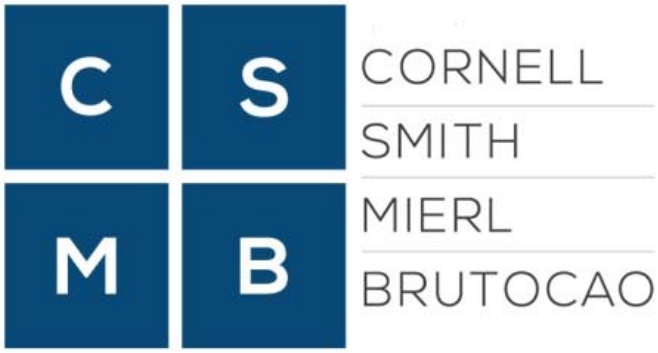
INVESTIGATING SENSITIVE EMPLOYEE COMPLAINTS



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INVESTIGATING SENSITIVE EMPLOYMENT COMPLAINTS
By Connie Cornell

Investigating certain employee complaints is a human resources tool to determine the nature of a problem so that appropriate solutions may be identified. If addressed promptly, the goal is to resolve a concern before it results in formal legal action. When a legal claim is made, in some contexts, the investigation may also serve to insulate the employer from liability. This is best illustrated in the area of hostile environment type harassment based on an employee's protected class status, such as race, religion, national origin, disability, age, sex, or genetic information. In some cases, the employee must prove that once the employer knew or should have known of the harassment, it failed to take prompt remedial action. In cases where a supervisor's conduct is involved, the burden of proof may switch allowing the employer to present an affirmative defense, the first prong of which is that the employer acted reasonably to prevent and promptly correct the harassing behavior. This prong typically requires the employer to 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.

HOW TO CONDUCT INVESTIGATIONS OF HARASSMENT COMPLAINTS

There is no standardized rulebook for conducting harassment investigations. While there are often similarities, each situation has its own set of variables that must be weighed in determining how best to proceed. If there is any guiding principle, it would be not to lose sight of common sense. If a jury is listening to testimony about the steps taken or not taken during an investigation, a practical approach may be easier to explain than an impractical effort to follow a process that simply doesn't fit the situation. Employers may take some comfort in the holding of the Texas Supreme Court that an employer cannot be sued for a negligent harassment investigation. *Texas Farm Bureau Mutual Insurance Companies v. Sears*, 84 S.W.3rd 603 (Tex. 2002). Nevertheless, a poor investigation may result in an inaccurate conclusion and/or unduly influence a jury. While recognizing that there is not a one size fits all process, it can be useful to see an outline of a fairly typical scenario and the challenges that may arise.

While not all harassment complaints are made by females against males, or even against someone of the opposite sex, for simplicity sake, the hypothetical investigation referenced herein will follow the more common fact pattern of a female (the "Complainant") complaining of sexual harassment by a male (the "Accused"). The terms "Complainant" and "Accused" also are used in this paper for simplicity. In the actual investigation, these terms should probably be avoided. Instead, the investigator may refer to them as the "concerned employee" and the "employee who is the subject of the concern."

I. EMERGENCIES AND EMOTIONALLY VOLATILE SITUATIONS

On occasion, there are situations so severe in nature that it requires emergency action. For example, if there has been a physical assault or threat of physical harm, consideration should be given to extraordinary measures, such as police involvement. The company should not send a Complainant back into a work situation where the employee fears for his/her personal safety.

In instances when the Complainant wishes to resign, the company should evaluate the pros and cons of discouraging the resignation. Once the Complainant has left the company's employment, even if she resigns, she may claim that the harassment caused her "constructive discharge." Such a claim would require that she prove that a reasonable person under the same or similar circumstances would have felt compelled to resign. It may be prudent for the company to encourage the Complainant to give the company an opportunity to address the situation before making such a decision. If successful, this may avoid a constructive discharge claim. If not, it may convince a jury that the Complainant was unreasonable in choosing to resign without giving the company a chance to solve her problem, and therefore the Complainant would lose the constructive discharge claim. If a Complainant insists on quitting, prepare a

memo to the Complainant stating the company's regret that they have chosen to resign, and urging them to reconsider their decision and to allow the company an opportunity to investigate and address their concern (See Attachment A).

On the other hand, there may be sufficient evidence that the resignation is unreasonable without any efforts on the company's part to dissuade her, or her resignation may be desirable for unrelated reasons. In such cases, it may be best not to intercede. Regardless, a threatened or actual resignation notice is an opportunity for the company to quickly evaluate, preferably with legal counsel, the pros and cons of attempting to talk her out of it.

If the Complainant appears too emotionally distraught to return to work, the company may consider giving the Complainant a day off, or even a few days off, with pay, until the matter is resolved. However, this approach should first be given very careful consideration. Too often such a generous and understanding response backfires by an increase in the risk of a constructive discharge claim. Once the Complainant is out of the uncomfortable situation, getting her to return to work may prove to be extremely difficult even if steps have been taken to resolve the concern. Instead, it may be less risky to consider a temporary reassignment of the Accused pending the investigation. Any reassignment of the Complainant could risk allegations of retaliation unless the change it is truly the Complainant's preference and this is documented in writing.

II. GETTING STARTED

Although the obligation to investigate is triggered once the employer knew or "should have known," harassment complaints are typically triggered by an employee's complaint. A well drafted harassment policy creates a reporting process that encourages the employee to feel comfortable coming forward. This means designating recipients of such complaints who are not only approachable but who appreciate the critical importance of taking the concern seriously and moving without delay to initiate the investigation.

Regardless of who is involved in receiving these complaints on behalf of the employer, they should be well-trained on their obligations. They must be courteous and respectful to all employees involved, and they should never make light of the situation. An unthinking response like, "Oh, that's just Joe. He's really harmless," is unlikely to provide any comfort and is more likely to be perceived as tolerance for what the complaining employee views as offensive conduct. Even if a claim lacks merit, another employee with a valid claim may hesitate to come forward if he/she believes that the company fails to take such claims seriously, fails to take action, or retaliates against those employees who do complain.

It may be that an investigation will not begin for a few hours or not until the next day. In some instances, it may not be possible to begin for a few days. Any delay may need to be justified since part of the defense is that the employer was prompt in responding to the concern.

III. PREPARE THE ACCUSED

Word spreads fast when it comes to harassment complaints. Before the formal investigation begins, it may be wise for an appropriate designee to touch base with the Accused so that if he simply hears about the complaint through the grapevine, he does not do anything that would undermine the company's policy and compliance efforts. In this dialogue, simply let the Accused know that a concern has been expressed about their conduct and that an investigation will be taking place, but generally it should be left to the investigation interview to describe the specifics of the concern.

If the Accused is a member of a collective bargaining unit, he must be notified that he is entitled to union representation during interviews that may result in disciplinary action against him. This is referred to as his "Weingarten rights" as established by the United States Supreme Court, in the case of *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975). However, the employee must request such union representation before the right becomes operational.

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