You've Experienced Discrimination or Harassment in the Workplace: How to Effectively File an Internal Complaint and how to avoid a Sham Investigation

I. Introduction & Overview

Filing a workplace complaint of discrimination, retaliation and or harassment is a daunting decision. The repercussions can impact the trajectory of your career in the short and long term. How you utilize the process, the wording of your complaint and who receives the complaint are critical to obtaining your desired outcome. The discussion herein is no substitute for legal advice and or counsel, so be sure to also confer with an attorney. Nonetheless, the discussion herein should equip you with the foundation to navigate your employer's complaint process. Upon review and reference, you should also be able to constructively and effectively engage your attorney. The key is to start by reading your employer's policy. To make the best use of any initial communications, you should also have your employer's policy readily available for you and your attorney.

II. Indicators that Your Employer's Policy Is Substantive and Effective

Key Points

• **It Starts at the Top:** Your employer's commitment to having a workplace free of discrimination and unlawful conduct, is vital to the efficacy of the complaint procedure.

• **Workplace Policies Should Serve as Prophylactic and Proactive Protections Against Violations of the Law:** Conduct that may violate the policy may not be unlawful. The goals are to protect you/the employee and the employer, before the misconduct becomes actionable under the federal, state and or city human rights laws.

• **The Employer Should have a Formal and Consistent Complaint Process:** Employees are not required to file written complaints. Best practices usually comprise of complaint forms, that may be submitted electronically or to a repository anonymously if necessary. If the employer does not have a formal process, be sure to send an email to the head of the organization and HR. The subject of that email should clearly state that it is a discrimination and or workplace complaint.

• **The Process Should State the Investigation's Steps and Duration:** If there is a complaint procedure, it should list all of the steps and the estimated time to complete each facet of the investigation.

• **Your Employer Should Have a Qualified Designated Staff Person to Process Complaints:** If your supervisor is the subject of your complaint, your

employer's complaint process should have a designated staff person where you can initiate the process without their involvement. Ideally your employer should have members of each gender, and or adequate staff to address the organization's workload in a timely fashion.

• **The Investigator Must be Independent:** An investigator or official tasked with the capacity to investigate complaints must have a vital role within the organization. Is the investigator a senior employee who directly reports to the CEO or agency head? Does the investigator work independently of Human Resources and or the Legal department? Is the investigator neutral or are they conducting the investigation in anticipation of litigation? Answers to these basic questions will help to determine whether you have adequate recourse to resolve your disputes within your workplace (i.e. without filing with an external agency like the Equal Employment Opportunity Commission (EEOC) or in Court).

• **Employees Have Different Burdens of Proof Depending on the Stage They're in and the Venue:** If you're filing a complaint within the workplace, your burden for establishing a violation of your employer's policy should be rather minimal. Your burden increases once you file externally, i.e. with the EEOC or administratively (however, this burden remains lower than if you were to file a lawsuit). The highest burden of proof is once you initiate litigation. When you file your complaint to start the case, you must plead facts sufficient to establish that your claims are plausible. As your case advances in litigation, your burden increases. The record evidence that you have and are able to acquire must be sufficient to show, that a reasonable juror may determine that you experienced unlawful conduct.

• **Consult or Work with a Lawyer as Early in the Process as Possible:** Having a lawyer involved early on ensures that you are acting in a fashion that protects you in the short and long run. If you're in a union, you are entitled to legal representation per the Weingarten decision. Weingarten provides, that you are entitled to legal representation at any meetings, that have the potential to impact the terms and conditions of your employment.

III. Legal Precedent and Recent Decisions

In 1998, the Supreme Court addressed this topic in two major decisions:

- Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998); and
- Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

These two decisions have collectively become known as the **Faragher Ellerth defense**. Employers can only raise this **affirmative defense** if they have not taken any tangible actions against an employee who has complained. *Faragher* has defined tangible actions to constitute any of the following: hiring, firing, promotion, compensation and or alterations in work assignment.

