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ELEMENTS OF AN “EFFECTIVE” HARASSMENT INVESTIGATION

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Attorneys who represent employers know how critical it is to investigate allegations of workplace harassment. An investigation allows the employer to determine whether any inappropriate conduct is occurring in the workplace and creates an opportunity to resolve the situation before it escalates. When done correctly, an investigation can be an extremely powerful and effective tool for preventing expensive and time-consuming litigation.

As importantly, an employer who is sued for harassment will find that having conducted an “effective” investigation is invaluable in defending the lawsuit. Under both state and federal law, an employer who does not properly investigate suspected harassment loses the ability to avail itself of a critical affirmative defense and significantly increases its odds of being held vicariously liable for the underlying harassment.

While significant attention has been paid to the importance of conducting an effective investigation, there has been considerably less discussion about what constitutes a legally effective investigation. New Jersey courts have provided virtually no guidance on this issue. Rather, the effectiveness of most investigations is reviewed after-the-fact, when the investigative process comes under attack during litigation. By then, of course, it is too late to remedy any deficiencies.

While the definition of an “effective” investigation varies depending on the particular situation, there are several guiding principles that apply to virtually all investigations. The purpose of this article is to help employers (and their counsel) identify those factors that influence an investigation's effectiveness, with the goal being to help employers maximize the positive impact of their investigations.

Carefully Select Your Investigator.

The first step in every investigation is identifying the right person to investigate the complaint. This selection likely will be influenced by the nature of the complaint, the severity of the conduct at issue and, in some instances, the gender of the complainant. Regardless of these variables, however, all investigators should possess certain non-negotiable characteristics.

First and foremost, the person who serves as investigator must be completely objective . She must be able to impartially evaluate the complaint, the witnesses' credibility, and all other evidence relating to the investigation. Finding an objective investigator can be particularly challenging in smaller organizations, where people tend to know each other well, and where the claim involves high-level managers, since an internal investigator likely will be perceived as motivated by self-interest. These situations often warrant designating an investigator from outside of the organization.

Regardless of where the investigator comes from, she must be well qualified and knowledgeable about the complaint at issue. Where the complaint involves alleged workplace harassment, the investigator should be well-versed in the underlying substantive law and understand the legal underpinnings of a harassment claim. The investigator should be skilled at interview techniques and have solid analytical skills. This ensures a thorough process and a reliable outcome. The investigator's interpersonal skills also should be considered in context with the parties involved. Consider whether the complainant will feel comfortable giving the person a detailed account of her claims, which might require her to disclose embarrassing information. Also evaluate whether the investigator can adequately question the accused about these same sensitive allegations. Finally, ensure that the investigator can coherently communicate her findings. Select someone who has excellent written communication skills and will be able to serve as an effective and credible witness.

Have an Attorney Oversee the Investigation.

Whenever possible, have an experienced employment attorney “manage” the investigation process. Having counsel guide the employer and/or offer direction to the investigator on the complex issues that often arise during an investigation will result in a more cohesive process and a more valuable outcome. Where the investigator is an internal employee, an experienced attorney can offer guidance on the process to ensure that the investigation is being done correctly. The attorney can offer counsel about the scope of the investigation, any issues that arise with the process and the appropriate post-investigation response. With an external investigator, the attorney can provide similar guidance to the employer and can work with the investigator to ensure a fair, thorough and conscientious process. Having separate counsel for the employer also eliminates the possibility that the investigator will be asked to give legal advice about the investigation process.

Act Promptly.

One of the fundamental elements of an effective harassment investigation is “promptness.” While there is no hard and fast rule for determining what constitutes a “prompt” investigation, the process should begin immediately upon notice of the complaint. Where the investigation is done internally, ideally it should be commenced within 24 hours of receiving the complaint (assuming the investigator is immediately available and the complainant is cooperating). When the situation warrants retaining an outside investigator, it is still good practice to commence the investigation within a few days of receiving the complaint. Where that is not possible, notify the complainant that you are in the process of identifying an investigator and that the investigation will begin shortly.

The length of any given investigation will depend on the complexity of the allegations, the number of witnesses involved (and their availability), the level of cooperation the investigator receives, and other extenuating circumstances. Whenever the investigation is delayed by factors beyond the investigator's control (e.g., lack of cooperation by the complainant or other

witnesses, illness, vacation schedules, document availability, etc.), document the reason and always keep the complainant “in the loop” about the status of the investigation.

Take Steps During the Pendency of the Investigation to “Protect” the Complainant.

