

## **INVESTIGATING PERSONNEL COMPLAINTS (WHEN, HOW, AND WHAT TO DO WITH THE INFORMATION)**

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Increasingly, employers are faced with circumstances that require investigation of personnel complaints. Examples of such circumstances include complaints of sexual harassment, hostile work environment, theft, use of drugs and alcohol in the work place, and violence in the work place. This paper will discuss policies an employer should have in place prior to conducting an investigation, how to conduct an investigation, and what the employer should do with the information.

Prior to receiving any complaint, an employer should have in place written policies prohibiting illegal conduct such as sexual harassment, hostile work environment, use of drugs and alcohol in the work place, theft, and violence. In fact, the United States Supreme Court, in Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998) and in Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) held that employers have a defense to claims of sexual harassment and hostile work environment if the employer can establish (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The Court noted:

While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any

complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Employers' policies should be in writing, should provide assurances against retaliation for persons making complaints, should require an investigation, and should identify a reliable contact person to whom complaints should be made. In selecting a contact person, the employer should be especially careful to identify persons who will follow through and not "drop the ball." If the contact person is not the CEO, the policy should provide for complaints to the CEO or Chairman of the Board of Directors.

The first step in actually conducting an investigation is to obtain a written statement from the person making the complaint. Typically, such statements are made in the first person tense, even if being recorded by the person to whom the complaint is being made. The statement should first identify the person making the statement by name, address, and a method for contacting the person in the future. The statement should then further identify the person in terms of date of hire, position with the company, and that person's opportunity to observe the subject matter of the statement. Finally, the statement should, on a chronological basis, set forth the basis of the complaint, including the identity of any persons or documents that corroborate the complaint.

Such a statement would read as follows:

Statement of

1. My name is \_\_\_\_\_. I reside at \_\_\_\_\_. My telephone number is \_\_\_\_\_. The name, address and telephone number of someone who will always know how to contact me is as follows:

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2. I was hired by the company on \_\_\_\_\_. My present position is \_\_\_\_\_.

3. (through as many paragraphs as necessary). On \_(date and time)\_ followed by

(chronological, step by step description of circumstances of complaint, identifying persons and documents which can corroborate the statement).

After obtaining the statement, the employer must decide who will conduct the investigation. If the investigation is performed in-house, the investigator should be a member of management who is generally familiar with the laws that apply to the misconduct at issue. The investigator must not be involved in the alleged incident, either directly or indirectly. The chosen investigator should not be an advocate, and should remain neutral and objective in investigating the facts involved. Remember, an investigator may eventually be called to testify before a jury. As a result, the individual chosen as an investigator should be available to testify and should have qualities that will make him or her a credible and effective witness. In the event of litigation, statements and the results of an investigation performed in-house are more likely to be discoverable as an investigation obtained in the ordinary course of business.

In cases of misconduct likely to have future repercussions, such as alleged embezzlement or sexual harassment, an employer may want to consider retaining an independent or outside investigator. Exercising this option will help allay suspicion that the employer's investigation was biased or favored one employee over another. In addition, an employer may also wish to consider conducting the investigation of serious matters under the protection of the attorney-client privilege. By having an attorney involved, eventual disclosure of embarrassing information or poorly written investigative reports may be avoided. Additionally, taking personnel action on advice of counsel may provide some defense to the employer in the event of litigation. Obviously, to the extent the employer asserts a defense based on advice of counsel, the attorney will be a witness and any privilege will be waived with respect to the results of the investigation.

While the investigation is pending, depending on the circumstances, an employer may wish to suspend the accused employee with or without pay. Such a procedure tends to minimize disruption in the work place, and may help to diffuse a potentially volatile situation. If termination or discipline does not result, then the employee should be reinstated with full back pay.

The investigation should include a thorough review of relevant documents, such as performance evaluations and supervisor's notes on any employee misconduct. The investigator should then speak with all persons who have any knowledge of the relevant facts, and take detailed notes. Signed statements should be obtained from the witnesses to preserve their testimony.

After interviewing all witnesses, the investigator should next meet with the accused employee and obtain his or her version of the events. The employee should be given a full opportunity to rebut adverse statements and to deny each allegation of misconduct. A signed statement should be obtained from the accused employee. This statement allows the employer to tie down the accused employee's version of the facts prior to institution of legal proceedings and helps to defend against the situation in which a discharged employee later alters his or her story to suit a particular legal theory.

Once the investigation is complete, the investigator should assess the credibility of all participants and witnesses, and submit a report to management. If the investigator determines that misconduct did occur, then all forms of appropriate discipline should be considered, up to and including counseling or termination. If the investigation is inconclusive (such as results from a "he said, she said" swearing match in which neither side can be independently corroborated), all persons should be advised of proper company policy and warned of the consequences of any

future breach. If the investigation was as the result of a complaint, management should follow up with the complaining witness to insure no retaliation occurs. If the investigation exonerates the accused, the accuser should be so advised. Absent evidence that the accusations were absolutely and clearly unfounded or made maliciously, adverse action against the accuser creates a very real potential for claims of retaliation, see Burlington Northern and Santa Fe Railroad Co. v. White, 126 S.Ct. 2405 (2006) (anti-retaliation provisions of Title VII protect against employer actions that would have been materially adverse to a reasonable employee or applicant, i.e., employer actions that “might well have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination’”).

By use of investigations, employers can minimize the adverse consequences of hasty action, and insure that a decision to terminate or discipline an employee for misconduct will be made on the basis of all relevant facts. In addition, such investigation provides an opportunity for an employer to obtain evidence and statements from witnesses and the problem employee, which information may be more difficult to obtain following termination.