Internal Investigations

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It happens to every employer. At some point, an employee comes to a manager, supervisor, or owner and explains that a coworker, or worse, a supervisor, has done something that the reporting employee does not like. The offensive conduct can be as minor as an employee showing up late or as serious as sexual misconduct. When the employee reports the problems, he or she usually wants a resolution. Most often the employee wants the resolution quickly. Often the issue can be resolved with a simple discussion. On other occasions, such as when an employee reports illegal activity, a more thorough investigation is often warranted. In fact, in some situations, an investigation will serve as a strong potential defense against claims of illegal practices.

Many claims warrant more thorough investigations. One such situation includes claims of sexual harassment. In 1998, the United States Supreme Court, in two separate cases decided on the same date, declared that an employer sued by an employee for claims of sexual harassment resulting in "no tangible employment action" can raise an affirmative defense that includes as elements the employer's use of "reasonable care to . . . correct promptly any sexually harassing behavior" and the employee's unreasonable failure "to take advantage of any . . . corrective opportunity provided by the employer."[1] Reasonable corrective actions include internal investigations of the complaints.[2] Additionally, it may be unreasonable for an employee to refuse to participate in such an

[1] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
[2] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § V.C.1 (June 18, 1999).

investigation. Other situations that may warrant more thorough investigations include claims that an employee has violated the law in such a way that the employer could be liable for the employee's conduct, claims that an employee has stolen from the employer, or claims that could result in the dismissal of an employee who has a contractual restriction on the employer's right to terminate his or her employment, such as union employees, or employees with a just-cause employment contract, or civil service employees.

Once an employer has determined to conduct an investigation, the employer must be careful to conduct a good investigation. Mistakes in investigations or in the conduct of an investigation can often lead to employee discontent or, in the worst case, additional legal violations. The hallmarks of a good investigation include the following:

- An Objective Investigator. Most employees will view the selection of the investigator as the clearest sign of how seriously the employer is taking the claim. An investigator should never be a person who is claimed to have engaged in the conduct or to be associated with the underlying facts of the investigator. An independent human resource employee who is not below the alleged perpetrator in the supervisory chain is a good choice. For particularly sensitive matter or matters that are likely to end up in litigation, an outside investigator or lawyer may be the best choice.

- Appropriate and Timely Process. The process should be appropriate to the claim made. Additionally, the process should be conducted in as expedient a manner as is appropriate. A quick response, coupled with the appropriate level of investigation, increases the perception of fairness.

- Objective Inquiries. An investigator should always conduct an interview or request statements from the person making the allegations. He or she should then speak with others who are also witnesses. Additionally, the investigator should assure all witness that there will be no retaliation for the statements that they make. At the same time, the investigator should inform the witnesses that it is a serious matter that should not be taken lightly. The questioning should be with open-ended questions requiring narrative responses as opposed to questions that suggest an answer. The investigator should not comment on any aspect of the investigation with the witnesses.

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- Keep Good Records. An investigator should record every interview if possible. Additionally, an investigator should keep good notes, making sure that the notes reflect suppositions and guesses.

A. The New Trend of Outsourcing Investigation – Money Well Spent

As indicated above, investigations can be very delicate. Given the issues that are often at stake (which will be discussed more thoroughly below), it is a dangerous proposition to have an inexperienced person conduct an investigation. A sloppily handled investigation can serve as fodder for a good (or even bad) attorney. Accordingly, many employers are outsourcing their investigations to experienced experts in these types of investigations. Many human resource professionals are specifically trained or have years of experience in investigating employee complaints. Additionally, law firms will often be specially retained simply to investigate serious employee complaints. Given the potential liabilities that can come from a bad investigation or the potential advice that an employer may receive from an experienced, well-trained expert, outsourcing investigations makes sense. Additionally, many employees will see the outsourced investigator as a more independent and objective investigator and will perceive that the employer is taking the employee's claims much more seriously when such an investigator is hired.

