# INVESTIGATE OR LITIGATE:

## AVOIDING COSTLY LITIGATION THROUGH PROPER INVESTIGATION*

BY

MICHAEL J. ROSSITER**

What's past is prologue.

-*William Shakespeare*, The Tempest, Act 2, scene 1, 245–254.

Shakespeare's famous quote boils down to this: What has occurred in the past sets the stage for significant future events. For employers, the quality of a workplace investigation into alleged employee misconduct sets the stage for future legal action. If an employer conducts a timely and proper investigation, significant legal action may be mitigated, or completely avoided. However, if an employer conducts an improper and untimely investigation the employer may be subject to significant liability in the future – in other words, "what's past is prologue."

Employers should conduct workplace investigations in several instances. Employers, for example, may use workplace investigations as part of their defense to discrimination and harassment claims.[1] *See, e.g., Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). Likewise, employers may use such investigations as a defense to wrongful termination claims. *See Cotran v. Rollins Hudig Hall Intl.,* 17 Cal. 4th 93 (1998). The adequacy of these investigations impacts the employer's ability to defend and avoid legal claims. While the exact procedures used in any investigation may vary on a case-by-case basis, this article will discuss the basic and fundamental issues that employers should be aware of when conducting an investigation. Because every situation is unique, and must be handled differently, nothing in these materials should establish standards or policies for any particular employer.

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** Michael J. Rossiter is an associate with Fisher & Phillips, LLP (Irvine) practicing in all areas of labor and employment law, including handling claims brought under California's Fair Employment & Housing Act, Title VII of the Civil Rights Act of 1964, and claims brought pursuant to California's numerous wage and hour laws.

[1] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. See *Faragher*, 524 U.S. at 786-787 (in determining an appropriate standard of liability for sexual harassment by supervisors, the Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 524 U.S. at 760-761 (the Court imported the concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). For cases applying *Ellerth* and *Faragher* to harassment on different bases, see *Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race) ; *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). See also *Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), cert. denied, 119 S. Ct. 1141 (1999).

## I. WHEN TO CONDUCT AN INVESTIGATION.

A. Notice of Misconduct.

An employer should begin an investigation once notified of employee misconduct. Generally, an employer cannot be held liable for misconduct of which it is unaware. However, an employer has an obligation to conduct an investigation in the absence of an employee complaint if the employer "knows or should have known" of the misconduct. *See* 29 CFR § 1604.11(d) (2003) (emphasis added); *See also Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000) (employer not liable for what occurred before it was put on notice of the harassment, but is liable for the harm inflicted after it has been put on notice or as a result of its inappropriate response); *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001) ("employer cannot be held liable for misconduct of which it is unaware"); *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000) (employer must have advance notice, and, if employer takes appropriate corrective action, it will not have ratified the conduct).

B. Type of Misconduct.

Employers are not required to investigate simple teasing, offhand comments, or isolated incidents that are relatively minor. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786-788 (1998). Rather, the conduct must be so objectively offensive as to alter the terms and conditions of the victim's employment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). However, when these minor incidents come to the attention of management, the employer should still conduct an appropriate inquiry and consider proper action to ensure these minor incidents do not escalate into a serious problem. *See Faragher*, 524 U.S. at 786-788 (1998); EEOC Notice N-915.002 Sec. I, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) last modified April 6, 2010 ("EEOC Notice N-915.002").

For example, an employee who complains to management that he or she was cut-off in the parking lot by a fellow employee may not require a full investigation. Management, however, should ask follow-up questions to ensure that the incident is, in fact, isolated and innocuous. Specifically, management may want to ask if the offending employee had done this, or anything similar, before or whether this incident is an indication of a larger problem.

C. Immediate Investigation.

If a full fact-finding investigation is necessary, it should be launched immediately. *See* EEOC Notice N-915.002 (Sec. V, C, 1). Prompt and thorough interviews of the complainant, the accused, and all witnesses are essential elements of a sufficient response. *See Swenson v. Potter,* 271 F.3d 1184 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action to remedy situation); *Daugherty v. Henderson,* 155 F. Supp. 2d 269 (E.D.PA 2001) (investigation was prompt and thorough where company learned of complaint and, a week later, initiated a thorough investigation which determined the accusation could not be corroborated).[2]

[2] *But see, Bennett v. New York City Dept. of Corrections,* 705 F. Supp. 979 (S.D.N.Y. 1989) (four week delay before interviewing complainant and co-worker not deemed prompt); *Sorlucco v. New York City Police Dept,* 971 F.2d 864, 867-69 (2d Cir. 1992) (interview of complainant and witnesses four months after complaint and interview of alleged harasser eight months after complaint held insufficient).

## II. HOW TO CONDUCT AN INVESTIGATION.

A. Prior Notice of the Rules.

All employees should have prior notice of the rules and a general idea of what is forbidden in the workplace. This is typically accomplished via employee handbooks, separate acknowledgments, internal memorandums, and training programs. The various laws against harassment and discrimination in the workplace are designed to encourage the creation of anti-harassment/discrimination policies and effective grievance mechanisms. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998). Failure to provide employees with prior notice of the rules will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. *See* EEOC Notice N-915.002. Therefore, an employer should provide every employee with a copy of the policies and complaint procedures and redistribute it periodically. *See* EEOC Notice N-915.002.

B. Adequate and Thorough.

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged misconduct. *See* EEOC Notice N-915.002. Failure to adequately and properly investigate allegations of misconduct may lead to claims for (1) Invasion of Privacy, (2) False Imprisonment, (3) Constructive Discharge, (5) Defamation, (6) Retaliation, (7) Breach of Contract, (8) Wrongful Termination, and (9) Negligent Retention.

