EMPLOYMENT LAW COMMENTARY

Volume 27, Issue
January 2015

San Francisco
Lloyd W. Aubry, Jr., Editor
Karen J. Kubin
Linda E. Shostak
Eric A. Tate

Palo Alto
Christine E. Lyon
Tom E. Wilson

Los Angeles
Timothy F. Ryan
Janie F. Schulman

New York
Miriam H. Wugmeister

Washington, D.C./Northern Virginia
Daniel P. Westman

London
Caroline Stakim

Berlin
Hanno Timner

Beijing
Paul D. McKenzie

Hong Kong
Stephen Birkett

Tokyo
Toshihiro So

Sidebar:
Are you ready to share?

MORRISON
FOERSTER

LANDMINES TO AVOID IN CONDUCTING WORKPLACE INVESTIGATIONS

By Jonder Ho

INTRODUCTION

With alarming regularity, employers find themselves in the unenviable position of having to investigate workplace complaints made by their employees. These complaints can range from informal allegations of harassment or discrimination to formal written complaints of criminal misconduct. Regardless of the subject matter, employers face significant liability risks if they do not handle workplace investigations properly. This article discusses some of the issues that employers should consider in conducting workplace investigations.

continued on page 2

WHEN SHOULD AN EMPLOYER CONDUCT AN INVESTIGATION?

Employers will often make the mistake of waiting for a formal complaint from an employee before commencing a workplace investigation. This is not a good practice. Investigations should begin as soon as the employer becomes aware of a potential issue. A delay in an investigation can lead to dire consequences in any subsequent lawsuit. An aggrieved employee, for example, may be able to use the delay as evidence that the employer condoned or even ratified some unlawful conduct.[1] In some cases, a delay may even create an inference of bad faith, which could be used against the employer as the basis for a punitive damages award.[2] The Equal Employment Opportunity Commission (EEOC) has similarly warned that "if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process."[3]

The bottom line is that federal and state harassment and discrimination laws impose a legal duty on an employer to promptly investigate employee complaints. These complaints do not need to come through formal, established channels, nor do they have to be in writing. Once the employer learns of problematic issues in the workplace, the employer should be proactive in initiating an investigation.

WHO SHOULD CONDUCT THE INVESTIGATION?

In its *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, the EEOC advises employers to select an investigator who can conduct a "thorough, and impartial investigation" and who has no stake in the outcome of the investigation. Potential candidates may include a member of the employer's human resources department, in-house counsel, or an outside, neutral third-party investigator. Regardless of the selection, the employer should select an investigator who can objectively gather and consider the facts without any pressures from the employer. Any potential or actual conflict of interest, such as the selection of an investigator with supervisory authority over key witnesses, may jeopardize the integrity of the investigation and open the employer up to liability. All investigators should, at a minimum, be familiar with the employer's policies and procedures. Investigators should also be experienced in the skills required for interviewing witnesses and evaluating credibility.

CONFIDENTIALITY CONCERNS

In the past, it was routine practice for investigators to instruct employees to keep all facts of an investigation confidential, pending the completion of the investigation. Such a practice allowed investigators not only to address the privacy concerns of their witnesses but also to maintain control of the investigation by restricting the premature dissemination of information. Although these may be valid reasons to require confidentiality from employees during an investigation, a recent decision by the National Labor Relations Board (NLRB) suggests that investigators should temper such instructions and refrain from issuing blanket confidentiality admonishments to their employees.

In *Banner Estrella Medical Center*, an employer's human resources consultant regularly asked employees, who filed an internal, work-related complaint, to keep the complaint confidential until the end of an investigation.[4] The NLRB determined that these routine confidentiality instructions violated Section 7 of the National Labor Relations Act.[5] The NLRB, however, did not express disapproval for all confidentiality instructions. The NLRB concluded that an employer can ask its employees to keep matters confidential as long as the employer could identify a legitimate business justification for the confidentiality that outweighs the employees' Section 7 rights. A legitimate business justification may include the need to: (1) protect witnesses, (2) prevent the destruction of evidence, (3) avoid the fabrication of testimony, and (4) prevent cover up. The NLRB held that a generalized concern with protecting the integrity of the investigation is not a sufficient business justification for a confidentiality instruction.

In light of the NLRB's decision, employers should be very careful about issuing broad confidentiality instructions to their employees during workplace investigations.[6] Rather, employers should request

continued on page 3

that their employees refrain from interfering with the investigation and use discretion when discussing the investigation with co-workers.

WHAT IS AN ADEQUATE INVESTIGATION?

There are no universal rules for what constitutes an adequate investigation. Every workplace complaint must be evaluated on an individual basis, and the proper scope of an investigation will vary depending on the facts surrounding each complaint. Notwithstanding, a recent decision from the California Court of Appeal reveals some fundamental elements that must be incorporated into any workplace investigation.

