QUIRKS AND QUAGMIRES:
SELECTED ISSUES FACED DURING REAL-WORLD HARASSMENT INVESTIGATIONS

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With increasing frequency, Nevada companies and their attorneys are called upon to undertake thorough and well-documented investigations to address harassment claims.[1] This article examines certain challenges that arise during these types of investigations, some commonplace and others just emerging.

Importance of Internal Investigations

An employer's prompt internal investigation is the most significant measure that can be taken in response to a harassment complaint. Indeed, the investigation itself can be a powerful factor in deterring future harassment. *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001). If conducted correctly, internal investigations can identify and resolve harassing behavior before it mushrooms into a legal violation and instill employee confidence that harassment issues will be addressed fairly without the need to seek external resolutions through government agencies and courts. Additionally, internal investigations are important to an employer's legal defenses to harassment.

Under Title VII of the Civil Rights Act of 1964, when the harasser is the victim's *co-worker*, an employer can be held liable only from the time it *knew or should have known* about the harassing conduct and failed to stop it. Employers have a two-part duty to take prompt corrective action that is reasonably calculated to end the co-worker harassment, consisting of:

(1) the temporary steps the employer takes while investigating to determine whether the complaint is justified; and

(2) the permanent remedial steps the employer takes once it has completed its investigation. *Swenson,* 271 F.3d at 1191-92.

The issue of vicarious employer liability is more complicated if the harasser has immediate or successively higher supervisory authority over the complaining employee. If the harassing conduct results in a "tangible employment action," such as discharge, demotion or undesirable reassignment, the employer is liable. However, if there is no tangible employment action, an employer may raise an affirmative defense to liability by proving it:

(1) exercised reasonable care to prevent and correct promptly any harassing behavior; and

(2) the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The first prong is generally established upon proof the employer has a published non-harassment policy and procedures to investigate and resolve claims.[2] In terms of the second prong, the affirmative defense can still be established even if the employee complained. The Equal Employment Opportunity Commission (EEOC) acknowledges that an employee complaint of harassment does not automatically defeat an employer's affirmative defense, because if the employee provided no information to support the allegations,

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gave untruthful information or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

Complaints of Former Employees

It is not uncommon for an employer to *first* learn of harassment allegations after an employee has left employment by way of a letter from an attorney, a charge of discrimination or an unemployment benefits claim notice. A common mistake is the assumption that no investigation is needed given the employee's departure. However, an employer's receipt of this type of information places it on notice of potentially problematic behavior that may have impacted the former employee or other employees, thus triggering its obligation to investigate and promptly take any corrective action. In situations where the former employee resigned, employers must also guard against a claim that the alleged harassment resulted in a "constructive discharge," which, if the allegations were substantiated through an investigation, could have been remedied early on.

Presence of Employees' Counsel at Interviews

Today employees frequently "lawyer up" for internal investigations and demand to have their counsel present for interviews. But, the presence of employees' counsel can substantially diminish an employer's ability to conduct an effective interview if it changes the dynamic from a fact-finding process to a quasi-judicial proceeding due to counsel's use of objections, instructions not to answer or counsel's insistence that he/she speak for the employee. This is not to imply that in some cases, if handled correctly, the presence of a third-party's counsel cannot be a benefit to an investigation.

Planning for any interview in which an employee's counsel is permitted to attend is key. As the investigation occurs in the workplace, not courtroom, conditions should be set as to the counsel's role. For example, the investigator should require the employee to personally answer questions. The investigator must also be ready to respond to the employee and attorney taking long breaks to discuss questions, as well as counsel's objections to questions or instructions for the employee not to answer.[3]

Documenting Witness Interviews

An accurate record of each interview is essential. With complaining employees, the interview forms the blueprint for the investigation. Investigators need to fully understand and "lock down" witnesses' recollections and supporting information and preserve them in a manner that does not allow for back-sliding or recanting. *At a minimum*, the investigator must take detailed notes, read the notes back to the witnesses to make sure the witness was clearly understood and obtain the witness' acknowledgement as to accuracy of the notes. Other options include having the witness sign the notes or hand-write a witness statement. If the latter method is used, the investigator must ensure that all pertinent information is included and address any inconsistencies between the investigator's notes and the statement. Other investigators may prepare witness summaries or affidavits for the witness' review and signature.