Employers, however, do not need to prove that allegations of misconduct are *true*, just that the employer *believed* the charges were true based on "substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." *Cotran v. Rollins Hudig Hall Internat., Inc.*, 17 Cal. 4th 93, 107-108 (1998).

C. Select the Investigator.

Potential investigators may include a member of Human Resources, a member of management, an outside investigator, or in-house or outside counsel. Whoever conducts the investigation should be unbiased, neutral, experienced, credible, and trusted by both the accused, the victim, and the potential witnesses. Investigations conducted by management and Human Resources may come under more scrutiny since the neutrality and objectivity of the investigator may come into question. *See* EEOC Notice N-915.002.

Having outside counsel conduct the interview has distinct advantages. For example, it is more difficult to show the appearance of bias because the attorney does not have a personal interest in the outcome. More importantly, however, the attorney-client privilege protects communications that a client makes in confidence to its counsel for the purpose of obtaining legal advice. Moreover, the attorney work product privilege protects the thoughts and impressions of an attorney-generated product during the course of the attorney's legal duties and in anticipation of litigation.

These privileges may have to be waived in order to prove the adequacy of the investigation or to establish that the employer had good cause to terminate an employee. *Worthington v. Endee*, 177 F.R.D. 113 (N.D.N.Y. 1998). However, the legal advice provided during and after the investigation may still be protected.

D. Prepare for the Investigation.

In order to prevent further misconduct, the employer may need to undertake intermediate remedial measures, such as implementing scheduling changes, transferring the accused, or placing the accused on non-disciplinary leave with pay pending the conclusion of the investigation. *See* EEOC Notice N-915.002.

Once the employer has effectively halted the misconduct, it is essential that the investigator know all of the issues arising from the alleged misconduct; therefore, the investigator should have the victim draft a statement under penalty of perjury that recites *all* incidents of misconduct, and that lists times, dates, locations, and witnesses. Based on this statement, the investigator then knows what information, documents, witnesses, and questions will be essential in conducting an effective investigation. Next, the investigator should review the relevant information and documents in order to outline the questions to be asked of the witnesses, the victim, and the accused.

The investigator should interview the victim first, witnesses second, and the accused last. Interviewing the victim first ensures that the investigator will have all information necessary to examine the subsequent witnesses. Interviewing the accused last ensures that the investigator has all the information needed to examine the accused effectively and gives the accused a chance to rebut *all* of the accusations and information presented. It is essential to give the accused an opportunity to rebut the allegations.

E. Conduct the Investigation.

Interview each witness *individually* and inform them that the interview is voluntary and that there will be no retaliation or reward for their participation. An employer should make clear to employees that it will protect the confidentiality of the allegations to the extent possible. An employer, however, cannot guarantee complete confidentiality since it cannot conduct an effective investigation without revealing certain information to the accused and potential witnesses. Information about the allegations should be shared only with those who have a need to know. Furthermore, records relating to complaints of misconduct should be kept confidential on the same basis.

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about the misconduct, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.

In conducting the interviews, the investigator should ask thorough open-ended questions followed by specifics (Who, What, Where, When, Why, How). The investigator should not stick to a script but should generally keep to an outline. The investigator should also ask for documents and witnesses that support the interviewee's version of the events. In addition, the investigator should always maintain objectivity. Specifically, the investigator should not leap to conclusions, comment on the credibility of the parties, or give an opinion as to what happened or did not happen.

When the investigation is complete, the investigator should inform the victim of the results, and have the victim acknowledge the result and his or her satisfaction with the result in writing. However, it is important not to discuss the results of the investigation with any other employees.

## III. WHAT ACTIONS SHOULD BE TAKEN AFTER THE INVESTIGATION.

A. Legal Standard.

The employer must take permanent remedial steps "reasonably calculated to end the harassment." *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir.1991). Remedial measures should be designed to stop the misconduct, correct its effects on the victim, and ensure that the misconduct does not recur. However, disciplinary measures should be proportional to the seriousness of the offense. *Mockler v. Multnomah County*, 140 F.3d 808, 813 (9th Cir. 1998). If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate. *See* EEOC Notice N-915.002.

B. Appropriate Discipline.

Typically, the employer chooses between issuing the accused a warning, requiring the accused to attend training, suspending the accused, terminating the accused, or some combination thereof. In determining appropriate discipline, the employer should review the employee handbook and relevant policies to ensure remedial action is applied consistently. If remedial action is not applied consistently, it may open the employer up to claims of discrimination. *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340 (7th Cir. 1999). If the discipline is inconsistent with prior remedial action, the employer should document why, and it certainly should be a good reason – especially if the accused is a member of a protected category. This rule applies similarly where the accused has made complaints or taken leaves of absence.

C. Issuing Discipline.

In any disciplinary notice, the employer should be very specific and identify *all* violations of company policy. The notice should contain a detailed description of the factual findings and the company policies that were violated. The employer should not make "legal" conclusions, such as "Mr. Smith committed sexual harassment" or "Mrs. Smith violated California law." The conclusions should only relate to company policy and not California or federal law. And finally, the employer should prepare an investigation wrap-up memorandum that is objective, does not make legal conclusions, describes the chronology of events, names the interviewees, lists the documents reviewed, and attaches relevant records.

## IV. CONCLUSION.

Should your company find itself in a position where it knows or should know of employee misconduct, it is vital that you investigate the alleged misconduct immediately and conduct a thorough investigation using the general principles listed above. Following these guidelines in the beginning may save your company from protracted and ugly litigation in the future. Conversely, failure to follow these guidelines could bring about costly litigation in the future.

For more information, please contact Michael J. Rossiter, Esq. at Fisher & Phillips, LLP, telephone no. (949) 798-2120.