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WORKPLACE INVESTIGATIONS

by
Anne-Marie L. Storey, Esq.
Rudman & Winchell

1. Why investigate?

There are many good reasons why you should, and often must, investigate allegations of misconduct and/or harassment. A thorough and proper investigation may have the power to resolve the issue and satisfy the complaining party before that person decides to file a lawsuit. On the other hand, failure to respond to a complaint with a proper investigation can have exactly the opposite effect. In the event a lawsuit is filed, it will be imperative to be able to show the jury that a proper investigation was completed, no matter how minor the complaints might appear. A proper investigation may also preclude involvement from state or federal agencies, such as OSHA, or at least may help convince those agencies that their own full-blown investigation is not necessary. Finally, a proper response to a complaint may give you certain legal defenses. For instance, if the complaint is of harassment by a supervisor which did not result in a tangible job action, an employer can limit liability and/or damages if it can show 1) it took reasonable care to prevent and correct the sexual harassment and 2) the employee unreasonably failed to take advantage of those preventative or corrective measures or otherwise avoid harm. The best way for the employer to meet the burden of showing it took reasonable care to prevent and correct the harassment is to show that it has a policy against harassment which is properly enforced and which the employee unreasonably did not follow. However, if an employee can show that prior complaints were not investigated or resulted in retaliation against the complaining party, he or she will likely be able to convince a jury that following the policy would not have done any good and may cost the employer this defense.

2. Who should conduct the investigation?

The short answer is: it depends. However, there are some general guidelines that are worth considering in choosing the investigator.

First, depending on the nature of the complaint, an employer may want to choose an investigator with some working knowledge of what the law requires. This would be particularly true in the area of unlawful harassment.

Second, it is helpful to have someone investigate who knows or has access to the employer's handbook, policies and history.

Third, gender and personality should at least be considered. If there is a particularly egregious claim of sexual harassment by a female, perhaps the employer wants to consider having a female investigate to try to put the accuser at ease. Personality is also key; remember, this person may end up before a jury someday to explain the report and the steps taken in the investigation. The

employer should make sure the investigator is someone who can engage a jury, not put them to sleep or appear arrogant.

Fourth, consider the level of both the accuser and the accused. If the accused is a Vice President of the company, the investigator should have at least be perceived to have power sufficient to actually recommend or enforce discipline against that person.

Fifth, consider whether the investigation will be performed internally by a current employee or externally, by, for instance, a lawyer. There are pros and cons to both. An internal investigator may have a better handle on the personalities involved and the history of the company's responses to similar complaints. The involved parties may also be more willing to talk to someone they know. However, the opposite can also be true; sometimes having an outsider conduct the investigation makes involved parties more willing to open up and be truthful about what is going on. In addition, an internal investigator may also appear biased or may be perceived by witnesses that way.

The question often arises about having a lawyer conduct the investigation. There are good reasons to use a lawyer to investigate. For instance, he or she will be trained in understanding what kind of conduct is unlawful and will be attuned to how a jury will perceive things as the investigation goes along. The lawyer may also hear things during the investigation which raise red flags to other possible claims that may need to be investigated. In addition, there may be some circumstances in which the employer wants a lawyer to investigate because it wants to try to avoid having to reveal the investigation to the other side; using a lawyer to conduct the investigation may help protect the report under the attorney client privilege or work product rules (as always there are many exceptions and the report may end up being produced anyway). This may be an unusual case, though, because generally the employer is going to want the accused and the jury to see how well it responded with the investigation. An employer must be careful about using its' own lawyer. If the company's lawyer conducts the investigation, she/he will not be able to act as the company's counsel on any claim arising out of the investigation since she/he will be a witness in the lawsuit.

Finally, the Fair Credit Reporting Act may be applicable if an outside party conducts the investigation. A recent amendment to the Act, however, appears to exclude certain investigations by a third party of employee misconduct from the definition of a consumer report and therefore exempt those investigations from the requirements of the Act.

3. Preliminary Issues

Even before the investigation begins, should the accused be placed on administrative leave pending investigation, with or without pay? Should other interim protective measures be given the complainant?

4. How should the investigation be conducted?

Essential elements of an investigation: Prompt, Thorough, Fair

An investigation should be conducted as soon as possible after a complaint/allegation has been made.

Interviews should take place on an individual basis, usually with just the investigator, another company representative, and the involved party (however, you also want to be careful of intimidating the interviewee). The accused or the accuser may ask for someone to sit in with him or her for support or to be a witness. You should be careful about allowing other parties to sit in because you must try to keep the investigation as confidential as possible. Never conduct an interview of more than one witness at a time.

The investigator should be aware of his or her approach. Generally, open ended questions are preferable to pointed questions. This is particularly for witnesses because you do not want to suggest any particular conclusion to them. For instance, rather than asking whether that person saw X put his hand on Y, ask whether that person ever saw any physical interaction between X and Y. The investigator should also avoid using inflammatory language in his or her questions. Rather than asking a witness whether he or she saw X sexually harass Y, simply ask what that person saw.

The interviews may be tape recorded if the investigator thinks that is necessary. If an interview is tape recorded, the recorder should be on the table, the witness should be made aware of the recorder, and should be asked on the record whether he or she is aware they are being recorded and whether they consent to it. If the interviews are not recorded, the interviewer must take very careful and thorough notes, which should then be signed by the interviewee as complete and accurate.

With regard to other types of investigations, some additional considerations include whether the use of surveillance, through email, the internet, the telephone, or cameras, is appropriate. One primary issue involving such surveillance is employee privacy.

