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You Can Handle the Truth! Conducting Internal Workplace Investigations

By Colleen D. Zahn

You are sitting in your office one day when a female employee comes in, teary eyed and frustrated. You ask her what's wrong and she proceeds to describe her frustration with her supervisor, who is male. She goes on at length about the personality conflict between the two of them and how she feels he doesn't respect her and constantly picks on her. You convey empathy and suggest a group meeting to attempt to work through and resolve the conflict. The employee reluctantly agrees, and then states, "I'll try it, but I don't expect him to change. He doesn't like women and treats all of us like this."

This last statement is enough to trigger your obligation to investigate the situation – not only under state and federal law, but likely under your anti-harassment policy. How you conduct that investigation, as well as the timing of the investigation, is just as important as responding to the employee's complaint.

When Should I Conduct an Investigation?

All too often employers ignore the sort of comments contained in the hypothetical situation above, instead chalking it up as just an informal rant. When such comments are made to a supervisor or someone in HR though, they must be taken seriously. The employee in the example above alleged that her supervisor treated herself and all the other women in her department differently, because of their sex. Regardless of whether the employee came in to lodge a formal complaint, or just to blow off some steam, the complaint is an allegation of discrimination. The fact that the employee may state she does not want to file a formal complaint does not mean the employer is off the hook to investigate and address any potential discrimination.

To ignore the employee's concerns could not only violate the employer's internal policies, but also deprive the employer of significant defenses if a lawsuit is filed. The failure to conduct an investigation will likely be brought up by a good Plaintiff's attorney in any future employment litigation as evidence of how the employer has failed to take other discrimination complaints seriously--even in cases that do not involve the complaining employee. Additionally, addressing and eliminating discrimination in the workplace is critical if the employer wishes to maintain positive morale and a productive work environment.

The Faragher-Ellerth Affirmative Defense

In the employment world, if an employee files a lawsuit against an employer, and alleges certain types of discrimination by a supervisor, then the employer may have the opportunity to take advantage of what is known as the *Faragher-Ellerth* "affirmative defense." An affirmative defense can allow an employer to defeat a complaint, even if all the facts supporting the complaint are true. As such, it is a way for an employer to defeat an employee's claim, even if everything the employee says is true. The *Faragher-Ellerth* affirmative defense is available in certain types of cases, if the employer had reasonable policies in place to prevent and correct

discrimination, and the employee knew about and did not use the policies. Thus, it is to the employer's benefit to have effective policies in place, and to use them.

1. Establishing an Anti-Harassment Policy is the First Step

The first step to ensure the *Faragher-Ellerth* defense is available is to enact a company policy prohibiting all unlawful discrimination and retaliation. The policy should be in writing and provided to all employees upon hire. There are forms for such policies, which include all the information that should be included. Generally the policy should outline that all forms of unlawful discrimination are prohibited and set forth the protected classes that may not be discriminated against. It should provide a clear complaint process and advise employees how to use that procedure in the event they believe they have been subjected to or witnessed conduct that violates the company policy. Finally, the policy should include assurances that those individuals who complain or participate in internal investigations will not be retaliated against, and advise the employee to utilize the complaint process if the employee believes he or she has been subjected to retaliation.

2. Training is the Second Step

Providing employees with training on the employer's policies and practices regarding harassment is the second step an employer must take to ensure it can reap the benefits of the defense. Just as every employer should have an anti-harassment policy, every employer should train its employees on that policy. Both the workplace policy and annual training should address all forms of unlawful harassment. All too often employers focus only on sexual harassment and ignore disability, age, gender and other unlawful harassment. New employees should be provided a copy of the anti-harassment policy at hire, and provided with training on the policy either at the time of hire or immediately after hire. All existing employees should be provided with anti-harassment training on an annual basis. Failure to provide regular training can prevent the employer from being able to use the defense in the event a discrimination complaint is filed.

2. A Prompt, Remedial Response to Complaints Is the Third Step

If your training and policy are effective, then employees will generally report complaints of harassment or discrimination. Upon receiving those complaints (whether made formally or informally), the employer should immediately commence an investigation and complete the investigation promptly. Doing so benefits not only the employee, but also the employer. By addressing complaints of harassment or discrimination promptly, the employer is able to address employee concerns internally, and hopefully without an expensive lawsuit. It also allows the employer to eliminate offensive behavior before it becomes severe and pervasive. And finally, in the event a complaint does turn into a lawsuit, a prompt investigation and annual training allow the employer to assert the *Faragher-Ellerth* defense.

