GUIDANCE FOR AVOIDING WRONGFUL TERMINATION CLAIMS

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UNLAWFUL DISCRIMINATION

Employees are protected from discrimination in employment on the basis of their protected class status. This means that employers may not lawfully take protected class status into account in any decision that is made about the employee, including who to hire, give raises to, promote, demote, discipline, or layoff. The following list includes all protected class statuses recognized under current federal and Washington State law:

- Race
- Color
- Sex
- Religion or creed
- National origin and ethnicity
- Age (over 40)
- Disability (physical, mental, or sensory)
- Marital status
- Family status
- Pregnancy and maternity
- Sexual orientation and gender identity
- Honorably discharged veteran or military status
- Genetic information
- Victim of domestic violence, sexual abuse, or stalking

When a county refers to itself an "equal employment opportunity employer" in its handbook, on its website, or in the advertisement it places for job openings, it means that none of its decisions regarding employees will be based on protected class status.

The standard that an employee must prove to prevail on a discrimination lawsuit differs if the claims are brought under federal law (such as Title VII or the Age Discrimination in Employment Act) or Washington State Law (such as the Washington Law Against Discrimination). If the claim is under federal law, the employee must prove that his protected class status (such as age, sex, or race) was a determining or "but for" factor in the adverse employment decision (such as termination or failure to hire). If the claim is under Washington State law, the employee must prove that his protected class status was a "substantial factor" in the employment decision. "Substantial factor" is defined as "important but not 'but for.'" While the difference may appear to be semantic, the reality is that employees have an easier burden to prove their claims under state law.

Most discrimination lawsuits are brought after an employee has been terminated. Although employees may also sue for discrimination after being passed over for a job or a promotion, or after being suspended, demoted, or reassigned, these claims of discrimination are relatively rare.

What the jury will decide in deliberations, after hearing from the employee and his former supervisors, is what they believe is real reason for the termination. Was it the employee's legitimate performance issues or conduct issues, as testified by the supervisors? Or did the employee's protected class status play an important part in the decision, as testified by the employee?

Counties can ensure that the jury concludes that the employee was terminated due to his performance or conduct, and not protected class status, by adhering to the following practices.

1. Education and Training

Inform supervisors of the class statuses that are protected under current law. Employment law evolves and changes rapidly, and supervisors can inadvertently make unlawful decisions by not keeping up to date with developments in the law. Here are some recent examples of government supervisors inviting a lawsuit by not knowing the current state of the law:

(a) A police supervisor denying training to a pregnant police officer after telling her that the limited training budget could not be wasted on an officer who would be taking an extended leave and might not return after having her baby.

(b) A mayor rejecting a female candidate for an administrator position, stating that most of the department directors were men who would not respect a woman in the position.

(c) A fire chief rejecting a female candidate for a firefighter position, explaining that the dangers and physical demands of the job made it unsuitable for a woman with small children.

(d) A police chief rejected a candidate because the chief knew that several family members of the applicant had a hereditary degenerative disease that would make the applicant unable to do the job if he too suffered from it.

In each of these cases, the supervisor was well intentioned and legitimately did not believe that the applicant or employee was a good fit for the position. Unfortunately, the supervisor was misinformed on what could be lawfully considered when making employment-related decisions, and shared that information with the applicant and others.

2. Avoid Loose Comments

While everyone enjoys a good joke, it is risky behavior for supervisors to make jokes or comments about age, sex, race, sexual orientation, or any other protected class status, either in

the workplace or outside the workplace with colleagues. While these jokes and comments may be innocent, and not indicative of any real discriminatory intent, they can be used as proof of animus toward an employee because of his protected class status. For example, referring to any employee as "old goat" or "old fart," even when used affectionately, will later be cited as evidence of age discrimination if this employee is ever let go.

3. THE PROBATIONARY PERIOD

Most government employees must pass through a probationary period of 6 months or 1 year before they obtain "regular" status under a collective bargaining agreement, civil service rules, or employee handbook. In concept, the probationary period is an opportunity for the supervisor to closely monitor the employee's performance, conduct, and fit to see if this employee has what it takes to be a success. Conversely, this is the employee's opportunity to demonstrate how attentive, responsible, and helpful he can really be.

If an employee demonstrates significant conduct or performance problems during the probationary period, the supervisor should terminate the employee as soon as those problems come to light (and definitely before the employee obtains "regular" status). While many employees may need a grace period to bring their job skills and knowledge up to speed, it is well known that new employees who distinguish themselves with conduct, attitude, or performance deficiencies do not improve once they achieve job security. Instead, these problems will likely become substantially worse.

