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"An Ounce of Prevention"

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One effective way to avoid sexual harassment, discrimination and wrongful termination claims is to implement early, effective intervention. Management can be trained to become objective and responsive.

There are at least five factors that militate in favor of more sensitive handling of employment claims by employers:

The rapid expansion in the number of and bases for asserting claims.
The increasingly large role played by the jury when these cases go to trial.
Management's dislike of an reluctance to be deposed and to testify at trial.
The diminution in work-force moral, productivity and profitability that can follow an aggressively asserted employee claim.
The likelihood that a substantial compensatory an punitive damage verdict will be front-page news (and the probability that a successful defense reduction of the verdict on appeal will be buried).
Most lawsuits are the result of misunderstandings, not malice. The remedy sought--money damages--is a poor but often emotionally necessary substitute for the employer's timely expression of empathy and validation of a plaintiff's hurt. This is especially true of claims arising in the employment context. Sexual harassment, discrimination and wrongful termination claims, being interpersonal in nature, can and should be solved in a personal way.

Thus the most effective way to avoid crippling claims is to implement early, effective intervention through comprehensive management training focusing on the establishment of fair, consistent, responsive policies. This prevents management from losing it objectivity or effectiveness when confronted with emotionally complex problems or being embarrassed to the point of inaction. Simple misunderstandings can then be promptly and thoroughly investigated and dealt with immediately and suitably. The claimant should be assured that the claim is being taken seriously and should be kept informed as to the progress of the investigation.

The opposite approach--treating each complaint as a potential lawsuit, with the attendant isolation of the complaint--increases the risk that the civil claim will escalate.

Sensitivity in dealing with a suspected superior-subordinate workplace affair, for example, is called for, since it is well-established that the company may not interfere with employees' rights of association. IN such a case, the superior should be counseled in terms of judgment, reputation, the risk of appearances of favoritism and effective team-building. The subordinate in such a relationship may have been pressured to keep the affair secret, but may actually welcome the chance to unburden when given an opportunity that is neither confrontational nor manipulative.

Sometimes a manager lacks the management skills necessary to deal effectively with a potential powder keg involving a subordinate. Managers must be encouraged to seek assistance when such a situation arises, so that, if necessary, it can promptly be identified as a crisis and an outside crisis manager brought in. In a crisis, chain of command thinking, "papering the file" and career worries cannot be permitted to interfere with effective solutions.

There are often two layers of hurt, disappointment and betrayal involved with employment claims. In an effort to build team spirit and company loyalty, employers not infrequently use the "loyal family" or "team" analogy. Consequently, an aggrieved employee expects the "head" of the family or team to respond decisively and supportively. too often, though, the opposite occurs: The employer isolates the charging party, fails to aggressively and objectively investigate the allegations and fails to keep the charging party informed, thus (in the claimant's eyes) inflicting a secondary injury that can be more painful than the primary injury. It is important to recognize that empathetically acknowledging the employee's underlying hurt does not constitute an admission of either liability or intentionally.

Often the employee has a limited understanding of the company's reason for doing things. communicating to the employee the totality and ultimate fairness of the policies and circumstances behind the offending action can sometimes suffice to reduce the employee's anger. And fairness is something juries relate to.

Juries sometimes unconsciously shift the burden of proof to the employer to justify a termination that fails "the smell test," i.e., when the jury doesn't approve of the manner in which the termination was accomplished or the claim was handled. To this end, the legal department should become involved at the early stages of the problem, rather than at discharge or the filing of a lawsuit.

Early involvement gives the company a greater opportunity to become familiar with, and perhaps influence, the course of litigation. Precipitous discharges, although they may satisfy management's immediate need for swift and severe action, often end up being legal nightmares that could have been prevented with proper attention to formalities. Arrogant managers who believe they are smarter than everyone else must be reined in.

Employers are sometimes reluctant to propose mediation for fear that their willingness will be perceived as a sign of weakness, thus encouraging the escalation of a plaintiff's demands. On the contrary, if the matter cannot be resolved in-house, and early offer to mediate communicates respect for the employee, engendering reciprocal respect for the employer's fairness and willingness to work cooperatively.

In fact, it would be wise for employers to agree in advance to accede to any employee's request for mediation, without the prerequisite lawsuit. This policy would in effect buy some time for the company to fully investigate the claim and determine a coherent settlement or litigation posture. After giving plaintiff a sympathetic listening, the employer

can always use mediation to telegraph its determination to resist claims not likely to succeed on the merits.