Steps to Take Before the Investigation Even Commences

As soon as a complaint of harassment or discrimination is received, the employer must evaluate whether any steps should be taken to protect the complaining employee. Depending on the specific allegations and their severity, the employer should evaluate whether the accused and/or the complaining employees need to be moved to a different work area or placed with a different supervisor during the pendency of the investigation. Each case will have to be dealt with individually, because no two sets of allegations are the same. A complaint about an employee forwarding questionable emails will often not require the same amount of concern and segregation as a complaint about an employee who continues to verbally harass another employee, despite repeated requests to stop.

If the allegations are severe and describe behavior which could cause a likelihood of safety concerns to the complaining employee, then the employer may need to place the accused employee on administrative leave

pending the outcome of the investigation. This is often a necessary and important step in cases alleging stalking or physical harassment, and may be applicable in other complaints alleging severe conduct. Whether the accused needs to be paid during the administrative leave may depend on the terms of any relevant collective bargaining agreement. However, in the event there is not a collective bargaining agreement in place, the employer may want to state in its anti-harassment policy that any employee on leave during an administrative investigation will not be paid, pending the outcome of the investigation. The policy could provide that, at the conclusion of the investigation, if evidence is uncovered to support the complaining employee's allegations, that the accused will not be paid. If, however, the investigator determines that there is insufficient evidence to support the complaining employee's allegations, the accused will be paid for all time on leave.

If there are reasons why the accused cannot be placed on leave, then the employer may decide to place the complaining employee on paid leave. If this is done, then it is recommended the complaining employee be paid during the leave. This avoids any appearance of retaliation or adverse action against the employee due to the complaint. Whatever action is taken, it is important that the employer be aware of, and sensitive to, the potential for the complaining employee to perceive actions as adverse and in retaliation for making a complaint.

Selection of the Investigator

Selection of an appropriate investigator depends on the nature of the complaint. When utilizing internal employees as investigators, employers should resist the urge to appoint one and only one employee as "the investigator." There will be instances where the usual investigator will not be the best person to investigate a complaint, or may not be able to immediately commence an investigation. The investigator should not be in the chain of command of either the complaining employee or the harasser. The investigator should be an objective and organized fact finder, and not the person who has the least to do or the most time. Investigations can also be performed by the employer's legal counsel or a human resources consulting firm. Regardless of who is doing the investigation, it is of utmost importance to tailor the investigator to the complaint—ensure you have the most appropriate person performing the investigation. This is true regardless of whether the investigator is an internal employee or an outside consultant.

In selecting the investigator, an employer should also evaluate whether it wants the investigation to be protected from discovery by the attorney-client privilege. Most often an employer is going to rely on the fact that the investigation occurred, the thoroughness and timing of the investigation and the outcome for defense purposes if a lawsuit is filed. One rare exception is in death investigations or investigations of other serious allegedly criminal conduct—in that instance, the employer will almost certainly be facing a civil suit and will want to protect its communications with its attorneys. If an employer does wish to protect an investigation under the auspices of the attorney-client privilege, then the employer must turn the investigation over to the attorney and keep out of it completely. The employer should not conduct any part of the investigation and should immediately contact the attorney to initiate the attorney-client relationship. If the employer tries to conduct certain parts of the investigation without the attorney's involvement, those portions will not be privileged.

The Scope of the Investigation

After selecting the investigator, the investigator should then work with management to plan the scope of the investigation. The scope of the investigation is going to depend on the nature of the complaint. If the complaint concerns an isolated instance, then it likely won't be necessary to involve the IT Department to examine the email correspondence of multiple employees. If the complaint involves more sweeping allegations, then the investigation is going to be broader in scope. In any investigation, the investigator will usually need to review the personnel files of the complaining employee and accused, any relevant phone, voice or email records, any relevant prior incident records, and time records. A must for every investigation is a review of the employer's relevant policies.

The necessary witness interviews will also be part of the planning process. The number of witnesses and amount of documentation to be reviewed may change as the investigation progresses and investigators should be open to interviewing more witnesses or requesting additional documentation. It is not uncommon for the first several witnesses to identify additional relevant witnesses and documents. While the investigator need not track down every witness or document identified, the investigator should be prepared to follow-up on additional relevant and material witnesses and documents that may be identified as the investigation progresses. It is recommended that the investigator review as much of the relevant documentation as possible prior to initiating witness interviews. Having reviewed the documentation will allow the investigator to appropriately tailor his or her questions.

The order of witness interviews should also be planned. It is recommended that the investigator start with the complaining employee, because that interview will help determine the scope and thoroughness of the investigation. The accused is often a logical second interview, although sometimes it will make sense to interview all witnesses and then interview the accused last. The number of witnesses and allegations involved will help dictate the order of interviews.

