PRESENTED AT

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WORKPLACE INVESTIGATIONS

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I. INTRODUCTION

When an employee complains about discrimination or harassment, investigation of that complaint allows the employer to identify potential solutions to the concerns raised by the employee, and may also insulate the employer from legal liability. There are defenses available to employers who appropriately investigate and respond to an employee's claim that the employee is being harassed because of the employee's race, religion, national origin, disability, age, sex, or genetic information.

In cases that involve hostile work environment claims based on harassment by non-supervisors, the employee must prove that the employer knew or should have known of the harassment, but failed to take prompt remedial action.1 In cases where a supervisor's conduct is involved, and where the employee's complaint is of a hostile work environment as opposed to quid pro quo harassment,2 then the burden shifts to the employer to prove the Ellerth/Faragher affirmative defense, the first prong of which is that the employer acted reasonably to prevent and promptly correct the harassing behavior, which usually requires the employer prove that once it knew or should have known of the harassment, it investigated and took prompt and appropriate remedial action. This article explores some of the more practical aspects of how to investigate and respond to complaints of workplace harassment. An appendix follows the article, which summarizes cases where employers attempted with varying success to avoid liability based on evidence of the employer action (including workplace investigations) that were undertaken to prevent and correct harassing behavior, as well as cases where issues related to the investigation were litigated, such as the confidentiality and admissibility of investigator reports and notes, and attempts to impose liability on employers for their statements or conduct during an investigation.

II. HOW TO INVESTIGATE HARASSMENT COMPLAINTS

There is no rulebook for conducting harassment investigations. In determining the best steps in any given investigation, there are several variables that should be considered. If there is any guiding principle, it would be to use common sense. If a jury is listening to testimony about the steps taken or not taken during an investigation, it will be easier for an employer to

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[1] That "the employer knew, or should have known, of the harassment and failed to take prompt remedial action" is the fifth of five elements of plaintiff's facie hostile work environment claim when the claim concerns alleged harassment by a non-supervisor.

[2] If the employee alleges that the harassment resulted in a tangible employment action, then it is a quid pro quo case and there is no affirmative defense available to the employer; instead, if the employee can show a nexus between the sexual advances and the employment action, the employer is vicariously liable. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283-84 (5th Cir. 2000). On the other hand, if there is no tangible employment action, but the employee cannot prove that she was subjected to tangible employment action, then the employer is subjected to vicarious liability **unless** it can prove the *Ellerth/Faragher* affirmative defense, which is: (1) the employer exercised reasonable care to prevent and correct promptly any harassment, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Id*. at 284.

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