when, what, where, why, which, and how. The writer resolves issues by asking sequences of questions, by progressing from the general to the specific, and she asks questions beginning with what is known to get at what is unknown.

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In addition to asking witnesses what they saw, heard, when it occurred, how often, etc., the writer also feels it is important to ask witnesses to describe the alleged harasser’s behavior toward the complainant and toward others at work. If applicable, the writer attempts to find out what, when and where the complainant told him/her about the allegations. Finally, the writer also asks witnesses whether they know of any other information that might be helpful, or if they know of other persons who might have relevant information.

When preparing questions to ask the accused, the writer has learned that it's best to formulate questions by asking for that individual's response to the allegations. And whenever the alleged harasser denies an allegation, the writer then asks why he/she believes the complainant is lying. As with the witnesses, the writer asks whether the alleged harasser knows of any other information that would be helpful, or whether there are other persons who might have relevant information. Finally, the writer also asks whether there is any physical evidence such as notes, memos regarding performance problems or other matters relating to the complainant.

4. When selecting an interview room, the writer ensures it is either her office, or a similar neutral room where there will be privacy, without interruptions or distractions.

5. Before interviewing the alleged harasser(s), the writer does the following:
   a. Reviews the complaint again.
   b. Reviews all witness statements and interviews.
   c. Carefully writes out the questions to be asked, and prepares a strategy by anticipating potential defenses and justifications. The writer also prepares for and anticipates an adversarial and confrontational encounter on the part of the accused; therefore, she mentally prepares for it.
   d. When scheduling the interview, the writer advises the accused that he/she has the right to representation during the interview.

6. Sequence of interviews:
   a. Following the complainant’s interview, the writer next interviews those witnesses she anticipates will give the most information first. During all interviews, the writer addresses witnesses by first name; she demonstrates that she is empathetic, and confident.
   b. Next, the writer interviews potential hostile witnesses. Basically the writer takes a similar approach to all witness interviews, except that with the hostile witness(es), the writer is persistent, maintains control over the scope and direction of the interview, and does not allow herself to be put on the defensive.
   c. Finally, the writer interviews the accused employee last.
7. Interviews:

a. When interviewing, the writer usually establishes rapport by beginning with a comment about everyday things to put the person being interviewed at ease. She explains the interview procedure and the nature of the allegation(s), and the reason for the interview. She also advises the interviewee that this is a confidential matter and that he/she is not at liberty to discuss the matter with others. Witnesses and the accused are also advised that there is zero tolerance for retaliation against the complainant or anyone else the writer may interview.

b. As necessary, the writer reestablishes rapport whenever a witness begins to act in a hostile, evasive, defensive or uncooperative manner. Finally, it is important to ask third parties if they know of any other information that would be helpful or if they know of other persons who might have relevant information.

The writer asks prepared questions, beginning with the easy questions first. During the questioning, she asks the witness how he/she knows what is being reported to separate the witness’s personal knowledge from knowledge by rumors. While maintaining control and keeping the interview on track, the writer asks follow-up questions to ensure that discrepancies are addressed so that she can distinguish truths from untruths. The writer at times will ask about known information as if it were unknown, and ask about unknown information as if it were known, making sure to explore vague answers and evaded questions.

At the end of the witness interviews, the writer leaves the door open for further contact. In most cases the writer reduces to written form what has been reported to her and at the end of the statement she adds something like "I have reviewed the information I have provided in this written statement and the information is true and complete." Also, just before the witness signs the statement, the writer asks the witness if he/she can think of anything further she should have asked but didn't.

c. When interviewing the accused, the writer makes it clear that the information he/she tells her, combined with other facts received during the investigation, may result in disciplinary action. The writer also advises the accused that all questions must be answered completely and truthfully, and that dishonesty may result in disciplinary action. The writer is always prepared to defuse the accuser’s general fear, but she never tells him/her that there is nothing to fear.

8. While gathering facts through interviews, the writer is composed and remains impartial.

10. The writer admonishes all to refrain from talking to each other about the case, and not to retaliate against the complainant, or anyone who is interviewed as part of the investigation, as this will be considered harassment and will not be tolerated.

11. Upon completion of the investigation, the writer prepares a draft report with findings, and a draft response to the complainant. Both draft documents are reviewed with County Counsel; the County’s Affirmative Action Officer, and the Director.
12. If the complaint is sustained, the writer discusses possible remedies and/or actions to be taken with the Director, County Counsel, the County Affirmative Action Officer, and the Department Personnel Officer, keeping in mind the remedies requested by complainant. If after such review, it is determined that discipline will follow, that process becomes the responsibility of the Department Personnel Officer and/or her staff.

13. Post Investigation Process:
   a. The writer provides written feedback to the complainant to close the case, explaining what actions will take place, and what actions have already been taken. She also emphasizes everyone's personal privacy rights. The writer also thanks the complainant for using the complaint process, and encourages the complainant to immediately report any form of retaliation or harassment as a result of bringing the complaint forward, again emphasizing that the Department will not tolerate retaliation. A "cc" of this letter is also sent to the Director and the County's Affirmative Action Officer.
   
   b. If the complaint is not sustained, the writer clearly communicates that finding, and she provides an explanation as to why the complaint has not been sustained. Again, a "cc" of this letter is also sent to the Director and the County's Affirmative Action Officer.
   
   c. According to the EEOC, even "if no determination can be made because the evidence is inconclusive, the employer should still undertake further preventative measures, such as training and monitoring." The writer's organization follows this recommendation, and includes that information in the response to the complainant as described above.

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SUMMARY:

I once read a fortune cookie that said something like, “flowing water never stale”. I believe this can be applied to the organization: While everyone in the organization is faced with a variety of internal and external obstacles that from time to time cause problems in the workplace (or in the flow of water), managers and supervisors must use their power and composure to keep things flowing in the right direction. Good preparation requires on-going training for managers and supervisors, and their clear understanding that they will be held accountable. This includes, but is not limited to timely resolution of work-related and performance problems, timely performance appraisals and other documentation, timely employment decisions based on job-related factors, timely and accurate production of the work product. Of course top management must lead by example and must be committed. If top management is lax, its managers and supervisors will also be lax, and whatever programs are in place will not be followed or enforced as intended. When this happens, the organization will find itself preparing for, and fighting off, many needless and potentially expensive problems.

In closing, my advice is to heed the words of Frederick W Lewis, who said, “The time to win a fight is before it starts.” In other words, don’t wait until the risk level of the problem has been allowed to escalate and spill over into other areas before you try to settle it. Think about it when dealing with others (at work or at home). It makes absolutely good common sense to tip the odds in your favor by solving problems when they first surface by wisely using your composure, power, communication and negotiation skills (including guidance from readily available experts). Why do otherwise and expose yourself to needless headaches, complaints from others, involvement of unwanted third parties, and higher expenditure of time, effort and expense?

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