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Good Workplace Investigations Are Good Business

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Conducting thorough and impartial workplace investigations is good business — pure and simple. When addressing employee complaints or allegations of other workplace misconduct, employers should conduct their investigations in a prompt, fair, and objective manner. The selection of the right investigator is critical. Failing to conduct a proper investigation exposes employers to the risk that they will not be able to adequately justify any decisions stemming from the investigation results and can bar employers from asserting what would otherwise be available defenses.

In 1998, the Supreme Court recognized the principle that proper investigations provide good defenses in *Ellerth v. Burlington Industries, Inc.*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed.2d 633 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed.2d 662 (1998). In these cases, the Court held that employers may avoid liability for harassment or discrimination claims that do not involve adverse employment actions if the employer can show that (1) it took reasonable steps to prevent and promptly correct such harassment or discrimination in the workplace *and* (2) the plaintiff failed to take advantage of the preventive or corrective measures offered by the employer.

When employers are made aware of alleged misconduct or an employee complaint, they must first determine whether to initiate an investigation. The answer is almost always — "yes," an investigation should take place. An employer is obligated to conduct an investigation when it knows or has reason to know that an employee is being subjected to discrimination, harassment or other unlawful conduct in the workplace, even if the employee never submits a formal written complaint.

Courts have repeatedly recognized that minimizing or ignoring complaints of unlawful treatment can jeopardize available defenses or subject employers to liability. A Pennsylvania Court held that punitive damages were appropriate in a hostile work environment suit where the plaintiff's repeated complaints about a co-worker's sexually charged conduct went ignored and the employer did not conduct an investigation. *See Scuffle v. Wheaton & Sons, Inc.*, W.D. Pa. No. 2:14cv708, 2015 U.S. Dist. LEXIS 33549 (March 18, 2015). In another case, in which the supervisor of an employee complaining of sexual harassment told her "ignore it and smile," the court held that the employee's claim for intentional infliction of emotional distress would survive a motion to dismiss. *See Gillum v. Safeway, Inc.*, W.D. Wash. No. 2:13-cv-02047, 2015 U.S. Dist. LEXIS 181593 (November 20, 2015). In *Meng v. Aramark Corp.* N.D. Ill. No. 12-cv-8232, 2015 U.S. Dist. LEXIS 36278 (March 24, 2015), the court found that a triable issue of fact remained regarding whether the employer properly investigated a female employee's report of sexually suggestive graffiti where the investigators failed to take notes during their investigation, shrugged off the employee's report of concerns by saying "You can't change stupid people," declined to actually view the graffiti, and told the employee that the person responsible for the drawing would not be found. The court determined that the investigators' actions "fell short of what one might reasonably expect of his or her employer."

The bottom line is that all employee complaints regarding unlawful treatment and other workplace allegations of misconduct should be taken seriously and investigated. Ignoring complaints is the surest way to create a landmine of opportunities for potential plaintiffs.

Once the decision has been made that conducting an internal investigation is appropriate, employers need to select the right investigator. The person chosen to investigate should be (1) unbiased and neutral, (2) have an understanding of applicable laws, regulations and policies, and (3) be able to instill confidence and gain the trust of all parties involved that the investigation will be fair and impartial. It can be an employee of the company or an independent neutral third party investigator specializing in workplace investigations. Regardless of whether an internal or external investigator is selected, that person should have training and experience with investigations, use a professional demeanor, and be well-versed in the assessing witness credibility and handling confidential matters. The investigator will be an important witness if the investigation is challenged or the matter results in a lawsuit. Employers want to select someone that employees, administrative agencies, and courts will find trustworthy and credible.

In some cases, human resources and management personnel are appropriate investigators; in others, an outside investigator may have better training, experience or impartiality. When the allegations of wrongdoing involve the highest levels of the organization or involve someone who normally would be conducting the investigation, selection of an outside investigator may make more sense. An investigator who is perceived to be "in the pocket" of the company will not have credibility — and without credibility, the findings of the investigation have little value. Where litigation is likely, employers may be wise to obtain an outside investigator to demonstrate intent to conduct an impartial investigation.

Attorneys can often be a good choice as an investigator. Someone who can withstand cross-examination is a critical attribute for an investigator. In addition, using an attorney as the independent investigator allows the company, at least initially, to protect the investigation report under the attorney-client privilege — which at a later point may be waived, if appropriate.