Interviews are also sometimes recorded. In Nevada, only the authorization of one participant of an *in-person, oral communication* is needed to record. *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998). However, a split of opinion exists as to use of recordings. Some feel that recording will inhibit the free flow of discussion or a witness with an agenda will use the recording to make self-serving statements. Others believe recording is the best way to capture the witness' complete statement, as well as the tone of the interview, which could help to eliminate any claim that admissions were obtained improperly. However, recordings equally capture the statements of the interviewer and management witnesses, who if not properly prepared, can make gaffes used against the employer in future proceedings. Thus, recording interviews should not be seen as a general panacea for taking notes the old-fashioned way.

Attempting to Impose Strict Confidentiality

An unfortunate side-effect of internal investigations is the "stir" sometimes created by their interruption of workplace routines. Witness interviews in particular can cause employee anxiety and generate gossip. When the alleged harasser is a supervisor, investigators sometimes confront an agitated management team concerned that the investigation gives an air of legitimacy to meritless allegations, thereby compromising their ability to manage as subordinates will feel empowered or perceive the managers as weak.

In response to such concerns, some employers issue iron-clad confidentiality rules forbidding indefinitely the discussion of harassment allegations and investigations with co-workers. Unfortunately, expansive confidentiality rules are problematic if they result in disciplinary or other adverse action that unduly interferes with employees' efforts to oppose discrimination in the workplace or to cooperate with government agencies or private litigants, as such actions may violate the retaliation prohibitions of anti-discrimination laws.

Additionally, iron-clad confidentiality rules can violate the National Labor Relations Act, which provides covered employees (in both unionized and non-unionized workforces) with the right to discuss harassment allegations and the related investigations with their co-workers. This employee right is balanced against the employer's legitimate, substantial business justifications for confidentiality, which can include ensuring that witnesses are not threatened and evidence is not destroyed. See *Caesar's Palace,* 336 N.L.R.B. 271 (2001) (upholding confidentiality rule applicable for the duration of an employer's investigation). However, a rule prohibiting a company's employees from discussing harassment complaints among themselves a year and a half after the employer's investigation ended was determined to be overbroad. See *Phoenix Transit Sys*., 337 N.L.R.B. 510 (2002). Thus, any confidentiality rule must be narrowly tailored and enforced only for the duration of the investigation.

Exposure to Defamation Claims

At the opposite end of the confidentiality spectrum is the potential defamation exposure resulting from discussions of sensitive information, particularly those outside of the investigation. A fair investigation necessarily requires the disclosure of some information to:

(1) The accused employees to allow a genuine opportunity to respond to specific allegations and evidence gathered;
(2) Witnesses in order to obtain meaningful information; and
(3) Managers who help coordinate witness interviews, gather relevant information and help carry out any corrective action.

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However, the disclosure of sensitive information to others absent a recognized business need or purpose could lead to defamation claims (in addition to possible invasion of privacy claims) against both the company and individuals. The fact such disclosures were made only to other employees/agents of the employer is no bar to a defamation claim as there is only a qualified privilege for intra-corporate communications limited largely to the release to employees/agents with a business need to know. See *Simpson v. Mars, Inc.*, 113 Nev. 188, 929 P.2d 966 (1997).

Outside Investigators and the Fair Credit Reporting Act

Particularly with sensitive investigations or those involving allegations against high-level managers, prudent employers decide to engage a third-party investigator with legal or human resource experience. The Fair Credit Reporting Act (FCRA), as amended by the Fair and Accurate Credit Transactions Act of 2003 (FACTA), imposes some minimal post-investigation reporting obligations on employers using such outside investigators. The FACTA amendments create an exemption to the normal FCRA notice and disclosure requirements for information given by an outside investigator to an employer where:

(1) It is connected to an investigation concerning suspected employment-related misconduct;
(2) The communication is not made for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity; and
(3) The communication is not provided to anyone other than the employer, an agent of the employer, a government official or an individual as otherwise required by law.

