

# 2019 MASA/MOSPRA Spring Conference

## Navigating Discrimination Claims by Misbehaving Employees

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# Scenario

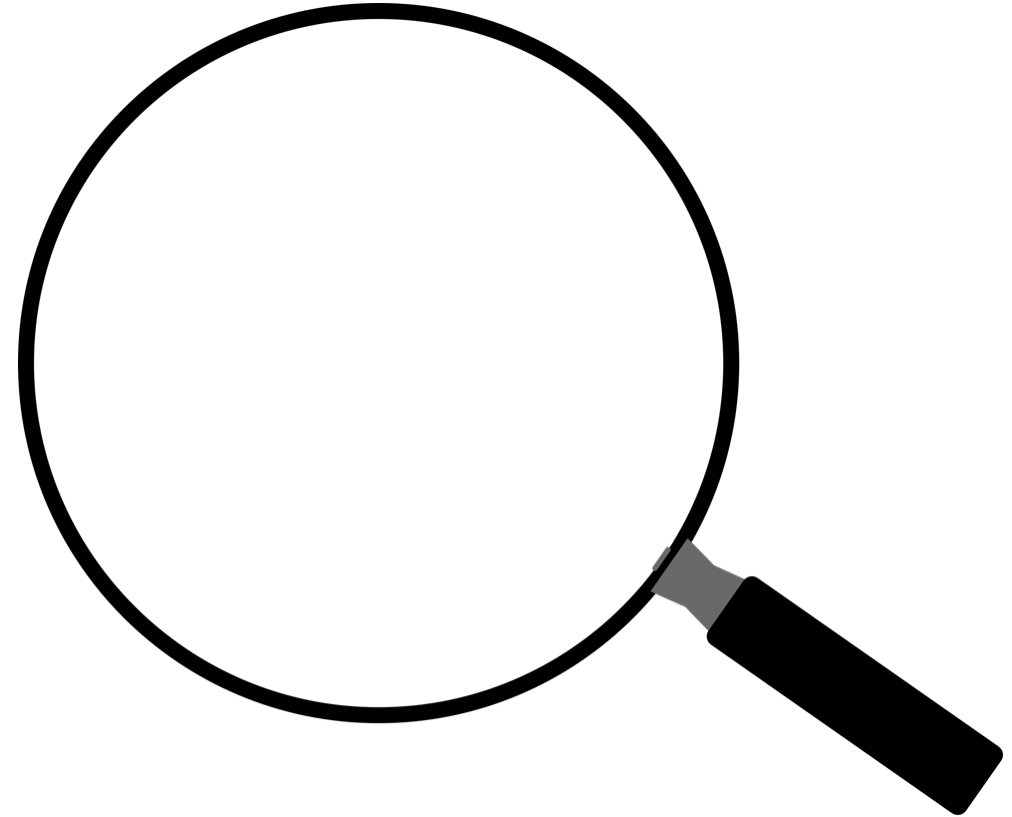
It is September. You have a White custodian in the District that is assigned to clean a section of an elementary school. His normal work schedule is from 12:00pm to 8:00pm, Monday through Friday. He has been employed for 2 years. He was issued written warnings by his supervisor last May about not coming to work on time, taking too many days off, leaving the building when he is supposed to be working, and not adequately performing his cleaning duties.

The Custodial Supervisor, who is African-American, informs you that there have now been 3 complaints from teachers about their rooms not being cleaned.



# Addressing Employee Misconduct – Overview

- Appoint one individual to conduct the investigation
- Promptly interview employee and any witnesses
- Obtain written statements
- Collect and preserve all relevant evidence
- Consider whether policies prohibiting discrimination, harassment, and/or retaliation are implicated
- Common Missteps
- Outcome



# Scenario



Just prior to issuing the NBPV to the Custodian, you are informed that a teacher in the Custodian's assigned area has reported that the Custodian is making grunting noises at her as the Custodian walks by and asks her "How you doing?".

# Board Policies

- MSBA – AC
- MCE – 1300, 4110



# Overview of the Investigation

- Investigate and document all complaints under the lens of the antidiscrimination Policy.
- Review the district's antidiscrimination policy
- Identify each individual allegation
- Make a plan for investigating
  - What evidence needs to be collected?
  - Who do you need to talk to and when?
- Documentation
  - Written complaint
  - Written statements
  - Investigation notes
  - Outcome Report
- Timelines
- Notification



# Scenario

After you provide the Custodian with the findings of the discrimination/harassment investigation and give him another NBPV, you are informed by the Custodial Supervisor that teachers have reported seeing the Custodian having his children and other students perform the Custodian's work while the Custodian sits in a chair with head phones on. The Custodial Supervisor also tells you that the Custodian is taking a lot of days off. When you bring the Custodian in to discuss these reports, he states that he is taking days off because his kids are sick. He also denies the accusations and claims

that he is being targeted because of the previous harassment complaint made against him by the teacher. He alleges that people are making false reports against him, and that the Custodial Supervisor is inspecting the Custodian's work daily when he doesn't do that for any of the other custodians.





