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THERE'S AN INVESTIGATION! WHAT'S AN EMPLOYEE'S LAWYER TO DO?

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Workplace investigations are increasingly common and increasingly important in employment law. The employee's attorney can be helpful in coaching the client who is still employed to help the client effectively make the case during the investigation. If the ensuing investigation is fair and is favorable to the employee, that may be the end of the attorneys' involvement. Commonly, the investigation is not fair or favorable. Even more commonly, the client does not call until the investigation is over and the client has lost his or her job.

This paper will explore some ideas for the employee's lawyer who is advising an employee about an investigation. It will also discuss some recent cases and ideas for challenging the results of an investigation in subsequent litigation, and for using an inadequate or unfair investigation as a potent weapon in that litigation.

The Employer's Obligation to Investigate

An employer has an obligation to conduct a prompt and thorough investigation of claims of workplace harassment. A generation ago, the EEOC issued guidance instructing, "When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly." Policy Guidance on Current Issues of Sexual Harassment (March 19,1990) (last viewed 10/11/16) https://www.eeoc.gov/policy/docs/currentissues.html.

An employer that fails to conduct a thorough and fair investigation may find itself unable to assert an affirmative defense under *Faragher*/*Ellerth*. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). "A threshold step in correcting harassment is to determine if any occurred, and that

requires an investigation that is reasonable given the circumstances." *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1303 (11th Cir. 2007).

The employer has an obligation to investigate a harassment complaint, even if employee did not report through the internal complaint process, for example if the employee reported the harassment to a supervisor, rather than to Human Resources. Therefore management must be trained to handle reports appropriately. *Varner v. National Super Markets, Inc.*, 94 F. 3d 1209, 1213 (8th Cir. 1996).

The employer's investigation must be reasonable under the circumstances. "A threshold step in correcting harassment is to determine if any occurred, and that requires an investigation that is reasonable given the circumstances." *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1303 (11th Cir. 2007). However, a "full-blown, due process, trial-type proceeding" is not required in response to complaints of sexual harassment.

Investigations are also legally required in the context of many whistleblower allegations. As just one example, Sarbanes-Oxley requires public companies to establish procedures for handling employee complaints and for the confidential, anonymous submission by employees of concerns about questionable accounting or auditing matters. *See*, 15 U.S.C. § 78f(m)(4.)

Counseling the Employee Through an Investigation

An attorney who is consulted by an employee who is still employed can be helpful in assisting the employee to navigate the investigation process. There is no legal right for the employee's attorney to participate in the workplace investigation, and an employee who wishes to keep her job may be better served by not announcing that she has retained counsel. In this circumstance, the lawyer may do the most good as a behind-the-scenes coach to explain the process.

The lawyer's first job will be to help the client assess whether the situation is one which the employee wishes to escalate and bring to the employer's attention. Not every employee who comes to see an attorney about an unfair workplace situation is best served by raising a complaint and our first responsibility is to give our clients straightforward advice about whether they have a viable legal claim and what their alternatives are.

If there does seem to be actionable harassment, the attorney can help the employee navigate the process. If the employer handles the complaint appropriately, the lawyer may have helped the client save his or her job and come to a helpful resolution. If the employer does not handle the complaint appropriately, the employee will be in a better position to assert a legal claim.

The lawyer should advise and assist the employee to:

- Make a report of sufficient specificity to trigger the employer's responsibility to investigate. This may be an email to HR, a discussion with a supervisor (ideally documented in some way, including by email) or even an anonymous report on the company's ethics hotline. The tone of the report may vary depending on many factors, including whether it is your client's goal to remain employed (but have the employer address a troubling situation) or whether it is your client's goal to negotiate an exit.
- Prepare a brief summary or statement of the facts.
- Gather evidence or documents that your client may wish to present to the employer.
- Suggest witnesses that should be interviewed.
- Instruct your client to "bcc" or forward emails concerning the complaint to a personal email address. If there is confidential employer information that is relevant to the complaint, you will need to have a separate conversation with your client about preserving that evidence without violating any employer policies.
- Remind your client that he or she should expect that the employer will be looking at emails from the work email address. Privileged emails should not be sent from that address. Some clients need to be reminded that all emails from the work email address should be professional and reflect well on the employee.
- Remind your client to be circumspect and professional on social media.
- Remind your client that this is the time to do his or her very best work. If the employer is looking for a reason to fire your client, we don't want to hand the employer ammunition.
- Prepare talking points that can be brought into an interview. This may be particularly helpful if your client is nervous about the process.
- Explore what your client wants the employer to do, so your client is prepared to discuss resolution of the complaint with the employer's representative.