At mediation, it is axiomatic that a decision-maker with authority be present, not just available telephonically. The company should think carefully about it choice of representative. The "money person" may not be knowledgeable about the facts giving rise to the claim. On the other hand, sometimes the person who made the decision that is now the subject of plaintiff's claim may not personally or politically be able to acknowledge that the company failed to live up to its obligations to the plaintiff. This person would consequently be hard-pressed to request or authorize a larger settlement than was initially contemplated.

The success of the mediation will turn heavily on the mediator's people skills: persuasiveness, diplomacy, creativity, tenacity, experience, compassion, trustworthiness, sense of humor and wisdom. It is always advisable to ask a proposed neutral for employment law references.

Outside counsel must know that corporate counsel has confidence in its choice. Otherwise, outside counsel may feel pressure to demonstrate to the client an aggressive advice style and ability to win the case at trial. This posture would undermine the mediator's ability to play the role of devil's advocated and expose the weaknesses in the company's case.

Corporate counsel should welcome the objective view of the evidence against the company that a neutral can provide. Sometimes, for example, a perceived strength in the defense case appears, under closer scrutiny, to be a potential liability, as in the case of decision-making that was so smooth that it suggests corporate callousness.

It follows, then, that posturing has no place in mediation, which should be characterized by a sincere desire of all parties to get to the crux of the problem and collaborate on finding a solution all sides can live with. A possible outcome of mediation is that both the complainant and respondent air their misunderstanding and improve their professional relationship.

The absence of structure in mediation sometimes vexes attorneys who expect a linear, agenda-driven process. Mediation is by its nature nonlinear. A proficient mediator may double back time and time again in an effort to surface and underlying feeling that is preventing one of the parties from proceeding toward settlement. When in doubt, counsel should request a caucus with the mediator to question whether continuation of the mediation is advisable, or to explore whether other avenues or techniques should be pursued in the mediation.

The considerations governing employer response to an employee's charge apply all the more to the company's stance at the mediation. While the company's representative may fear that empathizing with a plaintiff will fuel the fire, the contrary is often true. Sometimes the listeners in a mediation fulfill the function of the Greek chorus, echoing the deep,

painful themes being detailed by the speaker. Empathy can sometimes paradoxically create the catharsis that enables the aggrieved person to move beyond a seemingly self-involved, emotional perspective toward a broader, more closure-oriented point of view.

Mediation works best when trust is established between the parties. The company's representative can engender a plaintiff's trust by acknowledging the legitimacy of those elements of the plaintiff's complaint that are valid, and by empathizing with the plaintiff's pain even if its creation was beyond the company's control or responsibility. Plaintiffs sometimes focus on legally irrelevant minutiae; yet it is these minutiae--perceived slights, failures to explain or respond, isolation from other employees--that fuel the lawsuit.

Since, under Evidence Code Section 1152.5, admissions made in the course of a mediation are neither discoverable nor admissible, there is no harm in acknowledging a plaintiff's pain in connection with such minutiae. In fact, the trust on the part of the plaintiff that is thus engendered will be more than repaid later on in the "brass tacks" portion of the mediation.

Sometimes when a settlement is just beyond reach, the company's representative retreats, relying on "the principle of the thing." Defending an employment case can cost in excess of $1000,000, and at trial, on side is guaranteed to lose. It this principle that should be kept in the forefront when the final compromise needs to be made.

Mediation is sometimes the last chance for the company to make a quasi-public confession before the demands of litigation force the parties into one-sided, self-defeating postures. If a mistake was made by the employer, it is appropriate to state in mediation: "We are appalled by some of the things that took place. They violate our company's written policies, and more important, they violate the sense of decency that we have worked so hard to instill in every one of our managers. Each of the individuals you have mentioned is currently under review. We are also reviewing what we as a company can do to deter and punish this kind of problem."

Companies that take the opportunity to rethink their initial response to employment claims--processing them sensitively and fairly rather than automatically adopting a defensive mode--will be rewarded with a more productive work force and less litigation. In those situations where the crisis cannot be contained, mediation presents a second opportunity for the company to assuage the aggrieved party's pain and to work collaboratively toward a solution both sides can live with.

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