# Retaliation – MHRA § 213.070

- It shall be an unlawful discriminatory practice:
  - To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter
- A plaintiff must prove:
  - She complained of discrimination;
  - The District took adverse action against her; and
  - A causal relationship existed between the complaint and the adverse action.
- Retaliation Standards
- Tips for Mitigating Risk





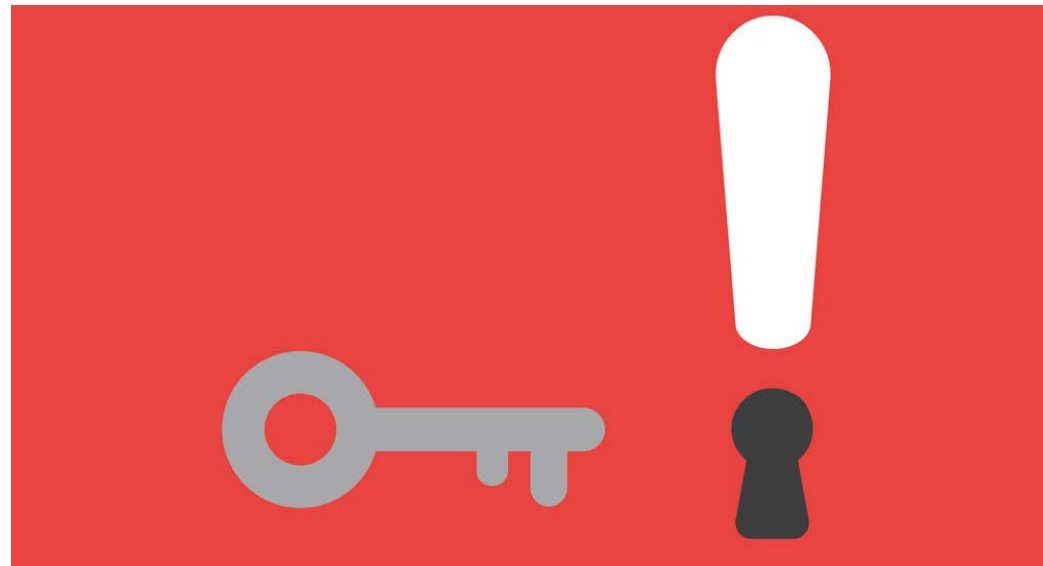
# Scenario



A few days later, the Custodial Supervisor hears that the Custodian is in town at a gas station when he is clocked in and supposed to be working. The Custodial Supervisor goes to the gas station, but doesn't find the Custodian. He returns to the building, finds the Custodian, confronts him about leaving work while being clocked in, and tells the Custodian, "You're a\*\* is on thin ice." The Custodian immediately comes to your office and says he wants to make a formal complaint of racial discrimination against the Custodial Supervisor.

# Harassment/Discrimination Investigations Against Supervisors

- Interim Measures are key!



# Scenario

A week after completing your discrimination investigation and informing the Custodian of the findings, you receive notice from the EEOC that the Custodian has filed a charge of racial discrimination against the District, but has not yet perfected the charge. The Custodian claims that the Custodial Supervisor is discriminating against him because he is White. That same day, you are informed by the building principal that the Custodian is not properly completing his cleaning duties and continues to call in to take days off.



# Documentation

- Document, document, document!



# Scenario

The Custodian calls in to work an hour before his scheduled shift to say that he won't be there because he has the flu. This is his 6<sup>th</sup> absence this month and his 22<sup>nd</sup> for the semester.



# Outcome

The Custodian in this situation was terminated due to numerous violations of Board Policy, including being absent too frequently under the District's attendance policy. A few days after he was fired, he filed a claim of discrimination with the MCHR, alleging that he was discriminated against by the District on the basis of his race and his disability (Crohn's). Since he first filed the racial discrimination charge with the EEOC, that agency took the lead on the investigation. The District first tried to engage in mediation with the Custodian and the EEOC, but the Custodian wanted over \$150,000. We walked away from the mediation at that point, and the EEOC ultimately issued a Right to Sue Letter to the Custodian. The Custodian then filed a lawsuit in federal court, which was settled for \$15,000.



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