

CONDUCTING A SUCCESSFUL, LIABILITY-FREE WORKPLACE INVESTIGATION THAT WILL STAND UP TO COURT SCRUTINY

The Good . . . The Bad . . . and the Ugly

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Introduction

When an employer knows or should know of workplace discrimination, harassment or retaliation it has an obligation to take immediate and appropriate corrective action (Gov. Code §12940(j)).

In many situations, the best "immediate and appropriate corrective action" is to initiate an investigation (*Swenson v. Potter* 271 F. 3d 1184, 1193 (9th Cir. 2001)). The investigation may be conducted internally, or an outside investigator may be retained. In either case, the propriety of that investigation is critical. When an investigation is conducted promptly, fairly, honestly and in good faith even if the findings are ultimately determined to be erroneous, the employer may not be held liable. (*Cotran v. Rollins Hudig Hall Internat., Inc.*, (1998) 17 Cal. 4th 93)

In *Cotran*, the Supreme Court held that it was not the jury's function to decide whether the acts that led to the decision to terminate actually occurred. Rather, it was the jury's role to assess the **objective reasonableness of the employer's factual determination of misconduct**. The court concluded the jury, on retrial, should be instructed: "[T]he question critical to defendants' liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so." (*Cotran* at p. 109.)

Juries, in general, will look at whether the defendant tried to do the right thing. The employer need not show that its efforts were perfect or that it reached the right result, but that it used its best efforts to respond promptly, fairly and in good faith. (*Harris v. L & L Wings, Inc.* 132 F.3d 978, 984 (4th Cir. 1997)). The purpose of Title VII is remedial, i.e. avoiding and preventing discrimination, not punitive, i.e. disciplining the alleged harasser (*Gregory v. Litton Systems, Inc.* 472 F.2d 631, 632).

When Is An Investigation Appropriate?

When a complaint can be resolved informally, a full-blown formal investigation is unnecessary. If the plaintiff's complaints are too vague to require an investigation, one is not necessary (*Hardage v. CBS Broadcasting Co.* 427 F. 3d 1177 (9th Cir. 2005) amended at 433 F. 3d 672 and 436 F. 3d 1050 (9th Cir. 2006). The employer is not however relieved of its obligation to take reasonable and appropriate action even when the employee says he/she will handle the matter him/herself. (*Hardage, supra*). But, unless the employer has some reasonable belief that the employee is being subjected to illegal discrimination or harassment, an employee's report of a personality conflict is insufficient to require an investigation (*Zimmerman v. Cook County Sheriff's Department* 26 F. 3d 1017 (7th Cir. 1996)

Meet with the complainant promptly, hear them out and ask them what suggestions they have to resolve the situation. Giving an employee an opportunity to be heard is a huge step towards finding a prompt and appropriate resolution.

Hoping a complaint will resolve itself is never sufficient. Complaints should not be ignored, discounted or disregarded including a statement by the complainant that they will handle it themselves. If that were really true, they would never have mentioned it in the first place!

If the employer is advised of the filing of an administrative complaint while in the middle of its investigation, discontinuing the investigation at that point can not be seen as retaliatory (*Browne v. City University of New York*, 419 F. Supp.2d 315); *EEOC v. Boeing Company*, 2005 U.S. Dist. LEXIS 21994, 23-24 (D. Ariz. 2005); *Reilly v. Metro-North Commuter Railroad*, 1996 U.S. Dist. LEXIS 17061 (S.D.N.Y. 1996).

If the employer learns of the claim for the first time upon notification of a DFEH or EEOC Complaint, while an investigation may be initiated at that point, the confidentiality of the investigation should be maintained as "attorney-client privileged" prepared "in anticipation of litigation." Should the case become litigated, it may be determined that it is advantageous to produce the investigation, but should the investigation disclose problems, the client will likely find it more useful for risk management purposes by 1) determining what disciplinary action is appropriate and 2) looking at an early resolution of the case.

