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WORKPLACE INVESTIGATIONS — BUILDING BLOCKS FOR YOUR LEGAL DEFENSE

By Cindy Lin, CIS Pre-Loss Attorney

Workplace investigations can be time consuming, disruptive, and expensive. Why bother spending time and money on an investigation when the employee only complained of "harassment" to delay the performance-based termination that is likely inevitable? Is there any point of "going through the motions" when the employee has been accused of such serious criminal misconduct that every minute they remain on the payroll is a minute too long? If an employee is "at-will," why is proof that they did something wrong even necessary if you can terminate for any reason?

While at times it can seem like a pointless exercise, the legal case for completing a prompt, thorough and impartial investigation is solid. This article provides an overview of the way most employment law claims are analyzed and explains where your workplace investigation fits into that framework. You will see examples

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of how this plays out in the real world with some recent cases where these investigations have made the difference between dismissal of an employment claim by the courts based on lack of legal merit (aka "summary judgment") and rolling your dice with a jury (read: many thousands of dollars).

1. Your investigation supports lawful reasons for termination and other employment actions.

Employment claims often start with a disputed employment action, be it termination or something less. The employee disagrees with the employment action and alleges it was made for an unlawful reason. Regardless of whether an employee is designated as "at-will" or has some job protection under a policy or collective bargaining agreement, employment actions like termination can only be made for lawful (i.e., non-discriminatory, non-retaliatory) reasons. To dispose of the claim, the employer must prove that the employee is wrong and that its reasons were lawful.

The legal analysis often looks like this:

First, an employee alleges and presents evidence that there was an unlawful motivation for terminating their employment — for example, age discrimination, or because they complained about harassment. The courts acknowledge that this preliminary burden, sometimes called a "prima facie case," is very low. In retaliation cases, for example, the closeness in time between an employee's protected activity and termination alone is sufficient to raise a question regarding the real reason for the employee's termination.

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An employer must respond to the employee's initial case by providing evidence of a legitimate and lawful reason for termination. This is where an employer's investigation becomes critical. A robust and impartial investigation can dispel allegations of unlawful motivations. For example, if an employee's evidence of retaliation is limited to the timing of termination, an investigation could reveal facts to prove the performance concerns or misconduct, or to show concerns about the employee predated the employee's protected activity. If the employee is unable to offer additional evidence that the employer's reason is pretext for an unlawful motive, the case could be dismissed for lack of legal merit, also known as summary judgment.

This is exactly what happened in a 9th Circuit case arising out of Nevada, *Curley v. City of North Las Vegas*, 772 F.3d 629 (9th Cir. 2014). In that case, a long-term employee (Curley) had a history of engaging in protected activities including recently requesting reasonable accommodation for a hearing impairment and then filing a charge with the Equal Employment Opportunity Commission (EEOC) alleging that his accommodation request was wrongfully denied. Curley also had a long history of misconduct, which unfortunately, had not been timely addressed. Shortly after Curley requested accommodation for a hearing impairment, a coworker asked him to remove his hearing protection so they could discuss a work matter. Curley responded angrily, swearing at the coworker. This incident resulted in an investigation into Curley's behavior toward his coworkers. The investigation revealed numerous serious situations where Curley threatened his coworkers and their families, including a bomb threat and a threat to shoot a colleague's children. The investigation also led to the finding that Curley had a personal consulting business, and that he spent many hours of his workday on private calls, often related to his personal consulting business. The City terminated Curley for nonperformance of duties, intimidation of coworkers and conducting personal business on

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work time. Curley claimed that the termination was pretext for disability discrimination and retaliation for filing charges with the EEOC. In reaching its decision, the 9th Circuit noted that the employee lacked evidence to refute the legitimate reasons articulated by the City for his termination. Even though the short time between Curley's EEOC charge and termination was evidence of retaliatory intent, the information revealed by the City's investigation was sufficient to defeat the inference that the EEOC charge caused the termination. The 9th Circuit Court of Appeals affirmed the district court's dismissal of Curley's case at summary judgment.