B. Equal Employment Opportunity Guidelines

In response to the United States Supreme Court pronouncements regarding employer vicarious liability for supervisor sexual harassments in the decisions *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), the Equal Employment Opportunity Commission (EEOC) published a document entitled *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* on June 18, 1999. Although the document deals largely with issues that are not relevant to the topic of investigations, it did include in section V.C.1 a description of an appropriate policy and complaint procedure. As one of the necessary elements of an "anti-harassment policy and complaint procedure," the

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EEOC listed "[a] complaint process that provides a prompt, thorough, and impartial investigation."[3]

Not only did the *Enforcement Guidance* list an investigation as an integral part of the complaint process, but it provided detailed guidance on what the EEOC considers an "[e]ffective [i]nvestigative [p]rocess."[4] According to the EEOC, an effective investigation will:

- be "prompt, thorough, and impartial"
- include an assessment and determination of whether "a detailed fact-finding investigation is necessary"
- "immediately" "launch[]" when harassment is alleged
- take the appropriate amount of time "depend[ing] on the particular circumstances"
- include "intermediate measures before completing the investigation" if "necessary"
- have an objective, "well-trained" investigator who will not be subject to the "supervisory authority" of the alleged harasser and whose investigation is not controlled by the alleged harasser[5]

The *Enforcement Guidance* also provides a list of suggested questions to ask parties and witnesses during the investigation.[6] Questions about "the personal lives of the parties outside the workplace" are considered "relevant only in unusual circumstances."[7] Additionally, the investigator is cautioned against "offering his or her opinion."[8]

The EEOC further guides employers in how to assess the credibility of each of the witnesses.[9] It details the factors to consider in assessing credibility:

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[3] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § V.C.1 (June 18, 1999).
[4] *Id.* § V.C.1.e.
[5] *Id.*
[6] *Id.* § V.C.1.e.i.
[7] *Id.*
[8] *Id.*
[9] *Id.* § V.C.1.e.ii.

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- Inherent plausibility: Is the testimony believable on its face? Does it make sense?

- Demeanor: Did the person seem to be telling the truth or lying?

- Motive to falsify: Did the person have a reason to lie?

- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person after the alleged incidents, or people who discussed the incidents with him or her at around the time they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

- Past record: Did the alleged harasser have a history of similar behavior in the past?[10]

After the investigation is completed, the EEOC suggests that a determination be made "as to whether harassment occurred."[11] The determination can be made by the investigator or a "management official who reviews the investigator's report."[12] The *Enforcement Guidance* suggests that "[t]he parties should be informed of the determination."[13]

C. Always be Aware of What will be Discoverable from the Investigation

As discussed above, an affirmative defense to a claim of discrimination or retaliation is that the employer has conducted an investigation and reasonably acted pursuant to the outcome of that investigation. Thus, all employers would be well served to conduct investigations of claims of discrimination or retaliation. Of course, investigations of all other serious matters make sense as well. An employer is not well-served if it makes a significant employment decision without first investigating the underlying facts of the claim. However, all employers should be aware that much of the underlying documents created in the investigation and the thoughts and conclusions of the investigators are likely pieces of evidence that an employer will be required to

[10] *Id.*
[11] *Id.* § V.C.1.e.iii.
[12] *Id.*
[13] *Id.*

disclose to the employee and his or her lawyers in litigation, even if the investigation is conducted by an attorney or at the request of an attorney.

Two evidentiary doctrines are implicated by the evidence created in an investigation: attorney-client privilege and the work product doctrine. The attorney-client privilege "protects confidential communications made for the purpose of obtaining legal advice."[14] Thus, "confidential communications . . . between a client's representative and the client's attorney, between representatives of a client, or between attorneys for a client"[15] are protected by the privilege.

The work product doctrine, which is broader than the attorney-client privilege, "exists to provide attorneys with a zone of privacy in which they can formulate and prepare legal strategies without intrusion from opposing counsel."[16] "Work product materials are those 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative.'"[17] "'The work product doctrine does not apply to information collected or communications made in the normal course of business. It applies only to material generated primarily for use in litigation, material that would not have been generated but for the pendency or imminence of litigation.'"[18]

Both the attorney-client privilege and the work product doctrine are subject to waiver. "Parties may waive any work product [and attorney-client privilege] protection by putting the privileged information at issue."[19]

As a practical matter, if an employer does an internal investigation not involving its attorney in order to ascertain the truth of the claims alleged by an employee and does so pursuant to its policies and procedures, the internal investigation is subject to disclosure in litigation. This is so because no attorney-client privilege attaches and the work product doctrine does not apply because it was "information collected . . . in the

