


**Caught in the Web of Conflict:  
Navigating Workplace Issues and Ways  
to Appropriately Solve Them**

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**Learning Objectives**

- How to identify conflicts in the workplace and properly diffuse them as they arise
- How to properly maintain attorney-client privilege and confidentiality throughout an investigation
- How to conduct a proper, fair, and thorough workplace investigation

  
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**IDENTIFYING AND  
ADDRESSING CONFLICTS**

  
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## CONFLICT IN THE WORKPLACE

- Conflict need not be feared. Conflict in the workplace is unavoidable. It will find you whether you look for it or not.
- Difference is at the heart of conflict, so it is important to explore areas where people may be misaligned.
- The ability to recognize conflict, understand the nature of conflict, and to bring swift, just resolution will benefit you and the entire organization tremendously.



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## PREVENTING CONFLICT IN THE FIRST PLACE

- Properly train supervisors and employees on how to manage conflicts.
- Survey the workforce to give them an opportunity to voice any concerns.
- Foster a work culture and environment where respect is a fundamental principle.
- Maintain clear policies that detail the steps the company will take to resolve workplace conflict.
- Assess risks.
- Equip and support employees.



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## IDENTIFY THE CONFLICT

- Some conflict is difficult to detect.
- Common signs of conflict
  - Body language
    - Avoiding eye contact, crossed arms, frowning, posture, etc.
  - Behavioral changes
  - Clique formation
  - Decrease in productivity
  - Complaints and/or comments
  - High staff turnover
  - Frequently calling in sick



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## IDENTIFY THE CONFLICT

- Clarify the source of the conflict
- Brainstorming questions to help narrow it down:
  - Do the individuals have the same objectives so that everyone is working towards the same goal?
  - Is the level of competition healthy or unhealthy?
  - Are the roles and expectations of a project clearly defined?
  - Was there a breakdown in communication?
  - Are emotions driving decisions?

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## ADDRESS THE CONFLICT AS IT ARISES

- Have an informal meeting first with each affected employee to gain a foundation of what took place.
  - Utilize active listening skills.
  - Remain neutral.
  - Be sensitive and aware of emotions at play.
- Identify whether a misunderstanding has taken place.
  - If yes, then a meeting with the individuals involved should clear the air.
  - Set expectations for behavior and address as needed in evaluations/reviews.
  - If not, or if it is a more serious issue such as discrimination or harassment, then utilize more formal channels and follow investigation procedure.

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## WHAT IS BULLYING BEHAVIOR?

- Verbal, physical or written behavior,
- generally as a pattern of conduct directed at an individual or group of people,
- that is offensive, intimidating, harassing, degrading and/or otherwise physically or mentally damaging.

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## WHAT IS UNLAWFUL HARASSMENT?

- Unwelcome conduct
- Based on a person's membership in a protected class
  - Such as age, race, ethnicity, sexual orientation, marital status, religious beliefs/creed, disability, military status, use or non-use of a lawful product.
  - State, federal and local laws list out their own protected categories.
- Where:
  - (1) enduring the offensive conduct becomes a condition of continued employment, or
  - (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider it to unreasonably interfere with an employee's job performance or creates an intimidating, hostile, or abusive environment.



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## HOW IS BULLYING SIMILAR TO AND DIFFERENT FROM UNLAWFUL HARASSMENT?

- Both are linked to abuse of power
- Both are unwanted, offensive and affect another's dignity
- Repetition/Severity
- Relevance of harm caused
- Protected class status v. lack of defined targets/equal opportunity bully



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## WHY SHOULD WE CARE?

- Safe and healthy environment for all
- Potential discipline for failure to meet job expectations and violating policies
- Legal liability for both the employee and the employer
- Reputational concerns for you and your employer
- Work culture matters!



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## FUNDAMENTAL RIGHTS

- Everyone is entitled to dignity & respect in the workplace
- This is a basic human right, even if not mandated by law
- Golden Rule still applies



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## APPLICABLE STATE LAWS

- Wisconsin Fair Employment Act, Wis. Stat. § 111.31 et seq.
  - State law protects workers from harassment in the workplace because of their race, color, creed, ancestry, national origin, age (40 and up), disability, sex, arrest or conviction record, marital status, sexual orientation or membership in the military reserve.
  - Harassment may include verbal abuse, epithets, and vulgar or derogatory language, display of offensive cartoons or materials, mimicry, lewd or offensive gestures and telling of jokes offensive to the above protected class members. The behavior must be more than a few isolated incidents or casual comments, unless sufficiently severe. It involves a pattern of abusive and degrading conduct directed against a protected class member that is sufficient to interfere with their work or create an offensive and hostile work environment.
  - State law does not protect workers from general workplace harassment or bullying unconnected with some characteristic under the law.
  - Currently, Wisconsin state law does not require harassment training.