Who Will Conduct the Investigation?

Whether the organization has employee relations or human resources staff trained to conduct investigations or retains an outside investigator, there will always

be the potential for a plaintiff attorney to argue bias. It is important that the individual who will be conducting the investigation understands the legal issues involved.

In deciding who will conduct the investigation the employer should consider whether there is a basis for a perceived bias. For example, will the investigation involve individuals with whom the investigator works or has a personal relationship? Has the investigator conducted investigations in the past in which claims of bias were substantiated? Has the investigator conducted an investigation in the past involving the same people?

If the investigation will involve high level employees or supervisors of the organization, strong consideration should be given to employing an outside investigator or an attorney; preferably one who has no prior relationship with the company. If you hire an investigator who has done numerous investigations for the company already and always reaches the same conclusion, a plaintiff attorney will target their bias. If you hire a law firm which has represented the employer on other cases, the plaintiff attorney will be arguing that they too are biased because a significant portion of their income comes from this same employer.

No more than one or two people need to be involved in the investigation including the conduct of the interviews. Beyond that number, it is intimidating to the interviewees. When an independent witness is in tears because too many people are questioning him/her, you know you have pushed the envelope.

What Should You Have to Get Started?

A clear statement or understanding of the problem or allegations of the person making a complaint.

Policies and procedures applicable to the claims; grievance procedures; MOU/union agreement (where applicable)

It is probably also a good idea to obtain copies of and review:

Complainant and accused's personnel file, job description, application for employment, discipline records, counselings, performance evaluations, supervisor's area file, return to work file, discrimination/harassment training records; attendance and payroll records. A review of these documents should not delay the investigation, however.

What Questions Will Be Asked?

As Jack Webb would say in the television series DRAGNET, "Just the facts, Ma'am." The investigator's questions should not be leading, unnecessarily disclose information from other sources, or be suggestive. Questions should be open-ended and allow the witness to provide the information rather than the interviewer asking the witness to affirm a factual allegation. e.g. "Do you know of any witnesses to the alleged conduct?" rather than , "Was Mr. X a witness?" Or, "Do you know of any reason why Ms. Y feels she is being sexually harassed?" rather than, "Do you think it is because Ms. Y is a lesbian that she feels she is being sexually harassed?"

Questions which include who, what, where, when, why, and how should be phrased to be open-ended, and content neutral. Never threaten, intimidate, or offer an incentive for information.

Questions for the Complainant:

- What are the behaviors that are at issue?
- When did these behaviors occur?
- How many times did each behavior occur?
- Where did the behavior occur?
- Did anyone observe the behavior?
- When did you first tell anyone about the behavior?
- Did you report the complaint to management? Get details of the discussions.
- Did you tell the accused that their conduct was unwelcome? If not, explain why.
- Did you maintain any documentation, including any calendars, diaries, e-mails or other electronic data? Get a copy of all documentation.
- Do you know of anyone who had similar experiences with the accused? Who are they? What do you know about their experience? How did you learn this?

- Has the employee received any previous discipline (analyze any retaliatory motive)?
- Is the employee represented by a union? (Understand *Weingarten* rights, i.e. the right to have a union representative present during the interview)
- How has the complainant been affected by the conduct? Have they required medical or mental health care? Has their ability to perform their usual and customary duties been affected?

Questions for the Accused:

Do not forewarn the accused! In *Fuller v. City of Oakland* 47 F. 3d 1522 (9th Cir. 1995), the court found the investigation a complete farce where the harasser had been warned of the claims against him so that he could prepare extensive documentation in his defense.

In addition to obtaining their response to each accusation, identifying any witnesses or documentation, find out whether the complainant has him/herself participated in the same or similar conduct; or consented to the conduct.

Get copies of the accused's emails with the person who is complaining. Sometimes the complaining person only produces those emails which support his or her claim and not those that weaken it. Context is very important.

