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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 and appropriate 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. Under the recent amendments to the Texas Labor Code Sections 21.141 and 21.142, it appears that in certain sexual harassment cases, the plaintiff will bear the burden of proving that once the employer knew or should have known of the wrongful conduct, it failed to take immediate and appropriate corrective 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 defend a practical approach than it will be to defend its rigid adherence to a procedure that clearly did not fit the situation. Employers can take comfort in the fact that the Texas Supreme Court has explicitly held that an employer cannot be sued for a negligent investigation by the employee accused of harassment or misconduct. Texas Farm Bureau Mutual Insurance Companies v. Sears, 84 S.W.3d 603 (Tex. 2002) (holding that an employer does not owe an at- will employee a duty of care when it investigates an allegation of misconduct against the employee).[3] Nevertheless, a poor

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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.

[3] The appendix of cases synopses, which follows this article, includes cases that discuss situations where attempt was made to impose liability on employers for statements made or conduct during investigations.

investigation may result in the employer reaching an inaccurate conclusion, and a sloppy investigation can negatively influence a jury in a harassment case, where the reasonableness of the employer's response is an issue for the jury to decide. Although there is not a perfect formula that can be applied to every situation that requires an investigation, the following outline of how to approach a typical harassment investigation may be useful to highlight the common challenges and difficult choices that arise during many investigations.

While not all harassment complaints are made by females against males, or even against someone of the opposite sex, for simplicity's sake, this article is written in the context of a hypothetical female complainant (the "Complainant") complaining of sexual harassment by a male (the "Accused"). In the actual investigation, the terms "Complainant" and "Accused" 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."

III. EMERGENCIES AND EMOTIONALLY VOLATILE SITUATIONS

Occasionally, a situation arises that is so severe that it requires emergency action. For example, if there has been a physical assault or threat of physical harm, the employer may consider extraordinary measures, such as police involvement. The employer should not send a Complainant back into a work situation where she fears for her personal safety.

If 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 wise for the company to encourage the Complainant to give the company an opportunity to address the situation before making such a decision. If the company succeeds in convincing the Complainant not to resign, the company has sidestepped any constructive discharge claim. Even if the company is unsuccessful in its attempts to prevent the resignation, it may still avoid liability on a constructive discharge claim if the company's efforts persuade a jury that the Complainant was unreasonable in choosing to resign without giving the company a chance to solve her problem. If a Complainant insists on resigning, the company should prepare a memo to the Complainant stating the company's regret that she has chosen to resign, and urging her to reconsider her decision and to allow the company an opportunity to investigate and address her concern (See Attachment A).

In other cases, it may be better for the employer not to intercede and to accept the employee's resignation. For instance, if it is obvious that the resignation is unreasonable, given the allegations, and the employee's resignation may be desirable for unrelated reasons (for instance, the severance of a relationship with an employee who is a poor performer or difficult to work with for reasons unrelated to her complaint). In short, if the Complainant threatens resignation, the company should quickly evaluate, preferably with legal counsel, the pros and cons of attempting to talk her out of it.

If after lodging her complaint, 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, tread carefully. Sometimes, the employer's attempt to be generous and understanding backfires because it increases 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. If the Complainant requests a transfer, that can help to diffuse the situation. However, this option should typically be considered only if the Complainant requests it; an involuntary reassignment of the Complainant could result in the Complainant claiming that the reassignment or transfer was retaliatory. If the Complainant does request a transfer or reassignment, document this request.

IV. GETTING STARTED

Although the obligation to investigate is triggered once the employer knew or "should have known,"

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