[14] Vingelli v. United States, 992 F.2d 449, 454 (2nd Cir. 1993).
[15] Viacom, Inc. v. Sumitomo Corp., 200 F.R.D. 213, 217 (S.D.N.Y. 2001).
[16] McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 243 (E.D.N.Y. 2001)
[17] *Id.* (quoting Fed. R. Civ. P. 23(b)).
[18] Madsen v. United Television, Inc., 801 P.2d 912, 917 (Utah 1990) (quoting Kelly v. City of San Jose, 114 F.R.D. 653, 159 (N.D. Cal. 1987)).
[19] McGrath, 204 F.R.D. at 244; *see also* Walker v. County of Contra Costa, 227 F.R.D. 529, 533 (N.D. Cal. 2005) ("Several cases have held that defendants also lose the work product and attorney-client privileges once they assert the investigation as an affirmative defense.")

normal course of business."[20] Additionally, even if the investigation is conducted by an attorney who is not anticipating litigation, his or her investigative notes are subject to disclosure although his or her mental impressions probably will not be.[21]

Evidence gathered during an investigation conducted after the initiation of litigation to defend against the litigation is protected under the work-product doctrine.[22] However, this privilege is subject to waiver ***if*** the employer relies as a defense on the fact that an investigation was conducted and that action taken pursuant to that investigation was reasonable.[23] As a practical matter, since one of the elements of an affirmative defense in a discrimination claim is that the employer conducted an investigation and acted appropriately, much of the investigative notes of an attorney can be viewed if the attorney is not careful to identify that the pre-litigation investigation is what is being used as the basis for the defense.

Given these general rules, an employer should be very careful to assure that any evidence gathered in an investigation is accurate. Additionally, the employer should be careful to hire only competent and careful investigators to conduct and document investigations.

D. What to do With the Evidence to Resolve the Issue

Of course, once an investigation is completed, the affected employees are going to want to know what the results of the investigation are and what measures have been or will be taken. Communication of the results of an investigation should only be communicated on a "need-to-know" basis to the parties to the complaint and other managerial employees who will have to supervise elements of any remedial action.

In determining what remedial measures should be taken, employers should be careful to review any applicable contract terms that might restrict disciplinary procedures. Ordinarily, in private employment settings there are no contractual restrictions unless a

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[20] Madsen, 801 P.2d at 917; *accord* Long v. Anderson University, 204 F.R.D. 129, 136-37 (S.D. Ind. 2001); Robinson v. Time Warner, Inc., 187 F.R.D. 144, 148 (S.D.N.Y. 1999); Miller v. Federal Express Corp., 186 F.R.D. 376, 388 (W.D. Tenn. 1999).

[21] Long, 204 F.R.D. at 137.

[22] *See* Walker, 227 F.R.D at 534-35; Robinson, 187 F.R.D. at 146; Miller, 186 F.R.D. at 388.

[23] *See* Walker, 227 F.R.D. at 533; McGrath, 204 F.R.D. at 244; Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996).

union agreement is in place. However, in public entity employment civil service statutes and ordinances may govern any remedies that can be administered.

In the EEOC's *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* the EEOC suggests that "disciplinary measures should be proportional to the seriousness of the offense" and "should correct the effects of the harassment."[24] Of course, if, after the investigation, it is difficult to ascertain which party is telling the truth, the employer need not assess any "remedial measures" but "should still undertake further preventive measures, such as training and monitoring."[25] The *Enforcement Guidance* gives the following examples of appropriate remedial measures:

- oral or written warning or reprimand
- transfer or reassignment
- demotion
- reduction of wages
- suspension
- discharge
- training or counseling
- monitoring to ensure that harassment stops
- restoration of leave taken because of harassment
- expungement of negative evaluations
- reinstatement
- apology by the harasser

[24] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § V.C.1.f (June 18, 1999).

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D. Scott Crook represents both private and public sector employers and employees in most areas of employment law, including creation and negotiation of employment-related documents, including personnel policies, employee handbooks, employment agreements, severance agreements, and non-competition agreements. He has successfully handled employment contract claims, labor disputes, and discrimination claims in administrative agencies and courts at all levels, including the Equal Employment Opportunity Commission, Utah Anti-Discrimination and Labor Division, Merit Systems Protection Board, and the National Labor Relations Board.

Mr. Crook also has an active litigation and appellate practice, recently serving as chair of the Appellate Practice Section of the Utah State Bar. He has represented clients in state courts in Utah and Idaho, the Utah federal District Court, the Utah Court of Appeals, Tenth Circuit Court of Appeals, and Utah Supreme Court. He has lectured or written on employment law, constitutional matters, appellate practice, real property, and jury selection procedures.