

EMPLOYMENT INVESTIGATIONS

Why investigate, you say? In today's litigious society, it is important for employers to learn how to prevent a bad situation from becoming an expensive lawsuit. This article focuses on the obligations of an employer to promptly investigate allegations of misconduct and the importance of a fair and competent investigation.

The failure to properly investigate claims of employee misconduct (harassment, discrimination, theft, etc.) has always been a potentially dangerous area for employers. For example, in California a national law firm was forced to pay six million dollars for sexual harassment based mostly on allegations that the employer had failed to fully investigate reports of harassment. *Weeks vs. Baker & McKenzie*, 63 Cal App 4th 1128 (Cal 1998). Similarly, in *Hart vs. National Mortgage & Land*, 189 Cal App 3d 1420, 1430 (1987), the court held that an employer's failure to investigate and follow up on claims of harassment could constitute "ratification," making the

employer a "joint participant" in the supervisor's misconduct.

In a California case, the court focused more on the process of the investigation than on the results of that investigation. *Cotran vs. Rollins Hudig Hall Internat., Inc.*, 17 Cal. 4th 93 (1998). In this case, the Court held that in claims of wrongful termination, an employer investigating misconduct need not correctly determine that the employee committed the acts alleged. The employer instead must show that at the time the decision to terminate the employment was made (1) that its investigation was done in good faith; (2) that it was "appropriate under the circumstances"; and (3) that the employer had reasonable grounds for believing that the employee had committed misconduct.

The Cotran court did not go into detail as to what constitutes an adequate investigation, leaving that for subsequent cases, but the ruling highlights the importance of a fair and thorough investigation of any claim of employee misconduct. In a later case, a

lower California court used the Cotran standards to review an investigation conducted pursuant to sexual harassment allegations. *Silva v. Lucky Stores, Inc.* 65 Cal App 4th 256; 76 Cal Rptr 2d 382 (1998). The court spoke extensively on the number and type of interviews conducted by the human resources representative for Lucky Stores, how the interviews were recorded, the maintenance of confidentiality, and a host of other details that provide guidance as to what one court considers an adequate employment investigation.

The two recent major United States Supreme Court cases in the area of sexual harassment held that an employer's implementation of a sound policy against sexual harassment can be a defense against liability in some kinds of sexual harassment cases. The Supreme Court held that when complaints of sexual harassment are made, employers must respond promptly, treat them seriously, investigate them thoroughly with trained investigators, and then take appropriate action

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HEALTH INSURANCE PREMIUMS INCREASE

Premiums for Employer provided health insurance have increased an average of 11% in 2001. Last year, the increases averaged 8.3%,

up from 4.8% in 1999. Small Employers (under 200 employees) reported a 12.5% increase compared with a 10.2% increase

for large Employers. Average annual premiums reached \$2,650 for single coverage and \$7,053 for family coverage.

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice.

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designed to end any harassment which is found to have occurred. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257; 141 L.Ed. 2d 633 (1998); and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275; 141 L. Ed. 2d 622 (1998). Also, the decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), an age discrimination case, underscores the importance of investigating and documenting employment decisions before terminating an employee.

The Duty to Investigate

In many situations, the employer may have a legal duty to investigate. Typically, these obligations are premised on the theory of negligence. However, the duty may exist also under state and federal statutes. For example, if an employer receives credible information of a potential danger, he must investigate any employees who pose a potential threat to safety in the workplace.

Some of the legal duties to investigate are in the areas of:

1. Negligent hiring;
2. Negligent retention;
3. Duty to warn intended victims;
4. Duty to provide safe workplace;
5. Duty to warn of concealed hazards;
6. Duty to investigate and remedy harassment, discrimination, etc.

Do Immediate Measures Need to be Taken?

The first and most important consideration by the employer is what are the allegations being made and what, if any, immediate measures need to be taken. The employer is under the legal obligation to stop any type of discrimination, harassment, or risk of injury. There cannot be any retaliation against the complainant. Some of the actions that may be taken are:

1. Removal of the accused from the workplace;
2. Instructions to the persons involved not to communicate and to avoid any harassment or retaliation;
3. The referral of the employee to EAP or other counseling resources (be aware of privacy and disability issues);
4. Monitor the workplace for violations;

5. Providing employees with a clear and confidential procedure for further complaints or concerns;
6. Clear and prompt communication of company policies (including any rights under applicable laws) to employees;
7. Alerting supervisors and department heads to the issue as necessary.



Is the Investigation Necessary?

In most situations, an investigation is required if:

1. The allegations involve work safety;
2. Disciplinary action would be taken if the allegations were true;
3. Allegations involve sexual contact, harassment, or discrimination;
4. There are indications of a hostile work environment;
5. There is a dispute about what happened or the facts are complex.

Legal Considerations

There are a multitude of legal pitfalls for an employer that undertakes an investigation. A few of the more significant potential liabilities are discussed below.