The first step is often to meet with the complainant. A complete version of events should be taken. In a harassment claim, for instance, he/she should be asked for detailed descriptions of all instances of bad conduct, any history between the complainant and alleged harasser, and any supporting evidence, such as tape recordings, letters, notes, or diaries. Other issues to explore with the complainant include the names of any witnesses to the conduct at issue, any individuals the complainant spoke to about the conduct at issue, and whether the complainant is aware of others who have had similar problems.

The investigator should take thorough notes during the meeting. Consideration must be given as to whether the notes should be put into memo form following the interview and the interviewee asked to sign them in agreement that they are accurate and represent a complete description of his/her complaints.

The complainant should be reminded that no retaliation will be taken against the complainant for making the complaint in good faith. Also remind the complainant that any witnesses he or she names will also not be retaliated against for participating in good faith. The complainant should be told the company is taking the complaint seriously, is conducting a prompt investigation, and will take corrective action if necessary. The complainant should be given a general time frame

for the investigation and should also be encouraged to immediately bring any new incidents or new information to your attention.

Once the employer has this information from the complainant, it needs to determine whether immediate steps need to be taken. For instance, does the complainant feel unsafe in the same workplace with the alleged harasser? Should the alleged harasser be put on administrative leave with pay during investigation or should complainant be offered the same?

The next step is to meet with the accused. He/she should be told of the complainant's allegations and asked for his/her version of events. He/she should also be asked for any witnesses or other evidence to support his/her version. For harassment claims, this would include any background between the parties, any interactions outside of the workplace, or other relevant information. Once the accused's version of the events has been heard, the employer should again consider whether that person should be put on paid administrative leave pending investigation.

The accused should be told the employer is conducting an investigation into the complaint and that if necessary corrective or disciplinary action may be taken at the conclusion of that investigation. He/she should be informed of the non-retaliation rules and the fact that the complaint will be held in as much confidence as possible but that those persons identified as witnesses will have to be interviewed and perhaps other investigation will have to be done as well. Encourage the accused to keep the complaint in confidence.

As with the accuser, the investigator should take careful notes during this meeting, then write them into memorandum form and ask the accused to sign the memorandum, confirming it is accurate and complete.

In terms of the interview process, if the employer/investigator has more than one person present on its behalf, it should consider how duties will be split between them. For instance, is one to focus on listening to the person being interviewed and asking questions while the other is primarily there to take notes?

Next, any named witnesses should be interviewed. Any explanation of the investigation should be limited to the minimum needed to focus questions. These individuals should be asked about what they know about the situation. They should also be asked whether there are other possible witnesses or persons with knowledge of the claims. The investigator should also take notes of these conversations and have the witnesses sign them as accurate and complete and explain the non-retaliation provisions.

Once the investigator has met with all of these individuals, he/she may find he/she needs to meet again with the complainant or the accused for follow-up. The investigator may also decide to take some further investigative steps, such as reviewing any relevant surveillance tapes, viewing the work area, expense accounts, time sheets, calendars, e-mails, etc. Because this process may take some time, you should keep the complainant informed of your progress.

5. How to conclude the investigation/follow-up?

An investigation generally concludes with a report and decision on action to take in response to the complaint. How you conclude an investigation depends in part on whether you have engaged an investigator to conduct the investigation then provide that material to you for you to make a decision, or whether the investigator has been engaged to conduct the investigation and make a recommendation. If you have hired the investigator to make a recommendation on the outcome, you should follow that recommendation unless you have a VERY good reason not to.

You should assume a jury is going to see the final report. Therefore, it should be clear, concise, and support the recommendation. The report should list the complaint, the individuals interviewed, a fact section regarding each interview, any individuals not interviewed and why, and an analysis. The report should also be very careful of wording; you may even want to have your attorney review it before it is put in final form.

You must communicate the conclusion to the person accused, and decide how much information you are going to give the accuser about that action. If you determine there was improper behavior but the accused is not terminated or transferred, you should check in with the accuser regularly to be sure the behavior has not continued. You should also be sure both parties and the witnesses are aware of your policy against retaliation.

You should maintain the report and any witness statements or other materials in a confidential manner, generally in a locked cabinet separate from other materials. However, you should also be aware that in 2001, the Law Court held that internal investigation materials, including witness statements, are part of the accused's personnel file. Harding v. Wal-Mart, 2001 ME 13, 765 A.2d 73.

Remember that you cannot punish or disadvantage the complainant if the complaint was brought in good faith. You should inform the complainant of the action you have taken or intend to take and seek that person's reaction to your actions. Of course, any disciplinary or corrective action taken against the alleged harasser should be documented.

As a last step, you should consider a company-wide training for all employees to reconfirm the company's policy against harassment and address any issues that have come to your attention in the investigation. In addition, you should plan to follow-up periodically with the complainant to confirm that there are no further problems, and that there is no retaliation.

6. Other follow-up. Sometimes, an investigation may uncover bad acts or policy violations other than those first complained of, which may justify corrective action. In 2009, the US Supreme Court held that the anti-retaliation provisions of Title VII covered an employee who was interviewed in connection with a complaint of harassment brought against a manager, even though she was just a witness. In that case, the witness reported during the investigative interview that she had witnessed inappropriate behavior by the accused and described incidents where that person also engaged in such behavior toward her. She had never reported that behavior before. She was terminated shortly after the investigation was completed. The reason given was embezzlement but she sued, alleging her termination was actually terminated for reporting the bad behavior toward her.

The employer argued she did not meet the anti-retaliation provisions of Title VII because when she reported the conduct she was not instigating a complaint but instead was simply responding to questions asked during the investigation into her co-worker's complaint.

The Supreme Court held that the anti-retaliation provisions apply to employees who voluntarily cooperate with an employer's internal investigation, even if that person did not initiate the complaint/reason for the investigation and even if that person has no complaint pending with the EEOC.

In the event new information is received during an investigation into behavior by the accused or by any other person, that information should be taken seriously and investigated itself.