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## APPLICABLE STATE LAWS

- Wisconsin Worker's Compensation Law, Wis. Stat. Chapter 102
  - Injuries related to bullying and harassment could be covered because the definition of "injury" includes mental harm.
- Wisconsin Criminal Code Violations, Wis. Stat § 947.013 & 947.01 "Harassment" & "Disorderly Conduct"
  - Harassment can result in a felony or a misdemeanor and occurs when a person
    - (a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.
    - (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.
  - Disorderly conduct results in a misdemeanor and occurs when a person
    - Engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.
- Wisconsin Criminal Code Violations related to sexual assault and/or assault and battery, Wis. Stat. Chapter 940



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**APPLICABLE FEDERAL LAWS**

- Harassment is classified as a form of discrimination that violates the following:
  - Title VII of the Civil Rights Act of 1964 (Title VII)
    - Protected characteristics: race, color, religion, sex (including gender identity and sexual orientation), and national origin.
  - Age Discrimination in Employment Act of 1967 (ADEA)
  - Americans with Disabilities Act of 1990 (ADA)
  - Genetic Information Nondiscrimination Act of 2008 (GINA)
- Occupational Safety and Health Act (OSHA)
  - Harassment under OSHA is still an open question

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**EMPLOYER LIABILITY**

- Harassment by a supervisor that results in a negative employment action automatically holds the employer liable.
- Harassment by third parties or non-supervisory employees over whom the employer has control (i.e. independent contractors such as physicians) may hold the employer liable if the employer
  - Knew or should have known about the harassment
  - And failed to take prompt appropriate corrective action.
  - 29 C.F.R. § 1604.11(e).

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**COMMON LAW**

- Intentional infliction of emotional distress
- Defamation
- Negligent hiring, supervision, training, retention etc.
- Constructive discharge

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<b>EMPLOYER POLICIES</b>
<ul style="list-style-type: none"> <li>• Code of conduct</li> <li>• Harassment/discrimination</li> <li>• Bullying</li> <li>• Respectful workplace</li> <li>• Civility</li> </ul>


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<b>INDIVIDUAL COST OF IGNORING TOXIC BEHAVIOR</b>
<ul style="list-style-type: none"> <li>• Work-related stress</li> <li>• Depression, anxiety, anger, panic attacks, PTSD</li> <li>• Inability to work, concentrate, focus, make decisions</li> <li>• Loss of productivity, reduced performance</li> <li>• Loss of self-confidence and self-esteem</li> <li>• Physical impairments</li> <li>• Reduced quality of life/relationships</li> <li>• Increased use of drugs or alcohol</li> <li>• Suicide</li> </ul>


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<b>ORGANIZATIONAL COST OF IGNORING TOXIC BEHAVIOR</b>
<ul style="list-style-type: none"> <li>• Stressful and toxic work environment</li> <li>• Diminished performance, attendance, engagement &amp; customer focus</li> <li>• High turnover</li> <li>• Lack of trust</li> <li>• Poor morale</li> <li>• Damage to reputation</li> <li>• Increased work comp and disability claims</li> <li>• Legal claims</li> </ul>


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## HYPOTHETICALS PART 1

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## WORKPLACE INVESTIGATIONS: PRELIMINARY CONSIDERATIONS AND CONFIDENTIALITY

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### PRELIMINARY CONSIDERATIONS

- What should be investigated
- Relevant policies and procedures
- Timing of the investigation
- Interim measures
- Selection of an investigator
- Who can attend the interviews

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**PRELIMINARY DECISIONS**

- Privilege
- Scope of investigation
- Representatives
- Logistics
- Conclusions and determinations to be made by investigator

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**SELECTION OF THE INVESTIGATOR**

- Ensure the investigator is impartial and unbiased.
- Avoid conflicts of interest.
- May need a neutral third party or outside investigator.

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**SELECTION OF THE INVESTIGATOR**

- An attorney as investigator:
  - When the investigator is an attorney retained to provide legal advice, witnesses must be advised of this fact, and told that the investigator represents the employer only and that the investigation is being conducted for the purpose of obtaining or rendering legal advice. *Upjohn v. United States*, 449 U.S. 383 (1981).
  - The investigator should make clear that he or she is conducting an unbiased and impartial investigation, and that the findings and conclusions will be shared with the employer.
  - The witness should be told that the investigator does not represent the witness personally, and that while their discussion is protected by the attorney-client privilege, that privilege belongs to the employer alone and only the employer can waive it.
  - Also known as an *Upjohn* warning
- An attorney as investigator, in general, allows the employer to cloak the investigation with the attorney-client privilege.

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## SELECTION OF THE INVESTIGATOR

- A non-attorney as investigator:
  - If the non-attorney investigator is acting as the attorney’s agent, the privilege may apply.
  - However, if an attorney is there for assistance, but not as the investigator, in most cases the attorney-client privilege will not apply to the investigation.

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## ATTORNEY-CLIENT PRIVILEGE: BASICS

- The privilege protects communications relating to an investigation.
  - Absolute protection under the right circumstances.
- Creation of the privilege
  - Applies to all communications between an attorney and his or her client that relate to legal advice.
- Duration of the privilege
  - The privilege *generally* continues to protect communications made during the attorney-client relationship even after the relationship ends.