Questions for the Witnesses:

Do not express any opinions about plaintiff's claims, the accused's response, or the information you have gathered. You are a neutral fact-finder only and your neutrality needs to be maintained.

While a witness' impressions or opinions might lead you to relevant information, only first hand knowledge is of value in determining whether the complaint is substantiated and disciplinary action is appropriate

Questions for the Supervisors:

- Were they aware of any problems between the complainant and the accused.

- Had they received any complaints from others about the complainant or the accused.
- What action had they taken and what documentation do they have.

Who will be Interviewed?

Whenever possible, the complainant should be interviewed first. Let them give you all the details of their claim, identify each incident, when it occurred, where it occurred, who the witnesses might be and any documents which might substantiate the complaint. Hear them out!

The accused would be the appropriate second interview. This gives the opportunity to put the individual on notice that a complaint has been lodged against them and that although the allegations have not yet been investigated or substantiated, they should be sensitive to the fact that there is a complaint. They should also be advised at that point that they may not take any action in retaliation.

Co-workers and others who may have information should be identified and interviewed without regard to whether they are known to be happy with their employment or disgruntled employees. The investigator will have the opportunity to determine what amount of weight to give to each witness' statement. Former employees may also be contacted if there is a reasonable belief that they might have relevant information.

It is likely that as the fact-gathering continues that the investigator will have additional questions for the complainant and require clarification, possibly based on information obtained from other witnesses. In addition, the investigator will want to give the plaintiff an opportunity to explain additional information which has been gathered.

Each person interviewed should be instructed that the interview and their discussions should remain confidential although confidentiality can not be assured. The interviewer should also maintain confidentiality of the identity of the witnesses and the content of their statements until such time as the investigation is complete to the extent possible.

Scope of the Investigation

Investigations are not supposed to be witch hunts, but fact gathering processes. Going back 25 years and trying to recreate every negative comment made by someone is not really relevant to the investigation.

How Will the Interviews Be Preserved?

If you obtain permission from the witness, an interview may be recorded. However, if the demeanor of the interviewer comes across as too aggressive or biased, or the questions are leading or suggestive a jury hearing that interview will be put off. On the other hand, the demeanor of the witness to reasonable questions may be very revealing about their credibility.

Preparing witness statements. If the interviewer keeps notes of a witness interview and then formalizes them into a statement, the witness should be given an opportunity to review the statement and make corrections or revisions and be asked to sign it. Never put words in the witness' mouth.

Some investigators may take notes of their interviews and when they prepare their final report may destroy their notes. Other investigators not only prepare a final report but also preserve all of their notes. In those cases where the investigator is called upon to either give a deposition and/or testify at trial, preservation of the handwritten notes may be very important. No matter how detailed a final report may be, there may be references in the notes which are not mentioned in the final report. If plaintiff's counsel wants to nit-pick every aspect of the investigation, it is preferable that the investigator be over prepared rather than having to say they can't recall if a specific question was asked or a specific topic covered.

Where Will the Witness Interviews Take Place?

Investigations should be kept confidential. Just as the complainant has the right to have their complaint addressed, so too does the target of the complaint have the right to a fair investigation before being openly accused of, or disciplined for wrongdoing.

It is preferable that interviews of witnesses take place away from co-workers. Minimizing the disruption to normal work activities and avoiding the buzz of the office rumor mill should be considered when deciding when and where the interviews should take place. For example, interviewing deputy district attorneys at a police station close to their office, where there was a private conference room and where it would minimize the disruption of their normal work activities appeared to be reasonable. But, when a witness expressed concern that being interviewed at a police station was intimidating, then it might be reasonable to ask what location the witness preferred. The investigator should document the witness' concern and the investigator's response to that concern.

When Will the Investigation Be Conducted?

Effort should be made to initiate and complete the investigation in as timely a manner as reasonably possible. The longer the delay in completing an investigation, the more likely it is to appear that the employer did not act in good faith to take immediate and appropriate action. If delays are due to witness schedules, the investigator should document all communications on the topic.