When an investigation is underway (whether or not it was initiated by your client), an employee is required to cooperate. Even if your client does not trust that the investigation will be fair or complete, the client needs to make a record that he or she was cooperative and honest. An employer may be permitted to terminate an employee who is uncooperative or dishonest during an investigation. *McGrory v. Applied Signal Technology, Inc.*, 212 Cal. App. 4th 1510, 1530 (2013). Termination in this situation is lawful as long as the reason for the termination was not unlawful discrimination, and refusing to cooperate with an investigation is not a protected activity.

Moreover, if an employee does not cooperate in an investigation, it will be obviously more difficult to substantiate the client's claims in later litigation. In *Espinal v National Grid NE Holdings,* 693 F.3d 31 (1st Cir. 2012), the employer terminated the employment of the plaintiff, who had refused to disclose the identity of the coworker who he alleged harassed him. The failure to cooperate led to a finding that the employer's actions were reasonable under the circumstances.

Workplace investigations range widely from an informal conversation with a supervisor or low-level human resources employee to quasi-judicial proceedings in which evidence is gathered and many people are interviewed. This can make it difficult to know how to prepare your client for the process.

The EEOC gave detailed and helpful guidance to employers about the types of inquiries that should be made when there is a claim of unlawful harassment by supervisors. EEOC, Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors, June 18, 1999, https://www.eeoc.gov/policy/docs/harassment.html (last viewed 10/11/16) at pp. . The employee's lawyer should be aware of this guidance to better prepare the client for the types of inquiries that a well-advised employer will be making.

The EEOC guidance sets for specific questions that may be appropriate in an investigation of harassment. You will do your client a service by discussing these questions with him or her in advance. The questions are attached to this paper as Appendix 1.

Attacking or Using the Results of an Investigation in Subsequent Litigation

Investigations become extremely important in subsequent litigation. An employer may use the results of an investigation to justify an employment decision or to avoid liability under Faragher/Ellerth. *See, e.g.*, *McKinnish v. Donahoe*, 40 F. Supp. 3d 689, 697 (W.D.N.C. 2014)(immediate and significant effort to investigate complaint and discipline harassing employee shields employer from liability). On the other hand, an employee may attack a poor or biased investigation as evidence of discriminatory treatment.

Investigation Notes Not privileged

If litigation ensues after an investigation, one of the plaintiff attorney's first tasks will be to obtain the investigation report as well as all notes and communications concerning the investigation. It is now well established that when an employer puts the reasonableness of an internal investigation at issue by asserting the *Faragher*/*Ellerth* defense, the employer waives any privilege that might otherwise apply to documents concerning that investigation. *See,e.g., Robinson v. Vineyard Vines, LLC*, 2016 WL 845283 (S.D.N.Y. March 4, 2016); *Ambrose-Frazier v. Herzing Inc.*, 2016 WL 890406 (E.D. La. March 8, 2016).

Ineffective Investigations

After obtaining the investigation report, the plaintiff's lawyer should look for signs that the report was biased or so inadequate as to indicate that the investigation was not taken in good faith. Questions to consider will include:

- Who conducted the investigation? Did the investigator have the authority and ability to be impartial? For example, if the investigator reports to the person being investigated, the integrity of the investigation can be questioned.
- Did the investigator take reasonable steps to seek statements from witnesses of various perspectives?
- Was the investigation undertaken with sufficient assurances to witnesses that there would be no retaliation?
- Did the investigator look at important documents or physical evidence?
- Is there a cogent investigation report? Who had input into the report and to whom was it provided?

When an investigation conducted by an employer was not adequate, reasonable or effective, the bias shown in the investigative process itself can be extremely important evidence in subsequent litigation, and can in itself be the basis for a finding of discrimination.

- In *Castelluccio v. International Business Machines Corporation*, the inadequacy of the employer's investigation was featured front and center in a case that ended with a judgment of nearly $2.5 million in favor of the Plaintiff. In a pretrial motion to preclude evidence of IBM's investigation, which had concluded that there was no age discrimination, the Court held that the evidence would not be admitted. The court strongly criticized the integrity of the investigation. "This was not an investigation conducted by a neutral party." The manager conducting the investigation did not obtain sworn statements, and the report did not consider evidence favorable to the plaintiff. Most significantly, the investigator indicated that he would stop the investigation if the plaintiff signed a release. This gave the court "reason to suspect that the purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly." *Castelluccio v. International Business Machines Corporation*, 3:09CV1145, 2013 WL 6842895 at **2-3 (D. Conn. Dec. 23, 2013). The case went to trial, and the plaintiff secured a favorable jury verdict. *Castelluccio v. International Business Machines Corporation*, 3:09CV1145, 2014 WL 3696365 (D. Conn. July 23, 2014).