While the discrimination laws protect all employees equally, no matter how long on the job, letting go of a probationary employee is less risky and expensive. Employees who are let go during their probationary period are less likely to sue, and less likely to prevail if they sue, than ones who have been retained for many years despite persistent problems,

4. COMPARATORS AND CONSISTENCY

When a supervisor is considering the discipline or termination of an employee, the supervisor should consider how he has disciplined other employees with similar performance or conduct issues. Many discrimination lawsuits are successfully litigated by employees who demonstrate, by comparison, that they were treated much more harshly than other employees (outside of their protected class status) who had similar conduct or performance problems.

For example, a Hispanic employee was terminated for attendance problems demonstrated that other Caucasian employees with similar attendance problems were only reprimanded or received no discipline. By proving this inconsistency in treatment, the Hispanic employee was able to convince the jury that her race was a substantial factor in her harsher discipline. Thus, before imposing discipline on an employee who may sue for discrimination, the supervisor should first assess whether this employee is being treated consistently with other employees who have committed similar offenses.

There are many legitimate reasons for treating employees differently. For example, other employees may have had different supervisors (with different disciplinary philosophies), or

different performance histories, or different disciplinary histories that justify more lenient treatment. Or the nature of the offenses at issue might not be comparable. Any difference in treatment should be articulated and justified in advance of the claim for discrimination that may arise.

5. Performance Evaluations and Other Documentation

The strongest evidence that an employer can have in defense of a discrimination lawsuit is documentation demonstrating that:

1) the supervisor noted problems with the employee's performance or conduct;
2) the supervisor communicated those problems to the employee, and gave him the opportunity to improve; and
3) the employee failed to improve.

There are several ways to generate the necessary documentation before the unsatisfactory employee is terminated:

- Conduct regular written performance evaluations that candidly communicate the deficiencies in the employee's conduct and performance, and the improvements that are expected if the employee is to keep his job. In too many cases, the employer is defending a discrimination claim with either no performance evaluations in the personnel file, or worse, performance evaluations that do not make any mention of the employee's known deficiencies. In that case, it is the employee who will use the performance evaluations to convince the jury that the supervisor's testimony regarding performance or conduct problems is a recent fabrication to hide the true motive of unlawful discrimination.

- Use progressive discipline to deal with performance and conduct issues as they arise. With progressive discipline, the supervisor imposes lower levels of discipline at first, and then increases the level toward termination if the deficiencies reoccur or are not corrected. Too often, supervisors seethe in silence until they are fed up and cannot take it any longer, and then they proceed directly to termination. This approach deprives the employer of the defense (and the documentation to support it) that the employee had ample warning of his deficiencies and effectively chose not to correct them.

- Maintain and keep supervisor files that show when performance or conduct problems arose and how the employee was notified of them. These contemporaneously created notes will support the employer's defense that the issues which resulted in termination were communicated to the employee in a timely fashion, and were not fabricated after the discrimination claim was made.

UNLAWFUL RETALIATION

Employees are protected from retaliation in employment on the basis of their protected activity. This means that employers may not lawfully take protected activity into account in any decision that is made about the employee, including who to hire, give raises to, promote, demote, discipline, or layoff.

The following list includes protected activities recognized under current federal or state law:

- Reporting discrimination or harassment
- Cooperating in a discrimination or harassment investigation
- Testifying in a legal proceeding involving discrimination or harassment
- Filing a lawsuit of discrimination or harassment
- Filing a worker's compensation claim
- Serving on a jury
- Taking leave as authorized by a federal or state statute
- Reporting workplace safety issues
- Reporting financial irregularities
- Reporting violations of law
- Speaking on a matter of public concern
- Request for accommodation of a disability
- Engaging in official union activity

Retaliation is a claim that has grown tremendously in the last ten years, and is likely to remain prominent. Note that Time Magazine declared 2002 the "Year of the Whistleblower."

Retaliation claims are very similar in form to discrimination claims. In a discrimination claim, the employee is alleging that his protected class status was unlawfully taken into account. In a retaliation claim, the employee is alleging that his protected activity was taken into account. Like with discrimination claims, most retaliation claims are brought after an employee has been terminated.

If the claim is under federal law or Washington State law, the employee must prove that his protected activity was a "substantial factor" in the employment decision.

