

NEWS & INSIGHTS

“The Sound of Silence” - Understanding the Fallout of Not Interviewing the Accused During an Internal Investigation

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A recent opinion from the Tenth Circuit Court of Appeals provides a sober reminder to employers that failure to conduct a thorough internal investigation can support a finding of pretext (i.e., proof that an employer’s stated reason for adverse employment action was false).

“People talking without speaking. People hearing without listening.”

Dr. Mathew Byrnes, a general surgeon, initiated a lawsuit against his former employers, St. Catherine Hospital and Centura Health Corporation (collectively the “Hospital”), alleging he was terminated and wrongfully reported to the Kansas medical licensing board because he made an internal complaint that another doctor was sexually harassing nurses. The Hospital conducted an investigation into Dr. Byrnes’ sexual harassment complaint, which was deemed unsubstantiated. Shortly thereafter, the Hospital received a notification from the Kansas Board of Healing Arts that an anonymous complaint had been filed against Dr. Byrnes. The Hospital subsequently conducted its own internal investigation into the anonymous complaint; however, Dr. Byrnes was never notified that the Hospital was investigating, and he, along with other essential witnesses, was never interviewed. A short two weeks later, the Hospital terminated Dr. Byrnes for alleged performance-related reasons.

Although the Hospital was initially granted dismissal by the District Court, on appeal the Tenth Circuit reversed, noting summary judgment could not be entered in favor of the Hospital because the most “glaring deficiency in [the Hospital’s] investigation was their failure to interview Dr. Byrnes.” According to the Tenth Circuit, this one misstep in the investigation process was not only a violation of Hospital policy and Human Resources best practices, but was also sufficient to lead a reasonable jury to believe the Hospital’s stated reason for termination was pretext.

“Hear my words that I might teach you”

While the *Byrnes* case is only binding precedent in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, it’s no doubt a cautionary tale for employers everywhere. Poor investigations can lead to poor litigation outcomes. So, what should employers do to ensure they don’t unwittingly create proof of pretext during an internal investigation?

1. **Follow the Policy and/or Process:** If the company has a policy or internal process related to investigations, including how complaints are handled, who is responsible for conducting the investigation, and/or certain steps that must be taken before termination or other disciplinary action can be imposed, make sure you are in lockstep with those directives. As noted by the Fourth Circuit Court of Appeals, deviations from an employer’s own internal policies are “circumstantial evidence from which pretext and discriminatory intent may be inferred.” *Hollis v. Morgan State Univ.*, 153 F.4th 369, 383 (4th Cir. 2025). The U.S. Supreme Court has handed down similar guidance, explaining that “departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).
2. **Don’t Skip Witness Interviews:** Critical to any investigation is gathering information from witnesses who may have relevant evidence. While this seems like a no-brainer, holes in witness statements arising from a failure to ask pertinent questions, cutting the interview short when a witness only has positive things to say about the accused, or failing to interview witnesses at all, can lead to the conclusion that the investigation was hastily conducted in order to justify termination for a discriminatory and/or retaliatory purpose. In the

event there is a legitimate reason not to interview a witness, be sure you explain why the exclusion was warranted, documenting the reason as part of the investigation file (e.g., employee was absent the day the incident occurred).

3. **The Accused Should (Almost) Always be Interviewed**: In most cases, nothing screams “unfair” to a Court (or jury) louder than an employer failing to confront the accused. In instances where an employee is not afforded an opportunity to defend against allegations of wrongdoing, the employer faces more scrutiny of the investigation as a whole—and will certainly have to explain why the accused was never interviewed. This significant omission in *part* of the investigation makes it easier for an employee to argue that the *entire* investigation was a sham, used only to create the appearance of neutrality in an effort to mask discriminatory and/or retaliatory animus. There are rare (read: very rare) circumstances where forgoing an interview of the accused is permissible; however, these instances are usually limited to situations where, for example, there is a criminal component to the allegations and law enforcement has requested that the company not interview the accused, the employee refuses to cooperate during the investigation, or conducting an interview creates a safety threat to other witnesses or company employees. If these circumstances exist, they should be well-documented as part of the investigation file.

Internal investigations are oftentimes crucial for legitimizing an employer’s decision to terminate an employee or take other adverse employment action. However, when the investigation is one-sided due to the company’s omission of relevant witnesses, it’s not hard for any onlooker to surmise the investigation is decidedly biased, thereby supporting the employee’s assertion that the company’s termination decision was pretext for unlawful discrimination or retaliation.

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