With time, the definition has become broader, a more expansive array of employment actions are now covered under the state and city human rights laws as well. Since the 2005 and 2019 Amendments to the city and state human rights laws, it is easier to establish claims of discrimination under those statutes. The drawbacks of seeking recourse under these statutes rather than the federal statutes, sometimes lies in the amount of damages. To maximize the likelihood of success, your attorney will more than likely bring claims under the federal, state and city human rights laws.

The following are additional cases that have been decided more recently (links to each decision have been provided for your review):

• Vance v. Ball State University, 570 U.S. 421, 133 S. Ct. 2434 (2013);

• Ferrara v. Sterling Inc., 23-CV-0454, 2024 WL 425742 (2d Cir. Feb. 8, 2024);

• McPherson v. New York City Dept. of Educ., 457 F.3d 211 (2d Cir. 2006); and

• Saenger v. Montefiore Medical Center, 706 F. Supp. 2d 494 (S.D.N.Y. 2010)

IV. Legal Standard: Employers are Not Protected When they Conduct Sham, Bizarre or Duplicitous Investigations

• The law requires the employer to have exercised **reasonable care** to prevent and promptly correct any unlawful behavior (was the employer's response effectively remedial or prompt); and

• The employee must not have **unreasonably failed to avail themselves of the employer's process**. Precedent does not require the employee to file a complaint to show that the employer does not have a viable complaint process. Instead, either the pleaded facts or record evidence must permit a trier of fact to find that the employer's process is inadequate. What that means is that beyond your conclusory opinions and assertions, you must state facts in your complaint that the employer's process is problematic. For example: employees fear retaliation in the wake of filing complaints; the employer has a pattern of not responding to complaints; the employer fails to monitor the workplace; and or the employer's investigatory office has a reputation for being biased.

V. You Believe that You Have Experienced Unlawful Conduct: How Should You Proceed? Be Methodical and Strategic

Step 1: Review the Policy Ideally, you have received annual training from your employer that notifies you of your rights. Amongst the materials that your employer should rely upon in the provision of that training, are their HR/EEO/DEI policies. Within those policies should be a clear discussion as to what the complaint process entails.

Step 2: Document Document Document The policy or training should tell you how and where to file a complaint; best practices usually include a complaint form. However, employees are not restricted to these forms. As long as the employer has actual notice/knowledge of the employee's complaint. Notice may be established by way of oral complaints, written emails and or other written documents that unequivocally state that the employee believes that they have experienced conduct prohibited under the employer's policies or in violation of the law (federal, state or city human rights laws).

The complaint process should be clear and should provide prescribed timelines. All parties should receive a letter or email which confirms receipt of their complaint. Such notification should be sent within one week of the complaint being filed. The notification should also lay out timeframes for each phase of the investigation. Best practices have given employers between **30 and 90 days** to complete their investigations. If there is a delay, the investigator or their office should notify the parties and estimate a date of completion.

Key Points

• **Put your Employer on Notice in a Timely and Unequivocal Fashion:** Any complaint should state upfront that it is a discrimination complaint or a complaint about the violation of the employer's HR policies. Ideally this should be in the subject of your email. Secondly, most complaint procedures cover conduct within a calendar year of the complaint. To protect your rights, the sooner you file the better. Also the earlier you file, the more protections you will subsequently have if you decide to file with either an external agency or in Court.

• **Follow up in writing with the investigator and their supervisor (if appropriate):** Make sure they don't need any additional documentation, evidence and or names of witnesses from you. If so, be sure to get them the requested information as soon as possible.

• **Follow up in writing about deadlines:** If there are phone calls, be sure to send an email that captures key points. The email does not have to be perfect, it just needs to establish that the phone call took place.

Step 3: Prepare to Speak with Your Investigator: Should I have Counsel? Can I record the Meeting? Don't Get Boxed into a Story or Fall into the Trap of Trying to Use Legal Terminology

• Per **Weingarten**: it is ideal that your employer will allow you to have an attorney or union representative present for the investigator's interview.

• If you can't have an attorney present, ask if you can record the interview. New York is a **one party recording** state, you don't need the other party's consent to record.