In *Mendoza v. Western Medical Center of Santa Ana*,[7] Romeo Mendoza, a nurse at Western Medical Center, complained to his manager that he was being sexually harassed by another male employee. The hospital terminated both employees after investigating the complaint and determining that both individuals were equally complicit in engaging in inappropriate conduct. Mendoza sued the hospital for wrongful termination, and a jury entered a verdict in the amount of $238,328.

Although the *Mendoza* court ultimately reversed the verdict due to incorrect jury instructions issued at trial, the court's decision to remand the case for a new trial serves as a cautionary tale for all workplace investigators. In remanding the case, the court declined the hospital's request to direct a judgment in its favor, noting that there was sufficient evidence for the jury to conclude that a substantial motivating factor of Mendoza's firing was his report of sexual harassment. The court explained that the primary evidence against the hospital were the numerous shortcomings in the hospital's investigation of Mendoza's complaint. According to the court, the "lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of truth so much as a way to clean up the mess that was uncovered" by Mendoza's complaint.[8]

Some of the main deficiencies that the court noted in the hospital's investigation include the following:

- Lack of a formal investigation plan,
- Delay in interviewing the employees,

Are you ready to share?

In the UK, a new type of statutory leave—shared parental leave (SPL)—will soon come into effect. The new leave allows parents of children due to be born (or adopted) on or after 5 April 2015 greater flexibility in taking leave from work to care for their child during his or her first year.

Employers (who haven't already) should start preparing now to ensure they understand the new rules around who is entitled to take SPL and what leave and pay rights are granted, as well as the rules surrounding notices to take or change periods of leave. It is also good practice to implement an SPL policy setting out the relevant parties' rights and obligations, as well as updating any existing family-friendly leave policies that may be affected.

Under the new regime:

- Employees must have at least 26 weeks' continuous service to qualify for SPL.
- Mothers must continue to take two weeks of compulsory maternity leave immediately after the birth of a child.
- Mothers can opt in to SPL by voluntarily ending their maternity leave and/or pay early. If they choose to do so, any remaining leave and pay entitlement (up to 50 weeks' leave and 37 weeks' pay) is converted to shared parental leave and pay, and available to share with the father or mother's partner.
- If SPL is unwanted, the existing maternity and ordinary paternity rules continue to apply (meaning fathers/partners will be limited to two weeks' ordinary paternity leave and pay).
- Parents are able to take SPL at the same time as each other, and can stop and start leave and return to work in between periods of leave. This represents a significant change from current family-friendly leave rights.

For further information in relation to SPL or assistance with family-friendly policies, please contact Caroline Stakim in Morrison & Foerster's London office at cstakim@mofo.com or +44 (0)20 7920 4055.

continued on page 4

- Failure to take witness statements,
- Decision to interview both the accused and the accuser simultaneously,
- Failure to interview witnesses other than the accused and the accuser,
- Allowing the investigation to be completed by the employees' supervisor, rather than a trained human resources employee.

In formulating a strategy for workplace investigations, employers should learn from the mistakes of the hospital in *Mendoza*. The hospital's investigation lacked many of the basic features of an adequate workplace investigation. At a minimum, employers should ensure that all of their workplace investigations: (1) start with a formal investigation plan, (2) be conducted as promptly as reasonably possible, (3) be well-documented, (4) be designed to ensure all appropriate witnesses are interviewed, and (5) be conducted by a trained, impartial investigator.

CONCLUSION

The failure to conduct prompt, thorough workplace investigations in response to work-related complaints can result in significant liability for employers. Employers should take special care in investigating all employee complaints.

Jonder Ho is an associate in our Los Angeles office and can be reached at (213) 892-5674 or jho@mofo.com.

To view prior issues of the ELC, click here.

---

1 *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

2 *Davis v. Kiewit Pacific Co.*, 220 Cal.App.4th 358, 373 (2013); see also *Bowles v. Osmose Utility Services*, 443 F.3d 671, 674 (8th Cir. 2006).

3 EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at http://www.eeoc.gov/policy/docs/harassment.html*.

4 *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012).

5 Section 7 of the NLRA protects that right of employees to engage in concerted activity regarding their employment.

6 The *Banner* decision was recently vacated and remanded to the NLRB following the U.S. Supreme Court's decision in *National Relations Board v. Noel Canning*, which held that President Obama's NLRB appointments were unconstitutional. See 134 S. Ct. 2550. The NLRB, however, has yet to issue any decision contrary to *Banner Health*. Pending a decision, employers should still use Banner Health as guidance and refrain from issuing broad confidentiality admonishments to their employees during investigations.

7 *Mendoza v. Western Med. Ctr. Of Santa Ana*, 222 Cal. App. 4th 1334 (2014).

8 *Id.*, at 1344.