Employees prove their retaliation claims in the same way they prove discrimination claims: (a) with direct evidence of a causal connection, (b) with comparators, and (c) by lack of documentation or inconsistent documentation. The issue of supporting documentation is very important in defending retaliation claims. If the employer's position is that the employee was terminated for longstanding performance and conduct problems, it should have documentation that predates its knowledge of the protected activity to support its defense. Such documentation can consist of formal performance evaluations, formal discipline, or supervisor files documenting performance issues as they arose. With such corroborating documentation, the jury is less likely to conclude that the motivating factor for the termination was the employee's protected activity.

Proximity in time is also a critical factor in retaliation claims. In other words, if less time passes between the employer learning of the protected activity (for example, making a claim of harassment) and the adverse employment action (for example, termination), the more likely the jury will conclude that there is a causal connection between the two. Indeed, when the proximity is six months or less, the judge may let the jury decide whether retaliation was the motive when the only evidence is the proximity of the two events. If the proximity is more than six months, the employee will likely be required to produce other evidence of a causal connection between the protected activity and termination.

Other ways to protect your county against retaliation claims include the following:

- ***Adopting a strong anti-retaliation policy***. While most counties have anti-discrimination and anti-harassment policies, anti-retaliation policies either do not exist or are buried in the anti-harassment policy and addressed in a single sentence. Instead, counties should draft and disseminate anti-retaliation policies that inform employees of their rights, encourage them to complain if their rights are being violated, and provide a mechanism for making and resolving complaints.

- ***Training and educating supervisors***. Like discrimination, this is another area where supervisors are lacking in their knowledge base. They may not understand what constitutes protected activity, like complaining of harassment or taking authorized leave. They may not understand that responses like shunning or isolating the employee who complained may constitute retaliation. They may not understand that the county has an obligation to take prompt, corrective action to stop any retaliation once a complaint is brought to any supervisor's attention.

- ***Separating the accuser and accused***. Discrimination and harassment claims often sprout retaliation claims when the accuser and accused are left working together while the complaint is being addressed. When a discrimination or harassment complaint is made by an existing employee, separate the accused supervisor and the accusing employee, if possible. Require review by a neutral supervisor of employment decisions made by the accused employee regarding the accuser or any witnesses.

- ***Monitoring the situation***. Even after the complaint has been resolved, check in periodically with the employee who complained to determine whether any complaints of retaliation have surfaced. If not, document the communication and the fact that the employee denied retaliation. If so, look into the complaint of retaliation immediately, documenting whether retaliation was found, and if not, why not.

EQUAL EMPLOYMENT OPPORTUNITY AND UNLAWFUL DISCRIMINATION

[County] is an equal employment opportunity employer. This means that [County] does not discriminate against any employee on the basis of protected class status. All employees will be recruited, selected, trained, promoted, compensated, and if appropriate, disciplined or terminated without regard to race, color, religion or creed, ethnicity, national origin, sex, age (over 40), marital status, pregnancy or maternity, sexual orientation or gender identity, veteran status, use of a guide or service animal, genetic information, or the presence of any sensory, mental, or physical disability (unless based on a bona fide occupational qualification).

Unlawful discrimination occurs when [County] bases a decision it has made about an employee on the person's protected class status (e.g., race, religion, sex), rather than the person's qualifications, conduct, performance, or other lawful factors. Your protected class status will not be the basis for any decision [County] makes about you.

Any employee who feels that he/she has been the victim of unlawful discrimination in violation of this policy should report this concern to the Human Resources Director. If you believe that the Human Resources Director is involved in the violation, or you otherwise do not feel comfortable reporting to this person, the employee should report this concern to the General Manager.

[County] will conduct look into the merits of any allegation reported to it. As discussed below, this may include an investigation by a qualified investigator who is either an employee or a professional employed outside of [County].

If the allegation is found to have merit, [County] will take prompt action to correct the unlawful conduct and remedy any violations that have occurred. Such corrective action may include disciplinary action against those employees found to have violated policy.

REASONABLE ACCOMMODATION FOR DISABILITIES OR RELIGIOUS BELIEFS AND PRACTICES

Disability Accommodation

[County] complies fully with its duty to provide a reasonable accommodation to allow employees with physical, sensory, or mental disabilities to perform the essential functions of their job.

Under federal law, a disability is a physical or mental impairment that substantially limits one or more major life activities. Major life activities include such things as breathing, eating, sleeping, learning, reading, concentrating, lifting, communicating and walking.