Regardless of how long it takes to complete the investigation, always take steps to ensure that the complainant is not subjected to harassment while the investigation is pending. Though this is particularly important where allegations of severe misconduct are involved (such as physical touching or abusive language), employers should consider this issue in all situations that include allegations of ongoing harassment. Employers are well advised to ask the complainant if she is comfortable remaining in the environment while the investigation is pending. If not, take steps to separate the parties. Options include placing one or both parties on a paid leave of absence, transferring the accused bad actor (not the complainant) during the pendency of the investigation, or temporarily modifying the reporting structure. Always be mindful that taking action which adversely affects the complainant might result in a retaliation claim.

Gather and Review All Relevant Information.

The goal of any harassment investigation is to determine whether inappropriate conduct has occurred. Thus, the investigator's job is to garner and review all pertinent information that supports and/or refutes the allegations in order to get at the truth. Though the precise investigative process is extremely fact-sensitive, most investigations should include the following information-gathering components: (1) An in-depth interview of the complainant to obtain a thorough accounting of her allegations (e.g., a detailed description of the alleged misconduct, dates of occurrence, potential witnesses, supporting documents, etc.); (2) A thorough interview of the accused, which should include fully detailing the complainant's allegations in order to give him an opportunity to respond and the investigator an opportunity to evaluate his credibility; (3) Interviews of all witnesses who have relevant knowledge regarding the complaint; and (4) Collecting and reviewing any and all documents that relate to the complaint (e.g., a copy of the complaint (if it is in writing), notes prepared by human resources or management personnel, the applicable anti-harassment policy and complaint procedure, prior complaints against the accused, etc.). Though every investigation involves its own set of relevant facts, witnesses and documents, the goal is always the same: to go where the evidence leads you and to leave no “relevant stone” unturned.

Document, Document, Document.

In New Jersey , documents regarding an employer's internal investigation of harassment complaints are subject to discovery where the employer intends to rely on the investigation in subsequent litigation. ¹ Thus, investigators must be prepared to produce copies of any documents that relate to their investigation. This holds true even where the investigation is conducted by an attorney. ² As such, it is critical to carefully and methodically document each and every phase of the investigation.

A typical investigation file should include the following documentation: a copy of the complaint (if written); copies of any written rebuttals from the accused; contemporaneous notes of all witness interviews (original notes should not be discarded, even if they are subsequently typed); all written communications between the investigator and any witnesses, including the complainant and the accused (or their counsel); any documents that support or refute the allegations (e.g., notes, emails, cards, memoranda, credit card bills, telephone records, video or audio tapes, etc.); the investigator's final report and any interim reports; documents regarding notification to the complainant and/or the accused about the investigation results [typically, the employer issues these notifications]; documents regarding any subsequent remedial action taken (e.g., disciplinary notices, termination letters, notices about additional training, etc.) [these documents also typically are issued and/or maintained by the employer]. Where the employer has separate counsel overseeing the investigation, maintain those communications separately and do not share them with the investigator, so as to preserve the attorney-client privilege.

Report the Results to the Complainant.

One of the most common mistakes employers make is failing to communicate the investigation results to the complainant. This is a critical error and one, I suspect, that has resulted in many lawsuits that could have been avoided.

As soon as the employer receives the investigator's findings and decides on a course of action, the appropriate company representative should immediately meet with the complainant. Advise her that the company has conducted a thorough investigation and has taken steps to stop any inappropriate conduct. Where the employer intends to retain the accused, the company must ensure that no one is subjected to any further improper conduct by this person. As such, stress to the complainant how important it is for her to immediately notify the company in the event she learns of any further objectionable conduct, whether directed at her or at someone else. Advise the complainant of her rights against retaliation, remind her of the company's internal anti-retaliation policy and instruct her to immediately report any retaliatory conduct. Whenever possible, memorialize these instructions to the complainant in writing.

Take Appropriate Post-Investigation Steps.

Where the investigation substantiates inappropriate conduct, always take some type of remedial action against the wrongdoer , even if it is issuing a written warning or mandating additional training. The severity of the response obviously should be dictated by the severity of the conduct. However, failing to take any disciplinary action at all against an employee found to have engaged in inappropriate conduct could be construed as implied acceptance of, or deliberate indifference to, workplace harassment.

It also is prudent to use the conclusion of the investigation as an opportunity to reaffirm the employer's commitment to maintaining a harassment-free workplace. This can be accomplished by: re-circulating the employer's anti-harassment policy, ideally with a cover letter from the head

of the organization, which recites the company's commitment to preventing and remedying harassment; conducting additional training on the prevention of workplace harassment and discrimination; and monitoring the workplace to ensure that the complainant (and others) are not being subjected to any additional objectionable conduct.

Of course, not even the “perfect” investigation guarantees that an employer will not be sued. However, adhering to the guidelines discussed in this article will help employers avoid litigation in many instances and will put them in a much stronger position in those instances where litigation is unavoidable.

Endnotes

1. See *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997)
2. See *id.*

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