How to Avoid Liability or Lawsuits

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The Mission

- Recognize risky personnel areas
- Avoid creating liability through actions, non-actions, or statements
- Take steps to allow your District to maintain compliance with the law
- Motivate your workforce
The Battlefield

• Discrimination, Harassment and Retaliation
• Leaves and Disability Issues
• Personnel Management
• First Amendment
Discrimination, Harassment & Retaliation
Harassment & Retaliation

The Risks

• Personal and district liability
• Poor productivity
• High absenteeism
• High turnover
• Public image
• Low morale
Harassment & Retaliation

Battle Plan #1
Know the District’s Policies

- Know all policies that relate to harassment, discrimination, and retaliation
- Understand definitions
- Know the complaint procedure
- Know your obligation to report (Responsible EE’s and Supervisors)
- Know the investigation process
Harassment & Retaliation

Battle Plan #2

Know the Protected Classifications

- Sex/Gender (including gender identity & gender expression)
- Race/National Origin/Color
- Disability/Medical Condition
- Age (40 and over)
- Religion
- Sexual Orientation
- Opposition to Harassment/Retaliation
- Marital Status (pregnancy, childbirth, breastfeeding)
- Association/Perception
- Military/Veteran Status
- Genetic Information
“Adverse Action”

• Any action with material effect on employment taken within course and scope of employment

• Includes actions which impact:
  – Ability to routinely perform duties
  – Transfers
  – Opportunity for advancement
Discrimination

• Intentionally treating individuals differently because of:
  – The individual’s protected classification
  – A perception that a protected classification is present
  – An individual’s association with someone with an actual or perceived protected classification
“Hostile Work Environment”

- Protected Classification
- Verbal, Visual or Physical Conduct
- Objectively and Subjectively Offensive (Unwelcome)
- Severe or Pervasive
- Unreasonably Interferes with Work
- No Intent to Harass Necessary
Melody, who is Tong’s supervisor, notices that Tong spends a lot of time walking around the office and socializing with coworkers. Annoyed by Tong’s lack of productivity, Melody warns Tong to get back to work and stop distracting his coworkers. Melody stops by Tong’s desk on a daily basis and asks him to provide status reports on all his projects. Tong is upset by Melody’s constant monitoring, and complains that Melody is harassing him.

Did Melody harass Tong?
Tong, a Vietnamese-born employee, speaks with an accent. His supervisor Melody often interrupts and corrects Tong’s pronunciation of English words. She also urged Tong to see a speech pathologist to help his chances of getting promoted (and after she declined to promote him because of his accent).

Enrico, a management employee who speaks with a German accent, does not get corrected by Melody and was not required to undergo speech therapy before Melody promoted him.

**Did Melody harass Tong?**
Battle Plan #4

Know How to Handle a Complaint

• Create appropriate environment
• Eliminate distractions
• Do not jump to conclusions
• Do not guarantee confidentiality
• Invite employee to submit the complaint and factual details in writing
• Document/Take notes. Ensure follow-up
• Advise HR or Title IX/EEO Coordinator
Battle Plan #5

Never Retaliate

1) Protected Activity
   • Reporting harassment
   • Advocating on behalf of a union
   • Filing a grievance

2) Adverse Action
   • Discipline
   • Poor evaluation
   • Bad shift, assignment, schedule
   • Taking away responsibility

3) Causal Connection
Mike, who is 53, believes that older employees receive less favorable work assignments. Mike tells his coworker Carol, who is 35, that he is going to submit an internal complaint alleging age discrimination. Carol tells Mike he will be sorry if he files a complaint. Two months later, Carol is promoted and becomes Mike’s supervisor. Carol immediately begins counseling Mike for poor work performance and being tardy, including issuing him written reprimands.

Is Carol’s conduct retaliatory?
Battle Plan #6

Document and Prevent

✓ Document reasons for any adverse actions
  • Failure to promote, failure to give specialty assignment, no merit pay, negative evaluation

✓ Ensure co-workers are not retaliating
  • Vandalism, ostracism, spreading rumors, etc.

