WORKPLACE INVESTIGATIONS

LESSONS LEARNED FROM THE REAL DEAL

Corey Tanner – Ogletree, Deakins, Nash, Smoak, & Stewart

Giana Ortiz – The Ortiz Law Firm

Ronn Garcia – The Underwood Law Firm

Workplace Investigations: Lessons Learned From the Real Deal

In theory, workplace investigations assist employers with ensuring that their working environments are fair and safe for all employees. Applying that theory, attorneys and investigators have developed many checklists for conducting timely, thorough and accurate investigations. These checklists generally include the usual topics, ranging from collecting documents, to conducting interviews, reaching conclusions and implementing remedial measures. But not all investigations can be done in cookie cutter fashion, pursuant to checklists. Often, when presented with atypical fact patterns, which is sometimes the case in the real world, employers must be able to quickly adapt their investigations by deviating from rote application of checklists.

Notwithstanding the foregoing, when employers base investigations on certain required fundamentals, they generally are able to adapt their investigations to ensure that they are adequate, thorough and accurate. We review these fundamentals, below.

I. SELECTING THE RIGHT INVESTIGATOR

The importance of selecting the "right" investigator is widely recognized, but recent cases highlight the myriad ways in which investigator selection can impact an employer's ability to successfully defend an adverse employment decision in litigation.

In *Smith v. Chicago Transit Authority*, 806 F.3d 900, 903 (7th Cir. 2015), CTA initially assigned one of the three members of its EEO Unit, which was tasked with investigating sexual harassment complaints brought to its attention, to investigate a complaint. After interviewing the complainant and one other witness, the investigator then interviewed the accused, who she recognized from a prior encounter that the investigator had deemed unwelcome. The investigator completed the interview of the accused, but then turned over the matter to another team member, who completed the investigation and prepared a report concluding that the accused had violated CTA's sexual harassment policy. CTA terminated the accused, who later filed suit claiming that CTA actually terminated him because of his race in violation of Title VII. During the litigation, the plaintiff, i.e., accused, identified a number of purported deficiencies in the investigation, including the failure of the initial investigator to recuse herself immediately rather than after taking his statement. The plaintiff also argued that the EEO Unit failed to interview a witness he identified, and did not sufficiently address certain inconsistencies in the account of one witness. Although both the District Court and the Court of Appeals concluded that these infirmities did not support an inference of race discrimination and that summary judgment was warranted in CTA's favor, the case highlights the importance of considering, both at the outset and as the investigation progresses, whether there are any reasons to assign a different individual to conduct an investigation.

KEY CONSIDERATIONS FOR INVESTIGATOR SELECTION

Is there any basis for the accused to argue that the investigator held an unfavorable opinion against him or her, or that the investigator's relationship with a key witness was likely to influence the investigation?

Are those with responsibility for conducting investigations aware that they can and should seek to have those duties reassigned when the accused has claimed, or may be expected to claim, that the investigator is biased?

Is the investigator sufficiently familiar with the company's policies and procedures to conduct the investigation?

II. AVOIDING RELIANCE ON A BIASED DECISIONMAKER

Ensuring that the individual who recommends action is unbiased is particularly critical in light of the Supreme Court's recognition of the "cat's paw" theory of liability. In *Staub v. Proctor Hospital*, 562 U.S. 411, 420 (2011), the Court stated that "the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's action, entirely justified."

Since that time, courts have wrestled with the circumstances that break the chain of causation. Several courts have found the chain to be broken when the ultimate decision is made by a panel that considers evidence presented at a hearing that the accused attends, cross-examine witnesses and makes arguments.[1] Other courts have concluded that the chain is broken when the decision is based on corroborating tangible evidence.[2] Some courts have held that seeking an accused's version of events is sufficient to remove the inference of bias from another participant's input.[3] Interestingly, even a promptly conducted, post-decision review may be found to be adequate to avoid cat's paw liability if it is thoroughly conducted by independent decisionmakers.[4]

On the other hand, merely conducting a second investigation that is less complete than the initial investigation by the biased investigator is insufficient to break the chain of causation if the ultimate disciplinary action is based in part upon findings by the initial, arguably biased investigator.[5]

---

[1] *See, e.g., Woods v. City of Berwyn*, 803 F.3d 865 (7th Cir. 2015) (stating that "the Board's formal and adversarial procedures and the evidence that that the Board relied on to support its decision to terminate [plaintiff] broke the chain of causation"); *Wood v. Calhoun Country Florida*, 626 Fed. Appx. 954 (11th Cir. 2015) ("any alleged animus by [plaintiff's] supervisor was cleansed by the independent review of the Calhoun County Board of Commissioners").

[2] *See, e.g., Jones v. Southeastern Pennsylvania Transp. Auth.*, No. 12-cv-6582-WY, 2014 WL 3887747, at *12 (E.D. Pa. Aug. 7, 2014) (noting that cat's paw doctrine did not apply because termination decision was based upon forensic handwriting analysis and "email, computer, and building access records"), *aff'd*,796 F.3d 323, 331 (3d Cir. 2015).

[3] *See Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 516-17 (10th Cir. 2015).

[4] *Id.* at 517 (noting that post-termination Review Panel reviewed plaintiff's entire disciplinary history, interviewed the plaintiff and gave him an opportunity to provide his version of events, and noting that the process was "designed to identify and unwind termination decisions that violated company practices and policies").

[5] *See, e.g., Boyd v. State, Dep't of Social and Health Servs.*, 185 Wash. App. 1045 (Wash. Ct. App. 2015) (relying upon *Staub* to conclude that "cat's paw" instruction was properly given in a lawsuit alleging discrimination under state law because "re-investigation . . . relied on facts provided by the biased supervisor," "[a]t the time of [second] investigation, some witnesses could not clearly recall the events and instead relied on the statements collected by and interviews [biased supervisor] conducted' and [second investigator] did not reinvestigate [all of the behavior cited as basis for disciplinary action]").

Title search: Workplace Investigations: Lessons Learned from the Real Deal

First appeared as part of the conference materials for the
32nd Annual School Law Conference session
"Conducting School Investigations That Result in Useable Findings, On Time, and Within Budget"