• Try to keep any discussion of what happened to the facts. Your statements should only address questions of Who, What and When. Do not try to provide any alternative explanations. For example, do not try to explain why a person has chosen to take a given course of action, or why they may have decided to treat you a given way. Avoid trying to define legal concepts. Examples include but are not limited to the following types of questions: why do you think you experienced discrimination; or why do you think what happened was discriminatory? These are ***legal conclusions***, and the investigator is being directed to ask these questions to kill your ability to move forward down the line.
• Be sure to express concern, if the investigator asks questions like the following:

a) Why do you believe you were working in a hostile work environment based on your race or gender?

b) Why do you believe you experienced retaliation or discrimination?

c) How many times do you recall Defendants acting in a fashion that violated the policy? The first two call for **legal conclusions** that the employer will inevitably try to use against you in a filing for summary judgment. The last one seeks to box you into a set of facts. Sometimes we forget what happened, or we don't remember all of the facts because we are nervous. Be careful in both instances, you may want to ask the investigator at this point if they are asking these questions in anticipation of litigation.

Bonus Tip 1: Some investigators engage in dirty tricks to get you off of your game. They may cough, sneeze or start moving to distract you. They want to interrupt your train of thought; again, don't let that happen. They may also ask questions in an illogical fashion (jumping from subject to subject) or out of sequence, with the hopes that you may forget things or you may become flustered. Take a deep breath and step out of the room so that you can compose yourself.

Bonus Tip 2: Don't rush. Always count to three before answering any questions. This gives you a chance to make sure you understand the question. It also gives you the opportunity to compose yourself. Don't let the investigator bully you into a set of facts. Don't let them put words in your mouth. Make sure you repeat and reiterate the question. When your investigator asks questions using some of your language, make sure they use your exact words.

Step 4: Inquire About The Outcome and Investigatory Reports in Writing A viable investigatory process should provide a written determination. This notification should not be perfunctory. It should provide the following information:

- The investigator's methodology: the persons the investigator interviewed and whether they were interviewed in person or over the phone;

- Notes, minutes, recordings or a summary of each person interviewed;

- The applicable provisions of the policy invoked;

- A summary of the parties' respective positions; and

- An explanation of the outcome. This phase of the process is critical and telling. A perfunctory determination is usually a tell-tale sign that the investigatory process is performative and lacking in substance: i.e. a letter that either says the investigation is substantiated or unsubstantiated without further explanation. Another red flag, is the investigator's title or background. If the investigator is an attorney or they have a legal position, in all likelihood the employer will argue that any work product is protected by the attorney client privilege. If you learn that the investigator is an attorney up front, then you should look into filing with an external agency within 60 days. The key here is that you must give the employer an opportunity to act on your complaint. Refer to the employer's process to ensure that you have all of the referenced reports. Some processes require sign off from the CEO or agency head. Again, you want to request this report or to make note of it for your lawyer should you pursue litigation down the line. The goal is to get as much as you can before filing any external complaints or lawsuits.

VI. Closing Thoughts: You're Not A Troublemaker and You are Protected From Your Employer's Retaliatory Employment Actions in the Wake of Your Complaint

Filing a complaint in the workplace takes a lot of courage. If you have a good faith belief that your rights have been violated, you are well within your right to seek recourse. You are not a troublemaker; you should not feel obligated to endure inappropriate or unlawful conduct at your workplace. The law prohibits an employer or its employees from retaliating in the wake of you filing a complaint. The reality is, often times it is human nature to seek revenge or retaliation. Being mindful of this, be sure to create a timeline of any changes to your working conditions after you complain. Document reductions in responsibilities, exclusions from meetings, removal of resources (i.e. staff, training and or other privileges material to your job).

Time is of the essence. Retaliatory intent is initially established by way of proximity. The sooner your employer makes changes to your working conditions after you have filed a complaint or engaged in protected activity, the more likely the Court is to find that you have experienced retaliation. Previously, acts that occurred within two to three months were actionable. Recent decisions have expanded this time frame, finding that workplace conditions and realities may cause employers to retaliate further down the line, as soon as circumstances permit. As such, there is no fixed time frame to establish retaliation. Again be sure to document and confer with an attorney who specializes in employment discrimination cases, and most importantly Good luck!