✓ Base all employment decisions on legitimate, explainable reasons
Leaves and Disability
Leaves and Disability

The Risks

• Failure to designate leave properly
• Improperly disciplining for using protected leave
• Potential disability discrimination claims
• Failure to accommodate claims
• Potential violation of privacy rights
• Retaliation claims
Edward, a classified employee who works in the cafeteria, begins calling in sick 4 to 5 times a month, and the absences are always on Fridays or Mondays.

Should the District warn Edward that it believes he is abusing his sick leave?
What if Edward claims indicates he receives medical treatment during his absences?
Leaves and Disability

Battle Plan #1

Know Protected Leaves

1. FMLA / CFRA
2. Pregnancy Disability Leave
3. Family Sick Leave
4. Workers’ Comp
5. Paid Sick Leave
6. Kin Care Leave
Leaves and Disability

Battle Plan #1
Know Protected Leaves (Cont’d)

7. Military
8. Appearance at Child’s School
9. Domestic Violence
10. Jury Duty or Court Appearance
11. Paid Sick Leave
12. Voting
Leaves and Disability – Battle Test

A full time teacher has her accrued 10 days of paid sick leave a year (Ed. Code § 44978). Her sister was recently hospitalized.

Can Christina use her paid sick leave to care for her sister?
Leaves and Disability

Battle Plan #2

No Discrimination or Retaliation

- Do not discriminate or retaliate against employee for using or attempting to ask for protected leave
  - Suspension or demotion
  - Termination
  - Discipline
  - Threat to discipline
  - Poor evaluations
  - Inconsistent application of a policy to the detriment of employee
Leaves and Disability

Battle Plan #3

Report Absences to HR

• Employee is absent for reasons beyond routine illness
• Employee makes statement that may trigger protected leave rights
• Employee should not be on undefined leave
• Make sure employees are given all required forms
Kevin submits a doctor’s note indicating he needs to be off work for 45 days for spinal surgery. Kevin’s supervisor provides him with an FMLA/CFRA certification form and tells him he needs to return the completed form within 15 days. Kevin goes on leave but fails to return the FMLA form. At the end of the 45-day period, Kevin does not return to work and does not return your phone calls.

Can you fire Kevin for job abandonment?
Leaves and Disability

Battle Plan #4

Know When to Use Fitness for Duty Exams

• Check policies
• If none, fitness for duty exam may be appropriate if:
  – Statements raise concern
  – Observations raise concerns
  – Doctor’s note raises concerns
  – Return after long disability absence
  – Other good cause
Battle Plan #4

Fitness for Duty Exams (Cont’d)

• Must have a legitimate, non-discriminatory business reason for medical exam
  ▪ Accidents
  ▪ Erratic, unusual, inappropriate behavior
  ▪ Performance issues
  ▪ Anger
  ▪ Drastic mood swings
  ▪ Observations
  ▪ Statements

• Must consult with Human Resources
Leaves and Disability

Battle Plan #5
Know Reasonable Accommodation Responsibilities

• When to accommodate?
  – Employer (supervisor) knows or has reason to know employee has disability that affects ability to do essential job duties
  – Employee makes comments about accommodation or requests an accommodation
Leaves and Disability

Battle Plan #5

Reasonable Accommodations (Cont’d)

• Accommodations that can affect supervision
  – Job restructuring
  – Modified work schedule
  – Change supervisory methods
  – Leave of absence
  – Accessible facilities
Leaves and Disability - Battle Test

A coach, Jason, has acute asthma. When the air quality is poor, he has difficulty breathing and cannot attend work. After trying several treatments, his doctor suggests a new drug therapy that will take several months to take effect and will require numerous doctor visits. He asks for a 6-month leave, supported by a doctor’s note.

Should the leave be granted? What if request is for indefinite time?
Leaves and Disability

Battle Plan #6
Actively Participate in the Interactive Process

• Supervisors play important roles during disability interactive process
  – Knows the (actual) essential functions of the job
  – Can help analyze the reasonableness of a proposed accommodation
  – Help identify possible accommodations
Performance Management
Performance Management

Risks

• Increased chance of lawsuits/grievances
• Lack of documentation to support discipline/adverse actions
• Morale will deteriorate
• Turnover will increase
• Efficiency and productivity will suffer
Performance Management