In a similar case out of the 7th Circuit, an African American employee alleged that her employment was terminated in retaliation for making a complaint of racial harassment, as opposed to the reason stated by her employer — that she abused the airline's travel privileges. *Vesey v. Envoy Air, Inc.*, 999 F.3d 456 (7th Cir. 2021). The employee, Vesey, had complained about racist remarks and actions by a coworker who ended up being terminated after an investigation of her complaint. Vesey alleged that two managers who favored the terminated coworker initiated a campaign of retaliation in several ways, including by pressuring another employee to file an anonymous complaint that Vesey abused the airlines travel benefits. The employer investigated this complaint, sustained multiple instances in which Vesey fraudulently used the airline's travel benefits, and terminated her employment for this reason. The 7th Circuit Court of Appeals agreed with the lower court's dismissal of Vesey's claim that her termination was retaliatory. In reaching this decision, the Court noted that the employer's investigators were independent of the allegedly biased managers, and there was no evidence that the investigation was biased. The findings in this unbiased investigation, including review of electronic systems and the plaintiff's travel history, provided a legitimate reason for termination and conclusively dispelled any causal connection between the plaintiff's racial harassment complaint and her termination.

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In the *Vesey* case, in addition to providing evidence to support the employer's actions, the employer's independent investigation also had the effect of acting as a buffer between the potentially unlawful motivations of certain managers and the termination because the decision-makers relied not on the biased managers, but on the independent investigation. This case illustrates the importance not only of conducting an investigation, but of being thoughtful about ***how*** the investigation is done. The neutral position of the fact finders, and the independent evidence they obtained, was critical to the employer's defense. In short, to have the best shot at maximizing the legal value of an investigation, it is important both to do it, and to do it right.

If you're not yet convinced, or if you think yes, but there are situations where what happened is so obvious this isn't really necessary, proceed with caution. Even if a case seems clear cut to you, it may not be so obvious to the judge, administrative agency or juror that is reviewing your actions. Indeed, there are cases where the lack of an investigation itself has been considered evidence that calls into question the employer's stated reasons for acting. And if the misconduct was so clear cut, why not do the investigation and seal the deal? A dismissal at summary judgment can save an employer from investing countless additional time and financial resources in litigation. Even if you're not so fortunate to have your case dismissed at summary judgment, however, a prompt, thorough and impartial investigation is going to be a key exhibit in litigation, or in response to an administrative charge. It can still make the difference between winning a case and losing, or between settling a claim for a reasonable amount and paying more than you should.

2. The Faragher Ellerth affirmative defense relies on your completed investigation.

Like in the examples above, an investigation is also critical to the defense of hostile work environment, commonly referred to as "harassment," claims.

ADDITIONAL RESOURCES

- The Employer's Guide to Employment Resolutions for 2022
- Kammersations Podcast
- Investigation Checklist
- Sample Investigation Report

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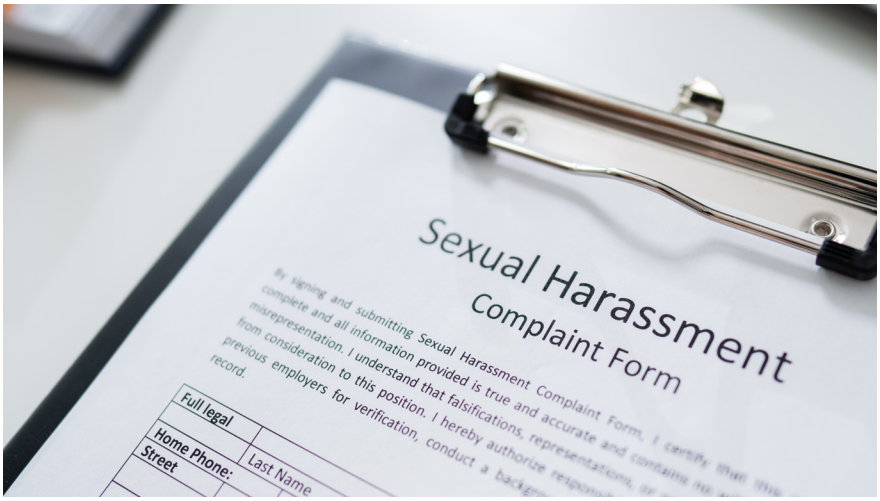

