

Dorsey and Whitney's Labor & Employment Group

Panel Discussion: Investigations and Employee Discipline



Panel Discussion

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Company provides accounting and consulting services to businesses, including some public companies. Erin (Employee) has worked for Company for 12 years and has acceptable performance reviews. She has had a few counseling statements but seems to have remedied the performance concerns. Erin recently reported to management and a federal investigator that she believed the CFO of the Company was improperly categorizing expenses to cover up unauthorized spending by senior management of a public company that is a client of Company. An outside investigator recently concluded that the CFO had acted properly but found that Erin had a good faith basis for suspecting impropriety. Erin openly disagrees with the outcome and insists that had the CFO been a woman, the investigation would have turned out differently.

Erin's supervisor, Sally, now wants to terminate Erin because she says that Erin's performance has deteriorated significantly over the last month. Sally has a few specific examples, including one that reflects a serious mistake that someone of Erin's experience should not have made. Sally wonders whether Erin is intentionally making errors in order to cause problems for the Company, and particularly the CFO. Sally has spoken to Erin informally (without documenting the discussions) about Sally's concerns but Erin has refused to acknowledge the errors or agree to corrective action. Sally is particularly upset because Erin's recent mistake caused Sally to receive significant criticism from her direct supervisor, the Company's CFO. Sally insists that termination should be immediate in order to protect the Company and its clients.

Company's Senior Vice President of Development, Victor, oversees a team of engineers, including Ernie. Victor's team is working on the development of a new product that is extremely lucrative and widely considered the best hope the company has of survival. Victor is married to Wilma who is the daughter of the Chairman of the Board. Earlier this year, Ernie married his long-time domestic partner, who does not work at the Company, during the short period time in which same-gender marriage was permitted in Utah.

One of the other engineers, James, recently approached the Company president (they are friends outside of work) about a conversation he had with Ernie. James required the president to promise he would not to tell anyone about the conversation. After the president promised confidentiality, James told him the following: Victor had approached Ernie earlier this year about commencing a secret romantic relationship together. Victor made clear that no one else could know about his proposal to Ernie because it could get back to Wilma and destroy his marriage. Ernie felt very uncomfortable during the conversation and told Victor that he did not think it was a good idea. He feared that Victor would not want him on the team if he rejected him and it would negatively impact his career, but did not know what else to do.

During the lunch, Ernie also told James that a week after the awkward discussion about starting a relationship, Victor assigned Ernie to travel with him to a meeting out of state. When they arrived late at night at the hotel following the meeting, it was discovered that only one hotel room had been booked – apparently the error of an administrative employee who assumed that a room with two queen beds would be acceptable. Since no other rooms were available and it was so late, they agreed to share the room. In the middle of the night, Victor complained to Ernie that he was cold and asked Ernie to sleep in the same bed with him to help keep him warm. Concerned that Ernie’s job could be in jeopardy if he refused, Ernie slept next to Victor. While there was no sexual conduct, Ernie told James that he is very upset about what happened. He does not want anyone to know about what happened with Victor because he fears it will affect his marriage, but just wants Victor to back off.

Company (based in Utah) sells highly specialized video equipment to businesses all over the world. Elaine is a senior sales associate who is exclusively responsible for sales in Europe, representing 25% of the Company's sales. The Company has developed a highly successful sales process that has tripled revenue. Elaine was part of the team that developed the new process. It is unlike anything that has been previously done in the industry.

When she was hired, Elaine signed an employment agreement that included a non-disclosure clause protecting the company's confidential and proprietary information from disclosure, as well as a covenant not to compete for two years following separation from the company.

The Company's president recently received an "off the record" tip from a friend who works at a Utah-based competitor that Elaine has approached about employment. Elaine has told the competitor that if hired she will triple revenues by implementing the same sales process that is used by the Company. While the friend was not certain, he understands that Elaine sent a customer contact list for the Company's European clients to the competitor that included contact information and, order and pricing history for each client. The friend understands that Elaine did not use her company email to send the information but sent it through her personal gmail account on the smartphone issued to her by the Company. When she is not traveling, Elaine leaves her smartphone charging in her office overnight.

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