- In *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726 (10th Cir. 2014), the Tenth Circuit reversed entry of summary judgment for an employer based on a Faragher/Ellerth defense. The court held that the investigation of a reported sexual assault and rape were so flawed that it could not be viewed as reasonable means to discharge the employer's Title VII obligations. *Id.* at 748. Among the inadequacies in the investigation, the court noted: 1) the investigator was not trained in conducting sexual harassment investigations; 2) there was no policy or procedure in how to conduct sexual harassment investigations; 3) mischaracterization of the issue as "sexual misconduct" between employees; 4) no statement from complainant; 5) no statements from witnesses on both sides; 6) no written report. Most offensive, the "investigation" seemed focused on the victim's consensual sex life with someone other than the alleged abuser, and

determining who was the father of the victim's unborn child. *Id.* at 735; 747-48. The plaintiff was encouraged to resign when the employer learned that the father was a married county employee.

- In *Mastro v. Potomac Electric Power Co.*, 447 F.3d 843 (D.C. Cir. 2006), *cert. denied,* 549 U.S. 1166,127 S. Ct. 1140 (2007), the plaintiff, a Caucasian employee, brought a reverse discrimination claim after he was fired following an investigation. The investigation concluded that Mastro had lied and he was fired. The court found that the investigation, "which was central to and culminated in Mastro's termination, was not just flawed but inexplicably unfair." *Id.* at 855. The indicia of unfairness considered by the court included: 1) Mastro was not interviewed, though others were; 2) He was allowed to give his version of events only after management had received the investigation results; 3) the fact that the investigator spoke to everyone other than the person at the center of the controversy "could lead a jury to believe there was . . . discrimination." 4) Investigator relied heavily on statement of an underling who had much to gain if boss was terminated or disciplined and who had a strained relationship with boss; 5) Investigator ignored contradictory testimony; 6) Investigator did not ask any of the individuals interviewed about their friendships to determine if collusion or camaraderie influenced their statements; 6) Investigator said he "relied on instincts" to determine credibility rather than objective indicia. The investigation lacked the "careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended." *Id.* at 855. In short, the flawed investigation led the court to conclude that a reasonable jury could conclude that the stated reason for firing Mastro was pretextual, *id.* at 855, and that "discriminatory treatment may have permeated the investigation itself." *Id.* at 856.

- In *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530 (10th Cir. 2014), the court held that a reasonable jury could find that the employer's investigation of a quarrel between two employees was not fair or adequate, allowing a reasonable jury to conclude that the purported reason for firing Smothers was pretextual. *Id.* at 542-43. The employer's "investigation" consisted of hearing only one employee's version of an altercation between the two employees. The employer decision makers deliberately prevented Smothers from defending his position and made the decision to terminate based on one-sided information. The court noted that "[i]f Solvay's decision makers had allowed Mr. Smothers to respond to Mr. Mahaffey's allegations before they fired him, we could perhaps accept that Solvay found Mr. Mahaffey's version of events more credible." The failure to interview the plaintiff, therefore, kept the claim alive.

- In *Miles v. Wyndham Vacation Ownership*, 2014 WL 287617 (D.P.R. Jan. 24, 2014), the court found that a reasonable jury could find that Wyndham did not take reasonable efforts to prevent or correct harassment. After 5 employees reported harassment, the employer found the claims unsubstantiated because the alleged harasser and one other employee denied it. The finding was made after

three days, and the employer did not interview all complaining employees. Accordingly, summary judgment for the employer was denied on Faragher/Ellerth defense.

- In *Fuller v. City of Oakland*, 47 F. 3d 1522, 1529 (9th Cir. 1995) the court held that a jury could conclude that an Internal Affairs investigation of plaintiff's sexual harassment allegations was conducted in a sexually-biased fashion when there were delays in the investigation, a failure to meet with or credit the testimony of witnesses supporting plaintiff, and a one-sided resolution of disputes of fact.