To recap, a hostile work environment claim arises when an employee alleges they were subjected to unwelcome conduct because of their protected status or activity that was so severe or pervasive that they altered the conditions of the employee's employment. While sexual harassment is typically the first type of harassment that comes to mind, employees may allege a hostile work environment based upon any status or activity protected by law (i.e., race, ethnic origin, sexual orientation, gender, age, etc.).

In 1998, the United States Supreme Court clarified the standards for when an employer becomes liable for harassment by a supervisor in two companion cases, *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). When an employer has not taken any tangible employment action against an employee, such as termination, the employer may defend against a hostile work environment claim with an affirmative defense by proving that (a) the employer exercised reasonable care to prevent and promptly correct any discriminatory conduct, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This became known as the *Faragher Ellerth* affirmative defense.

According to the EEOC's Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors,[1] an employer's obligation to exercise reasonable care to prevent and promptly correct discriminatory conduct generally requires an employer to establish, disseminate and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. In other words, the employer must show that it has an effective mechanism in place for preventing and correcting harassment. One important component of this is a complaint process that provides for a prompt, thorough and impartial investigation. These reasonable steps to prevent and correct harassment are echoed by the Oregon Bureau of Labor and Industries (BOLI), which

[1] *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors | U.S. Equal Employment Opportunity Commission (eeoc.gov)*

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directs employers who receive complaints of harassment to "make a prompt, thorough investigation to determine whether harassment has occurred."[2]

[2] *BOLI : Sexual harassment: For Workers : State of Oregon*

One recent case that illustrates the *Faragher Ellerth* affirmative defense in action took place in Illinois. *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624 (7th Cir. 2019). In that case, a female employee (Hunt) claimed that a male supervisor repeatedly asked to see her breasts. Wal-Mart showed that it acted reasonably to prevent and correct promptly the supervisor's alleged behavior; it had a comprehensive policy that explicitly prohibited sexual harassment and included multiple options for reporting such conduct. It conducted a prompt and thorough investigation, interviewing the alleged harasser just eight days after the complaint was raised. The investigation did not sustain the allegations because there were no witnesses to the alleged incidents. Nonetheless, Wal-Mart required the supervisor to retake the company's ethics course, which included anti-harassment training. In combination with the fact that Hunt failed to take advantage of the preventative or corrective opportunities provided by Wal-Mart when she waited months to report the alleged conduct, the Court of Appeals determined that Wal-Mart had established the *Faragher Ellerth* affirmative defense and affirmed the trial court's dismissal of the case.

3. Don't forget all the other reasons to investigate!

Of course, the types of claims and situations above only represent a fraction of the circumstances where a solid investigation will be necessary. They don't address obligations related to whistleblower or workplace safety complaints, or the specific obligations you may have under your policies or labor agreements.

There are also more than legal reasons for completing a prompt, thorough and impartial investigation. In the midst of the "great resignation," there may be no better time than the present to polish your reputation as a thoughtful and fair employer. There might be political or policy reasons for making sure your actions are supported by fully flushed out, independent findings. In some cases, even if there is no law or policy violation, your investigation could unearth valuable information about your workplace that provides a roadmap for improving work conditions or resolving workplace conflicts before they escalate into claims.

Remember — if you ever have questions about whether an investigation is warranted, or about the investigation process, Pre-Loss and H_2R are here to help!

CIS HR Resources

CIS' Pre–Loss and Hire–to–Retire teams can help navigate the investigation process. Please contact us at (503)763–3848 or email *h2r@cisoregon.org*.