Many employers entrust the investigation of employee complaints to in-house counsel. However, in-house counsel may face a possible conflict issues (he or she cannot be both witness and attorney) and credibility concerns.

While the sensitivity of attorney-client and work product issues is beyond the scope of this article, the topic should be addressed at the outset of the investigation to ensure that attorney-client and work product issues are protected. Ohio Courts have held that when

an employer pleads the affirmative defense of a thorough investigation, the result may be a waiver of claims of privilege as to documents related to the investigation. *See*, *McKenna v. Nestle Purina PetCare Co.,* S.D. Ohio No. 2:05-cv-0976, 2007 U.S. Dist. LEXIS 8876 (February 5, 2007). Evaluation of the employer's system for combatting harassment may force disclosure of in-house investigation practices or the employer may face court sanctions. *See*, *E.E.O.C. v. Spitzer Mgmt., Inc.*, 866 F.Supp.2d 851, 856 (N.D. Ohio 2012).

Regardless of who is selected to conduct the investigation, employers should avoid selecting an investigator who may be perceived as biased, as this can lead to a perception that the investigation and resulting findings are tainted. For example, in a recent Massachusetts decision, the Court reinstated a $500,000 punitive damages award in a sexual harassment case brought against a Lexus dealership where the investigation was found to be severely deficient. *See Gyulakian v. Lexus of Watertown, Inc. et al.,* 475 Mass. 290, 56 N.E.3d 785 (2016). In that case, among other things, the employer selected a member of management with a self-professed bias against the Plaintiff to investigate her allegations of "relentless sexual harassment" by her supervisor. The investigator testified that he "honestly didn't believe" the Plaintiff's report of sexual harassment, told her that there might be a job opportunity at one of the employer's sister companies but warned her that reporting the harassment might jeopardize that opportunity. The investigator also failed to interview the proper witnesses. The employer's selection of a biased investigator resulted in a significant punitive damages award that far exceeded the compensatory and other damages awarded. *See also Mendoza v. W. Med. Ctr. Santa Ana*, 222 Cal.App.4th 1334, 1344, 166 Cal.Rptr.3d 720 (2014) ("The lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of the truth so much as a way to clean up the mess that was uncovered when [the plaintiff] made his complaint.")

Additionally, a supervisor should not be selected to conduct an investigation into the alleged misconduct of an employee where that employee has accused that supervisor of wrongdoing in the past. *See Douglas v. Aiken Regional Medical Center*, D.S.C. No. 1:12-cv-02882-JMC, 2015 U.S. Dist. LEXIS 41176 (March 31, 2015). The suggestion of bias can undermine the process and compromise defenses.

Even if an investigator does not ultimately decide whether or how to discipline an employee, the investigator's alleged bias could impact the employer under the "cat's-paw" theory. This theory recognizes an employer can be liable for discrimination (1) if an ultimate decision-maker was "duped" by a biased manager who reports an employee for misconduct ***and*** (2) the reports from the biased manager were not truthful. Courts have applied this rationale in the context of workplace investigations and held that, if an unbiased manager takes disciplinary action against an employee based on a biased investigator's findings, the employer may be liable for discrimination. *See Staub v. Proctor Hospital*, 562 U.S. 411, 422, 131 S. Ct. 1186, 179 L.Ed.2d 144 (2011); *Bowish v. Federal Express Corp.*, 699 F.Supp.2d 1306 (W.D. Okla. 2010).

These decisions demonstrate that using investigators with an obvious or perceived bias can severely hinder the ability of employers to defend their actions in subsequent litigation and may, in fact, result in punitive damages for a plaintiff because of a tainted investigation. When thinking of how bias can affect an investigation, most employers think only of how bias might affect the reporting party. Employers, however, are also susceptible to claims by employees who allege that they were wrongfully accused of misconduct. As a result, investigations should be structured to avoid bias against both the reporting party and the responding party.

Investigation missteps including ignoring complaints and/or selecting the wrong investigator can expose employers to liability. At the end of the day, an unbiased investigator and an impartial investigation can bring clarity to a jumble of innuendo and assertions and best posture employers to justify decisions and defend litigation.

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