However, an employer must provide a summary of the investigator's report *after* taking adverse action based in whole or in part on the information provided by the investigator, which does not have to disclose sources, only the "nature and substance" of the report.

Wage and Hour Issues Related to Suspensions Pending Investigation

Employers often remove an alleged harasser from the workforce during an internal investigation as a precaution against possible intimidation of witnesses, to prevent the destruction of evidence or to separate the alleged harasser from the complaining employee to prevent any further harm,[4] by placing the alleged harasser on a suspension pending investigation (SPI).[5]

However, the SPI must be for a fixed period as the Nevada Labor Commissioner, in considering any claim for wages, will draw a rebuttable presumption that an employee placed on an indefinite suspension has in fact been discharged, rendering all earned compensation immediately payable to the employee at the time of the SPI, which, if not timely paid, subjects the employer to penalties. See NAC 608.155(3)(a); NRS 608.020; NRS 608.040.

Additionally, if an employee on an *unpaid* SPI is classified as "salary exempt" for purposes of the Fair Labor Standards Act (FLSA), not paying such an employee for part of a work-week in which the employee performed any work will violate the FLSA's salary basis test and could destroy the employee's exempt status. However, exempt employees do not have to be paid for any complete workweek in which they perform no work. See 29 C.F.R. § 541.602(a).

Circle Back and Circle Back Again

Employers can cause themselves substantial harm by failing to circle back with both the complaining and accused employees after the initial fact-finding and corrective action portions of an internal investigation are complete. Rather, the employer needs to meet with both the complaining and accused employees, first to provide an overview of the investigation's results and any corrective actions as well as review the employer's anti-retaliation rules, and later to check for the occurrence of any subsequent alleged harassment or retaliation.[6]

If an employer takes inadequate corrective action that results in continuing harassment or retaliation, the employer can be deemed to have adopted the offending conduct, and its results, just as if the conduct was affirmatively authorized. *Swenson*, 271 F.3d at 1192. Thus, regardless of an investigation's outcome, the investigator or other human resource representative should make periodic contact with the complaining employee to make sure there has been no further alleged incidents of harassment or retaliation, as well as making contact with the accused employee to verify conformance with the company's rules of conduct and to see if the employee has any other concerns to be addressed. These communications should be spaced out over a reasonable period of time, such as two weeks, six weeks and three months after the investigation and summarized in a written memorandum kept in the employer's confidential investigation file. Of course, if additional offending conduct is alleged, the employer must take appropriate action, which may include another investigation.

Conclusion

For employers, internal harassment investigations are a fact of life requiring careful planning and execution by knowledgeable professionals. Given the important role internal investigations have in remedying and preventing harassment and helping employers defend against harassment charges and lawsuits, employers are well advised to make sure its human resource professionals and any outside investigators are well trained and equipped to handle the numerous challenges that may be encountered along the way. NL

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1 See, e.g., NRS 613.330; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*.

2 *Dennis v. Nevada*, 282 F. Supp.2d 1177, 1184 (D. Nev. 2003) (applying *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) and *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 765 (1998)).

3 It must be noted that unionized employees may be entitled to have a representative present during investigatory interviews if the employees have a reasonable belief they may be disciplined. See *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). However, employees in a non-union setting do not have the right to have a co-worker present at investigatory interviews. *NLRB vs. IBM Corp.*, 341 N.L.R.B. 1288 (2004).

4 An employer is not required to separate the complaining employee and the alleged harasser pending the outcome of the investigation, but if it does not, the investigation must be expedited and an employer must at least try to limit contact between the two employees to strictly business-related. *Swenson*, 271 F.3d at 1193.

5 As a general rule, the complaining employee should not be removed from the workforce or otherwise relocated.

6 For privacy reasons the exact disciplinary action taken against the accused employee is typically not disclosed.