Battle Plan #1

Communicate

• Communicate about significant issues
  - Poor performance
  - Rules violations
  - Commendations
  - Exemplary work or conduct
  - Unacceptable behavior
  - Interpersonal conflicts
Battle Plan #2

Document

• Significant communications must be documented
  – Should be objective/factual
  – Ed Code 44031, ee has right to notice and opportunity to comment on derogatory info before included in personnel records
  – Obtain employee acknowledgment
  – These documents support/defend the district
Battle Plan #3
Evaluate

- Timely
- Comprehensive
- Honest (do not sugarcoat)
- Set specific, achievable goals
- Notify of consequences

Evaluations based on documentation
Performance Management

COMMUNICATION ➔ EVALUATION ➔ DISCIPLINE
Performance Management

Battle Plan #4

Discipline

1. Know sources of disciplinary rules/policies/codes
2. Make sure discipline is supported by documentation and is consistent with evaluations
3. Evaluate any investigation that was done
4. Anticipate challenges
Battle Plan #4

Discipline (Cont’d)

5. Be prepared to respond to employee responses or arguments/defenses.
   - “I did not know the rule or the penalty for violating it.”
   - “Nobody follows that rule, you never applied it before.”
   - “Employee X, Y and Z violated the rule, but they didn’t get disciplined.”
   - “The rule is ridiculous so why follow it?”
   - “The rule is unclear, nobody knows what it means.”
Thomas, a library clerk, comes to work 1-2 hours late a few times a month. Thomas tells his supervisor Christina that he had one too many drinks the night before and couldn’t wake up in the morning. Today, Thomas comes in 2 hours late and tells Christina he’s hungover. Christina suggests that Thomas drink some water and get to work. Thomas responds in a loud, aggressive voice, “I’m tired of you nagging me all the time, you’re not my mother. I’m feeling sick and going home,” and leaves work without receiving permission from Christina.

Would a 2-day suspension be appropriate?
First Amendment
Pickering Balancing Test

Facts:

- Illinois school teacher terminated for sending letter to local newspaper re proposed tax increase
- Critical of board’s handling of past proposals to raise new revenue for schools
- Board found conduct detrimental to efficient operation and administration of school (but record didn’t show effect on community or administration of school).
- Teacher claims violation of First Amendment

What Is First Amendment Protected Speech?

• First: Determine whether the public employee’s is speaking as a citizen on a “matter of public concern”? If no, stop here:
  – Employee does not have a claim under the First Amendment for speech that is not matter of public concern
  – Speech pertaining to a private dispute/private matter is not protected
What Is First Amendment Protected Speech?

• Second: Balance the interests of the employee, as a citizen, in commenting upon matters of public concern against the interest the public employer in promoting the efficiency of the public services
  – Interference
  – Disruption
Religious Expression at Work

• Johnson v. Poway Unified School Dist. (2011) 658 F.3d 954
  – Ninth Circuit held that school district did not violate a teacher’s First Amendment rights when it ordered the teacher to remove banners in his classroom containing phrases such as: “In God We Trust,” “One Nation Under God,” “God Bless America,” and “All Men . . . Are Endowed By Their CREATOR”
  – Teacher acted as a public official and not as a private citizen
  – Thus, he had no First Amendment right to free speech
NOTE: An employer cannot
a) Forbid or prevent employees from engaging or participating in politics or becoming candidates for public office, or
b) Control or direct the political activities or affiliations of employees (see Cal. Labor Code §1101),

BUT may be able to control the manner for engaging in political activities (e.g., during non-working hours and not through use of District time or property)
Case Study

An administrative assistant uses her School District email during non-working time to organize a protest on long hours and low wages. The District has a policy that prohibits the use of District email for non-business purposes.

May the District discipline this conduct?

No
Speech on Private v. Public Matters

- *Turner v. City and County of San Francisco*
  - Employee was terminated after he brought internal complaint contesting the use and hiring of temporary employees in violation of City policy.
  - No evidence the complaint was brought for anything other than his personal advancement.
  - Ninth Circuit found that the complaint was personal in nature and not a matter of public concern.
  - Held: no First Amendment protection
Conclusion

➢ Communicate and document
➢ Act consistently and fairly
➢ Know District policies, rules, CBA, Ed. Code
➢ Seek HR assistance

Good Luck!!!!
Thank You!