When conducting witness interviews, there are certain topics that the investigator should ensure are covered with each witness. First, the investigation should begin with an admonition that everything that is said during the interview is confidential and part of an ongoing investigation. The investigator should obtain the witnesses' agreement that everything that is said by the investigator and the witness will remain confidential and not leave the confines of the interview room. The investigator should next assure the witness that he or she will not be retaliated against for participating in the investigation, that such retaliation is against company policy and that should the witness feel he or she is being retaliated against for participation, he or she should report the concerns to the appropriate individual—who the investigator should identify by name. The investigator should next stress the purpose of the investigation and the need for accurate and truthful information. The investigator should not reveal more information than what is absolutely necessary to allow the witness to answer his or her questions. A helpful question to ask all witnesses at the beginning of the interview is who they have spoken with about the matter and what others have told them about the investigation. This allows the investigator some understanding of the workplace perception of the investigation. Further questions should begin in an open ended fashion, “Did Sue ever mention to you that she felt she was being harassed by anybody here at work?” and move to more specific, “Did Sue ever mention that she believed Steve was harassing her?”

Investigators should ensure that they do not allow witnesses to evade their questions or shrug them off with statements that they do not wish to provide the requested information. Witnesses should be advised that the failure to provide information will reflect on their credibility. The interview should always close with a general question, “Is there anything else that you believe is relevant or that you think I should know, but I haven't asked about?” The interview should end with the investigator providing his or her contact information to the witness, and a request that the witness contact the investigator if the witness thinks of anything later that he or she feels the investigator should know.

The United States Equal Employment Opportunity Commission published Enforcement Guidance in June 1999, entitled “Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors,” that offers advice on appropriate questions and procedures to be utilized in internal investigations. The guidance also provides helpful information on assessing witness credibility and making credibility determinations. That guidance is located at: <http://www.eeoc.gov/policy/docs/harassment.html>.

Regarding the interview setting, unless there are concerns that witnesses may disappear or be difficult to locate at a later date, it often is more effective to not record the interviews. If the investigator determines one or more interviews should be recorded, the investigator should obtain the witnesses' permission to do so. While Idaho

law allows one party to record a conversation without the consent of the other party, it is the best practice to obtain the witnesses' consent prior to recording, so the witness cannot later claim some sort of invasion of privacy or lack of knowledge that the interview was being recorded. Interviews should be memorialized by the investigator in writing. Notes of the interviews should be made during the interview if possible, and if not then immediately after the interview. If a witness does not speak the English language very well, an interpreter should be obtained to translate during the interview. Finally, it is recommended that witnesses be interviewed individually, as opposed to in a group setting. Witnesses are more likely to be truthful if not surrounded by the watching eyes of co-workers.

The Report and Remedial Measures

It should be made clear to the investigator at the beginning of the process that his or her job is to engage in a fact-finding inquiry and determine whether any conduct has occurred that violates company policy. The investigator is not being asked to make any legal determinations or examine whether any unlawful conduct has occurred. In keeping with these motives, the investigator's final report should be factual in nature and apply the facts obtained during the investigation to company policies to determine if any policy violations occurred. The report should detail the basis for reaching any decisions that one or more witnesses were more or less credible than others. The report should conclude with a determination that company policies were not violated, or if they were then a description of which policies were violated and how. The report should not contain recommendations for discipline—that is a job for management.

After receiving the investigator's report, it is management's job to determine whether remedial measures are necessary and if so, which measures should be employed. The employer's decision will be reviewed under a good faith standard. The employer will generally not be held liable for any decision made in good faith and based upon reasonably available information. Any remedial measures should end current misconduct and deter future misconduct by the accused or others. Management is not required to adopt the remedial measure desired by the complaining employee, but can certainly take that into account when determining which remedial measures are appropriate. The EEOC guidance referred to previously herein contains suggestions on appropriate remedial measures. Depending on the situation involved, it may also be appropriate to have all employees undergo harassment training, even if one has already been given in the same year.

Finally, both the complaining employee and the accused should be advised that the investigation has been concluded and of the employer's final determination. The employer may also want to consider a written document that includes another statement about the prohibitions against retaliation and its willingness to reexamine the matter further if the employee can provide additional information supporting his or her position. The employees should be provided a copy of the employer's anti-harassment and anti-retaliation policies with any such written statement.

One truism for all internal investigations is that no two are the same. The proper process for one complaint may not be appropriate for the next complaint. Each complaint must be assessed on its own merits and each investigation procedure tailored to the specific allegations. By promptly and carefully evaluating and investigating employee complaints, an employer is ensuring that it is not only acting in the best interests of its workforce, but also protecting its legal interests. By enacting a policy, training employees about the policy and promptly investigating all complaints, employers can ensure they have the benefit of the Faragher-Elzerth affirmative defense and protect themselves in the event of a lawsuit.