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## ATTORNEY-CLIENT PRIVILEGE: IMPLICATIONS

- When deciding whether to use an attorney as investigator, employers should consider potential waiver of the privilege.
  - For example, an employer may decide to waive attorney-client privilege and affirmatively use an investigation in the defense of a harassment case.
  - Additionally, communications with third parties almost always constitutes a waiver of the attorney-client privilege.
- The choice of an outside attorney may disqualify that attorney from representing the employer in ensuing related litigation if a court deems the investigator a fact witness.

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**ATTORNEY-CLIENT PRIVILEGE:  
MAINTAINING THE PRIVILEGE**

- Investigation’s goal should be to assist in the provision of legal advice rather than business advice.
  - Investigations conducted for business purposes, rather than legal, do not merit privileged status.
- Proceed with caution in all communications
  - Sharing investigation information with third parties generally destroys the privilege.
  - However, if attorneys conducting an internal investigation rely upon non-lawyers to provide information to the company, the privilege is not waived.

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**CAN CONFIDENTIALITY BE REQUIRED?**

- In the *Apogee Retail* case, the NLRB overturned the *Banner* framework, in favor of the *Boeing* test.
  - *Boeing* evaluates the nature and extent of the potential impact of a workplace rule on NLRA rights and the legitimate business justifications that may be associated with such a rule.
  - After conducting such analysis, the Board will designate the rule into one of three categories:
    - (1) Category 1, which includes rules that the Board deems lawful either because the rule either does not interfere with NLRA rights or because the potential adverse impact is outweighed by the rule’s justifications;
    - (2) Category 2, which includes rules that warrant individualized scrutiny in each case as to whether the rule would interfere with NLRA rights, and if so, whether the adverse impact is outweighed by the rule’s justifications; and
    - (3) Category 3, which includes rules that the Board will designate as unlawful because they would prohibit or limit NLRA-protected conduct and because the potential adverse impact is not outweighed by the rule’s justifications.

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**CAN CONFIDENTIALITY BE REQUIRED?**

- In welcome news to employers, the NLRB held that employer rules requiring confidentiality during the course of workplace investigations are per se lawful under the NLRA – as long as the rules are time-limited to the investigative period on their face. This would fall into category 1.
- The Board further held that investigative confidentiality rules that are not clearly time-limited on their face would be subject to scrutiny in each case as to whether the adverse impact is outweighed by the rule’s justifications. This would fall into category 2.
- *Apogee Retail LLC d/b/a Unique Thrift Store and Kathy Johnson*, 368 NLRB No. 144 (Dec. 16, 2019).

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**WORKPLACE INVESTIGATIONS:  
INVESTIGATIVE  
METHODOLOGIES**

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**INVESTIGATION PLAN**

- Review complaint and all relevant documentation
- Review applicable policies, employment contract and collective bargaining agreement
- Identify who should be interviewed and in what order
- Develop questions/areas of inquiry in writing

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**INTERVIEW: INTRODUCTORY REMARKS**

- Purpose of interview, role of investigation, identification as an attorney
- Relevant policies
- Role of the witness
- Confidentiality
- Retaliation prohibited
- Investigative process
- Voluntariness
- Questions

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**CONDUCTING THE INTERVIEW**

- Build rapport. This is an interview, not an investigation
- Initially use open ended questions, and then more focused follow-up questions
- Liberal use of questions like:
  - How do you know that?
  - What do you mean?
  - Tell me more about?
- Be intentional and carefully phrase questions to avoid suggestive or biased ones

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**INTERVIEWS**

- Specific areas of inquiry
  - Focus on nature, frequency, severity and impact of conduct
  - Ensure that witness provides specific and objective descriptions of complained of behavior. Remember to ask “Who, what, when, where, and why” for each incident.
  - Work around deflection mechanisms
- Concluding the interview

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**CREDIBILITY**

- Corroboration
- Observations
- Statements
- Bias/motive
- Plausibility
- Background/history/pattern/reputation
- Demeanor

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**FINAL REPORT**

- Date and summary of complaint
- Summary of scope
- Investigative process
- Summary of evidence
- Summary of findings and conclusions:
  - Findings
  - Credibility resolutions
  - Conclusion as to whether alleged conduct more likely than not occurred or did not occur
  - Violation of policies?

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**REMEDIAL MEASURES**

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**REMEDIAL PLANS OR TERMINATION**

- Legal actions
- Termination
- Remedial measures
- Prevention of retaliation
- Follow up with victim or affected employees
- Monitoring
- Training

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## PREVENTION

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## PREVENTION

- Culture of respect and dignity
- Policies
- Contract provisions
- Training and coaching
- Risk assessments
- Recruitment
- Equipping and supporting employees

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## HYPOTHETICALS PART 2

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**QUESTIONS?**

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