Under Washington State law, a disability is a diagnosable physical, sensory, or mental impairment that has more than a trivial effect on an employee's ability to perform the essential functions of the job.

A reasonable accommodation is one that [County] can reasonably provide, given its resources and obligations, that does not create an undue burden, significantly impair [County]'s services, or create legitimate safety concerns.

Depending on the circumstances, reasonable accommodations may involve new or different equipment used as part of the job, modification of the workplace or facilities, temporary light or modified duty, elimination of non-essential functions, a modification in the shifts, days, or hours worked, unpaid leave, or reassignment to another available shift. This is a non-exhaustive list of requests that may be made as a reasonable accommodation.

Religious Accommodation

[County] complies fully with its duty to provide a reasonable accommodation of an employee's sincerely-held religious beliefs, unless [County] believes such an accommodation would create an undue hardship.

Depending on the circumstances, reasonable accommodation requests may involve complying with dietary restrictions, a modification in the shifts, days, or hours worked, days off for religious holidays or to attend religious services or ceremonies, or modifications in the dress or grooming code for employees. This is a non-exhaustive list of requests that may be made as a reasonable accommodation.

Procedure to Request Reasonable Accommodation

Any employee who seeks reasonable accommodation for a disability should make this request to the ADA Coordinator. Any employee who seeks reasonable accommodation for a sincerely held religious belief and practice should make this request to the Human Resources Director.

A request for reasonable accommodation will trigger the interactive process. The interactive process may involve communications between you, [County], and either your medical providers (disability) or clergy (religion) to obtain information on your disability or religious beliefs/practices, the limitations it entails, the likely duration of the limitations, and what accommodations can reasonably be offered you. You may be required to sign releases or disclosures that will allow your medical providers to communicate with [County] regarding a medical condition for which you are seeking reasonable accommodation.

[County] will decide whether any accommodation can be reasonably offered after obtaining relevant information from you, your supervisors, and your medical providers or clergy.

Personal information that you submit about your limitations will be kept confidential, except for cases where (i) your supervisor needs to be informed of work restrictions or necessary accommodations, (ii) first aid or safety personnel need to be informed in order to provide emergency treatment, or (iii) government officials need to be informed in compliance with the Americans with Disabilities Act or other laws. In such cases, personal information is only released to the minimum extent necessary and you are assured that your information will be used in ways that are consistent with applicable laws.

Any employee who feels that he/she has been denied reasonable accommodation in violation of this policy should report this concern to the General Manager. [County] will conduct look into the merits of any allegation reported to it. As discussed below, this may include an investigation by a qualified investigator who is either an employee or a professional employed outside of [County].

If the allegation is found to have merit, [County] will take prompt action to correct the unlawful conduct and remedy any violations that have occurred. Such corrective action may include disciplinary action against those employees found to have violated policy.

POLICY AGAINST UNLAWFUL HARASSMENT

It is the policy of [County] to provide a work environment for its employees that is free from unlawful harassment based upon their race, color, religion, gender, national origin, age, marital status, sexual orientation, veteran's status, presence of a disability or the presence of any other protected status. Unlawful harassment negatively affects morale, motivation, and job performance. [County] is committed to ensuring that the practices and conduct of all its employees comply with the requirements of federal and state laws against harassment. To that end, [County] expects all employees to work in a manner that respects the feelings and dignity of their co-workers.

Unlawful harassment can come from a supervisory employee, a colleague, or a person outside the workplace.

Definitions

Unlawful harassment occurs when conduct is directed at protected class status (e.g., race, religion, age) that is unwelcome, offensive to a reasonable person, and sufficiently severe and pervasive to negatively affect an employee's work environment. Conduct may include jokes, remarks, comments, pictures, and images that are spoken to, shared with, or made in the presence of other employees. Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive work environment, or

has the purpose or effect of unreasonably interfering with an individual's work performance; or otherwise adversely affects the individual's employment opportunities.

Sexual harassment is a form of unlawful harassment, and means behavior of a sexual nature that is unwelcome, offensive to a reasonable person, and sufficiently severe and pervasive to negatively affect an employee's work environment. These may include sexual advances and other verbal or physical advances or conduct made when: (a) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment; (b) submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individuals; or (c) such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

Examples of sexual harassment include:

Unwelcome or unwanted flirtations, propositions, or advances. These include patting, pinching, brushing up against, hugging, cornering, blocking, kissing, fondling, putting ones arms around another, or any other similar physical contact considered unacceptable by another individual.