The interviews should be conducted during normal business hours unless a witness specifically requests otherwise. Contacting a witness at home or requesting that they meet outside of the workplace gives the appearance of intimidation by the employer to invade an employee's privacy rights. For example, when a female employee complains to her male supervisor that she is being sexually harassed by a male co-worker, the supervisor should not suggest they discuss it "over lunch" or "after work." Invariably, the next accusation will be that the supervisor also sexually harassed the employee!

How Quickly Should the Investigation Be Initiated and Completed?

While an investigation which takes 3-4 months seemed to take longer than expected, the delay in completion was documented and explainable (*Swenson v. Potter*, 271 F.3D 1184, 1194 (9th Cir. 2001)). If there are delays in scheduling an initial meeting with the complainant, or delays with meeting witnesses or collecting other data, the investigator should make sure these delays are documented and explained.

Will the Investigator Weigh Credibility of Witnesses and on What Evidence Are They to Rely?

As the neutral fact-finder, the investigator has the right and obligation to reach a conclusion even if the conclusion is that they were unable to substantiate the complaint. This will invariably include passing judgment on witness credibility. The investigator should state the basis for their opinion about credibility. The investigation should not rely on other witness' opinions or speculation.

Will the Investigator Reach a Conclusion and Make Recommendations for Further Action?

The investigator may be called upon to analyze the findings and apply them to the employer's stated policies regarding conduct for which disciplinary action is justified. They should make a recommendation about what disciplinary action should be taken. The employer will have the final say if what action should be taken.

What If There Are No Witnesses?

More often than not, especially in sexual harassment claims, there are no witnesses.

Whether you can substantiate the accusation is not your foremost concern, but rather whether you responded to the complaint in a prompt and appropriate manner. Just the fact that you promptly initiated the investigation and spoke with both the accused and the accuser will serve as a deterrent toward future improprieties and satisfies your obligations under the law.

Timing . . . is Everything (not always!)

In the recent case of *Arteaga v. Brink's, Incorporated* (5/28/08) 2008 Cal App LEXIS 785, the plaintiff was being investigated because of cash shortages. While the investigation was pending, he made a workers compensation claim that he was suffering from numbness and pain in his arms, hands and legs. He was thereafter terminated upon conclusion of the investigation. He then sued his employer for wrongful termination in violation of public policy (i.e. termination for filing a workers compensation claim). The court granted summary judgment for the employer finding that it had demonstrated a legitimate non-discriminatory reason for terminating his employment and further that although the temporal relationship between the workers compensation claim and his termination was a factor to be considered, it was not conclusive for finding that the termination was the result of discriminatory conduct.

Preparation of the Final Report

Do not reach a conclusion until you have completed the investigation.

Do not assume that because you have consulted with legal counsel that the investigation is automatically attorney-client privileged. It is not and should not necessarily be confidential. If plaintiff files a civil lawsuit, your best defense is the fact that you conducted the investigation in the first place and you will want to produce it! If as a result of your investigation you substantiate the complaint, then recommend appropriate remedial and/or disciplinary action. Be careful about admissions of liability, i.e., that "we find so-and-so violated the law". The better practice if there has been substantiation is to find a violation of company policy which can later be argued is a higher standard than that required by law.

If, in determining what disciplinary action should be taken you consult with legal counsel, do not state in the report what legal counsel told you. You can still

preserve the attorney client privilege for the communication by merely stating that after consulting with counsel, and whoever else, it is the investigator's recommendation that.....

Building a Defense for a Jury

While the majority of litigated cases will be resolved short of trial, the investigator should treat each investigation as if it were one that will be tried. Juries, although instructed on the law, will take the evidence they have heard and seen, evaluate the credibility of the witnesses they have observed, and then using more common sense than legal principles, decide who is right or wrong.