

Criminal law vs. employment law

- Garrity - statement compelled as condition of employment cannot be used against employee in criminal prosecution
- If criminal prosecution is a goal, employment issues must be handled differently
- This presentation focuses on employment issues



Sex/race discrimination claims

- Plaintiff must show treated differently from others of same group
- Best defense is to show all people are treated equally



An example

- White officer sues for reverse discrimination, claims he was suspended for conduct that did not lead to suspension of black officers in two incidents in the past
- But record shows one black officer *was* suspended for similar conduct and second black officer's conduct was less serious
- Result: no prima facie case of discrimination; case dismissed



Consistency Avoids Lawsuits

- enforcing policies in some cases but not others creates a bad evidentiary record
- discretionary action can be made to look like something it's not
- important to enforce disciplinary rules across the board, without exceptions
- important to train supervisory staff on this policy

Another common basis for lawsuits: Defamation



- Defamation covers false statements that damage a person's reputation
- Employee disciplined for sexual misconduct may well threaten to sue for defamation

Protection against Defamation Claims



- “Qualified privilege” protects representatives of employers who give out allegedly defamatory information for legitimate business purpose
- Applies to former employee reference checks, provided that . . .



Qualified Privilege

- To gain protection of qualified privilege, employer must show
 - lack of malice
 - good faith
 - belief in truth of statement made
- Best protection is consistent, well thought out policies



Proactive steps

- Establish and adhere to policy limiting dissemination of information about employee discipline
- Limit dissemination to “Need to Know” basis
- Implement policies protecting employee personnel files
- Implement consistent policy on reference checks
- Avoid and/or carefully word press releases, etc., especially before allegations are resolved

Other issues:

What is your context?



- Unionized employees
- Nonunion employees
- Public vs. Private Sector



Unionized Employees

- Disciplinary actions governed by terms of collective bargaining agreement
- Employee has right to union representation
- Arbitration will be key forum for resolving disputes about employee discipline



Arbitration

- Both sides have right to legal representation and to present evidence
- Employer may not interfere with right of employees to testify at arbitration hearing
- Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court



More on Arbitration

- Arbitrator's decision is given great deference by reviewing courts
- But, limited "public policy exception" may be used to argue that reviewing court should give greater scrutiny to arbitrator's decision on employee sexual misconduct



Proactive Steps in Union Context

- Run training sessions, which include clear statement of disciplinary rules
- Give union policy statement on disciplinary procedures for staff sexual misconduct
- Review collective bargaining agreement for inconsistent terms; request modifications if necessary

Nonunion Context: Private Sector



- Most private-sector nonunion employees are “at will” employees who can be fired at any time for any nondiscriminatory reason
- But employee personnel manuals can modify the at-will rule

Proactive Steps: Nonunion, Private Sector Employees



- Check personnel manuals, revise or eliminate any problematic terms
- Distribute to employees policy statement on employee sexual misconduct
- Develop and adhere to consistent procedures on access to disciplinary and personnel information, reference checks, etc.



Public Sector Issues

- Constitutional requirements apply to government acting as employer
 - due process rights – hearings etc.
 - equal protection – discrimination
 - privacy rights – surveillance, drug testing
 - freedom of association



Balancing Test

- Courts will balance employer needs against employee rights in employment context
- E.g., *Macklin v. Huffman* (W.D. Mich. 1997) - employee not entitled to pre-suspension hearing while being investigated for sexual misconduct



Public Sector Union Issues

- Rules regarding union activity by state and municipal employees are established by state law, not federal law
- State law also defines administrative procedures for public employee discipline



Privacy Issues

- In public sector, U.S. constitution applies
- basic test is “did the employee have a reasonable expectation of privacy?”
- courts will engage in a fact-specific inquiry

Proactive Steps: Employee Surveillance



- Provide general notice about employee surveillance methods
- Restrict surveillance methods to those reasonably necessary
- Use even-handed procedures for selecting surveillance targets



Psychological Testing

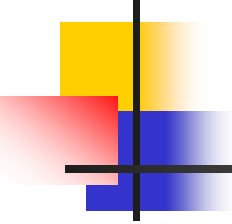
- No legal bar to using under federal law, EXCEPT as it may indicate discrimination
 - e.g., asking about religious views
- Check with your legal counsel about state law bars
- In public sector, privacy concerns re: intrusive questions may also be issue

Employee Polygraph Protection

Act



- federal law prohibits most polygraph testing in private sector but exempts public employees
- Many states have rules limiting or prohibiting polygraph testing; check with your legal counsel



No contact rules and freedom of association claims

- again, issue is balance of legitimate employer interests and employee rights
- courts of appeals have upheld reasonable no contact policies covering correction officers' contact with former inmates
 - A few trial court cases come out the other way



Constitutional Considerations

- Policies that restrict off duty freedom of association do *implicate* constitutional rights
 - Freedom of association
 - Privacy rights
- Doesn't mean can't have such policies but should think them through



Freedom of association issues

- Of most concern if a no contact policy affects family or marriage relations
 - But courts have upheld correctional facilities' rights to take job actions against officers who marry former inmates
 - And against an officer who moved in with former inmate brother

Employer Interests that Can Support No Contact Policies



- Interests in on-the-job performance
- Interests in off-the-job conduct that implicates officer's fitness for duty
- Interests in public reputation of correctional institution

Designing and Enforcing No Contact Policies



- Tailor to interests of your institution in having such policies
- Stronger the interest, safer the policy from challenge



Examples of Strong Interests

- Barring contact where there is evidence of ongoing criminal activity
- Barring contact when former inmate was housed at or has contacts with current inmates at officer's facility
- Barring contact when officer and inmate knew each other at the correctional institution



Examples of Weaker Interests

- Policies that disqualify job candidates if any immediate relative has criminal record, regardless of living arrangement or frequency of contact
- Policies that reach associations with persons with criminal records distant in time or connection to correctional institution
- Policies that are only selectively or intermittently enforced



Conclusions

- Be proactive – establish policies before you need them
- Be consistent
- Train supervisors frequently on policies
- Keep contemporaneous documentation of all infractions, even minor ones
- Protect employment info. from general discussion