Verbal behavior such as comments, suggestions, jokes, innuendos, or derogatory remarks based on sex;

Visual harassment such as leering, whistling, gesturing or posting sexually suggestive or derogatory pictures, cartoons or drawings, including at one's work station.

Pressure for sexual favors. This includes subtle or blatant expectations, pressures, or requests for any type of sexual favor accompanied by implied or stated promise of preferential treatment or negative consequences concerning an individual's employment (such as an employee's performance evaluation, work assignment, advancement, or training opportunities).

Procedure for Reporting Unlawful Harassment

If an employee believes that he/she is a victim of unlawful harassment, including sexual harassment, the following complaint procedure shall be followed:

If the employee feels comfortable doing so, the matter *may* first be brought first to the attention of the offender(s). The employee who feels harassed can tell the offender(s) that the conduct is unwelcome, is inappropriate, and needs to stop immediately. If the employee/volunteer has addressed the matter with the offender(s) and such communication is not successful in stopping the harassment, the employee/volunteer should proceed to report the matter as set forth below.

If the employee does not feel comfortable confronting the offenders, or confronting the offenders was not successful in stopping the harassment, the employee should report his/her concerns to the Human Resources Director. If the employee believes the Human Resources Director is involved in the violation, or otherwise does not feel comfortable reporting to this person, the applicant/employee should report this concern to the General Manager instead.

[County] will look into the merits of any allegation reported to it. This may include an investigation by a qualified investigator who is either an employee or a professional employed outside of [County].

If the allegation is found to have merit, [County] will take prompt action to correct the unlawful conduct and remedy any violations that have occurred. Such corrective action may include disciplinary action against those employees found to have violated policy.

Duty of Supervisors

All supervisors are assigned responsibility for implementing this policy, ensuring compliance with and knowledge of its terms, and for taking immediate and appropriate corrective action if they witness inappropriate behavior or receive a complaint. Supervisors must open and maintain channels of communication to permit employees to raise concerns of sexual or other harassment without fear of retaliation, stop any observed harassment, and treat harassment matters with sensitivity, confidentiality, and objectivity. A supervisor's failure to carry out these responsibilities may result in discipline up to an including termination.

POLICY AGAINST UNLAWFUL RETALIATION

[County] does not tolerate unlawful retaliation against employees, who engage in protected activities. Retaliation occurs when an employee suffers employment-related adverse consequences as a result of his/her protected activity.

Protected activities include, but are not limited to, the following activities:

(a) Reporting unlawful discrimination, harassment, or retaliation,

(b) Cooperating in an internal investigation regarding discrimination, harassment, or retaliation,

(c) Testifying in a legal proceeding regarding discrimination, harassment, or retaliation,

(d) Requesting reasonable accommodation for a disability or sincerely held religious belief or practice,

(e) Taking leave as authorized by federal or Washington State law;

(f) Reporting workplace safety issues,

(g) Reporting financial irregularities,

(h) Reporting criminal misconduct,

(i) Filing a worker's compensation claim,

(j) Serving on a jury,

(k) Engaging in union-related activity such as bargaining a contract or filing grievances or unfair labor practice complaints.

Employees do not receive protection for actions taken in bad faith. Bad faith occurs when the employee/volunteer provides false information with knowledge that the information provided is false.

Adverse employment-related consequences include, but are not limited to, the following:

(a) Termination of employment,

(b) Demotion in position, responsibilities, or pay,

(c) Suspension,

(d) Other disciplinary action,

(e) Reassignment to a less desirable position with less desirable duties,

(f) Shunning or isolating, or

(g) Harassment.

Procedure for Reporting Unlawful Retaliation

Any employee who feels that he/she has been the victim of unlawful retaliation in violation of this policy should report this concern to the Human Resources Director. If the employee believes the Human Resources Director is involved in the violation, or otherwise does not feel comfortable reporting to this person, the employee/volunteer should report this concern to the General Manager.

[County] will conduct look into the merits of any allegation reported to it. This

may include an investigation by a qualified investigator who is either an employee or a professional employed outside of [County].

If the allegation is found to have merit, [County] will take prompt action to correct the unlawful conduct and remedy any violations that have occurred. Such corrective action may include disciplinary action against those employees found to have violated policy.

All supervisory employees are assigned responsibility for implementing this policy, ensuring compliance with and knowledge of its terms, taking immediate and appropriate corrective action if they witness inappropriate behavior, and notifying the Human Resources Director if they receive a retaliation complaint. A supervisor's failure to carry out these responsibilities may result in discipline.