- *Pollard v. E.I. Dupont De Nemours Co*., 213 F.3d 933 (6th Cir. 2000), *rev'd on other grounds*, 532 U.S. 843 (2001). An investigation into the placement of a sexist bible verse in plaintiff's locker was found to be not effective because the investigation consisted of simply asking a series of yes/no questions to co-workers. When each employee denied knowledge of who placed the verses in the locker, the investigation was terminated. *Id.* at 942. The key wrongdoer in other harassing events was not interviewed because he was on vacation at the time of the locker incident. *Id.*

Biased Investigations May Form the Basis of a Cause of Action.

- In *Cole v. Management and Training Corp.*, 2014 WL 2612561, 123 Fair Empl. Prac. Cas. (BNA) 769 (W.D. Ky. June 11, 2014), the court considered the role of persons on an investigations team whose report called for the immediate termination of Plaintiff. There was evidence that at least one member of the five-member investigation team made statements indicating discriminatory animus. In effect, the employer delegated power to take an employment action to the investigators. The investigators are therefore considered supervisors. Because the recommendation of the investigators was adopted when the Plaintiff was fired, the court held that a cat's paw analysis was appropriate. Therefore the biased investigation report could be a basis for liability.

- *Lapaix v. City of New York*, 2014 WL 3950905 * 5 and *7 (S.D.N.Y. 2014). Investigation of claim that one employee grabbed another from behind. The person grabbed – a black male of Haitian origin and a military veteran – was required to undergo psychological testing as part of the investigation and was put on leave. The employee who was accused of being the "grabber" was not required to undergo psychological testing, and similarly situated white employees were not required to do so. The court held that allegations of disparate treatment in the investigation process were sufficient to plead a claim under USERRA and a claim for discrimination on the basis of race and national origin.

When Your Client is the One Accused of Wrongdoing

It is particularly difficult to represent the employee who has been accused of sexual harassment or other wrongdoing. Employers fearful of suits may be tempted to fire that employee without an adequate investigation, thinking that quickly getting rid of the accused will protect the employer from a suit.

However, there is some case law suggesting that the accused may have a cause of action if he is fired as a result of a biased or inadequate investigation.

- In *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009), a female employee accused a male co-worker of propositioning her for sex, stalking her and harassing her. The male employee contended that the female employee initiated the sexual talk. The male employee was told he would be terminated if he did not resign. The male employee/plaintiff testified at deposition that his supervisor told that the woman "knows a lot of attorneys; I'm afraid she'll sue me. And besides you probably did what she said you did because you're male and nobody would believe you anyway." *Id.* at 311. The court reversed summary judgment on behalf of the employer. The court stated that "an employer may not rely on an alleged fear of a lawsuit as a reason to shortcut its investigation of harassment and to justify an employment decision adverse to the putative harasser that in itself violated Title VII. . . . [A] reasonable jury could infer from the inadequacy of defendants' investigation, if proven, that defendants relied solely on a sex stereotype, and clearly not on the outcome of a reasonable investigation undertaken in response to their fear of a lawsuit, as the basis for the decision to pressure Sassaman to resign." *Id.* at 315.

- In *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 2d 167 (E.D.N.Y. 2013), a male and female employees both made allegations of sexual harassment against the other. Male employee was told he would be terminated if he did not resign. A reasonable jury could find that male employee was subjected to disparate disciplinary treatment based on gender, since he was constructively discharged after investigation and she as only suspended. *Id.* at 173-74.

- In *Caiazza v. Mercy Med. Ctr.*, No. 2013CA00181, 2014 WL 2466313 (Ohio Ct of Appeals, May 27, 2014), a male and female employee each engaged in sexually explicit conduct, and each filed a sexual harassment complaint. The male employee was constructively discharged; the female employee was not disciplined. *Id.* at 186. The court found that there was disparate treatment of male and female employees when the employer accepted the female employee's allegations against the male as true and did not make any inquiry into the male employee's allegations against the female employee. Further, the employer decided to terminate the male employee for the consensual sexual activity, took no action against the female employee, and did not conduct any further investigation. *Id.* at * 9.

CONCLUSION

Investigations are important! The employer usually has counsel to guide its actions when it investigates legal claims. All too often, the employee does not have assistance in navigating this process. Employee's counsel can be helpful in ensuring that a record is made of the employee's report of wrongdoing. If the ensuing investigation is not adequate or if the employee is terminated despite its efforts to have the employer take a careful look at the situation, the investigation can be essential evidence of the employee's claim.

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Appendix 1.

Suggested investigation questions from EEOC, Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors, June 18, 1999, https://www.eeoc.gov/policy/docs/harassment.html (last viewed 10/11/16)

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.

- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?