- A) Failure to adequately investigate
- 1) Half-hearted investigation of a sexual

harassment complaint finally initiated after numerous complaints. Key witnesses who did not speak English were interviewed and no interpreter provided. Appellate court upheld award of \$100,000 in punitive damages because of employer's indifferent response to allegations. *Henderson v. Simmons Food, Inc.*, 217 F. 3d 612 (8th Cir. 2000)

- 2) The U.S. Court of Appeals for the 11th Circuit held that a Georgia county manager and a county employee relations director intentionally discriminated against three white water-treatment supervisors when they disciplined the supervisors based upon a report they knew to be filled with factual inaccuracies. The jury held the two officials liable individually for \$50,000 in compensatory damages and \$225,000 in punitive damages to each of the three plaintiffs.
- 3) Allegation that employer engaged in religious discrimination by willfully failing to conduct an adequate investigation of anti-Semitic harassment complaint by Jewish teacher allowed to proceed to trial. *Bernstein v. Oak Park-River Forest High School*, 191 F2d 455 (7th Cir 1999).
- 4) Employer found liable for harassment and constructive discharge based on poorly conducted investigation of supervisor's harassment. *Wal-Mart Stores v. Itz*, 21 S.W. 3d 456 (Te. App. 2000)
- 5) Court affirmed jury award of \$150,000 to employee terminated on basis of an insufficient investigation and recognized, under Montana law, the tort of negligent investigation. *Crenshaw v. Bozeman Deaconess Hospital*, 693 P. 2d 487 (Mont. 1984)
- 6) Sexual harassment investigation aimed more at humiliating accuser than deterring harasser. (She was asked numerous questions of a personal nature, including if she had ever danced nude). *Sarro v. City of Sacramento*, 78 F. Supp. 1057 (E.D. Ca. 1999).

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- 7) In investigating allegation of racial discrimination, other African-Americans in office not interviewed. *Walker v. Thompson*, 214 F. 3d 615 (5th Cir 2000).
 - 8) But, courts have consistently found in favor of employers who promptly investigate complaints they receive, even if there are minor flaws in the investigations. *Casiano v. AT & T*, 213 F. 2d 279 (5th Cir. 2000); *Bierbower v. FHP, Inc.*, 82 Cal. Rptr.2d 393 (1999).
- B) Invasion of Privacy and defamation - care must be taken to confine the scope of the investigation to what is reasonable and necessary to gather the pertinent facts and that the information gathered is kept confidential and shared only with those who have a compelling need to know. The question of whether or when an employee's desk, locker, file, workstation or personal property may be searched is extremely important. Employer searches and retrieval of e-mail, voice mail messages and computer files as part of an employee investigation are lawful where the employer has a written policy that effectively diminishes the employees expectation of privacy. Nonetheless, even if these precautions are taken, potential liability exists, particularly in the area of e-mail and other forms of electronic communications. Do not represent to any employee that their complaints will be confidential.
- C) Right to representation at the investigatory interview.
- 1) *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), granted unionized employees the right to demand the presence of a representative or co-worker at any investigatory interview that might lead to disciplinary action against the employee.
 - 2) In July 2000, the NLRB ruled that *Weingarten* rights also apply to nonunion employees. *Epilepsy Foundation of NE Ohio*, 331 NLRB 92. Whether this decision is reversed by the current administration remains to be seen.

- 3) It should be noted that these decisions do not require the employer to notify the employee of the right to representation, along the lines of a Miranda warning, but rather that if the employee requests that someone accompany him/her to the interview, the employer must allow it.
- D) Outside investigations and the Fair Credit Reporting Act. A 1999 Federal Trade Commission staff opinion letter declared that FCRA notice and disclosure obligations were triggered by the use of paid outside investigators in a sexual harassment investigation. This letter opinion has not yet been enforced and there have been legislative efforts to override the opinion but employers need to be alert to the implications of the FCRA in workplace investigations.

Selecting an Investigator

As the previously mentioned cases illustrate, conducting an effective investigation may be the most significant tool the company has to protect itself against serious employment lawsuits. Therefore, selecting the proper investigator is a very important step. The risks of further claims and eventual liability are reduced. Because these investigations require specialized skills in listening and communication as well as understanding complex human interactions, only well trained persons should be retained. Incomplete, inaccurate, or biased investigations can actually worsen the problem and increase the employer's liability.

Neither employers nor attorneys should conduct the investigation. An attorney acting as an investigator may result in the loss of the attorney-client privilege as to his or her notes or other communications regarding the investigation. Generally, the courts have held that when the employer raises as a defense to a discrimination/harassment complaint that an adequate investigation was conducted (as in *Cotran, supra*), then documents relating to how that investigation was conducted are not privileged. *Peterson v. Wallace Computer Services, Inc.*, 984 F. Supp. 821 (D. Vt. 1997). Thus, when the adequacy of the investigation is placed at issue, then fairness requires that the attorney-client privilege regarding the conduct of the investigation be waived. *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D. N.J. 1996). However, when an

employer does not assert the adequate investigation defense, then the work product of the employment investigation remains privileged. *Robinson v. Time Warner, Inc.*, 187 FRD 144 (SDNY 1999).

More importantly, the attorney who conducts an investigation could be called as a witness, thus jeopardizing the employer's ability to have his/her chosen attorney to represent the company. There is a legitimate role for the attorney in employment investigations. Once the facts have been gathered by an investigator, then the attorney will analyze the information and advise the client on the best way to proceed.

The employer should, therefore, select an unbiased, well-trained individual who not only understands employment law, but also knows how to properly conduct an investigation. The investigator should have a good understanding of what constitutes illegal discrimination and harassment. An "inside" investigator, such as a human resources director or one of his/her assistants, may not be the best choice because of impartiality concerns, especially if the target of the investigation is at or near the top of the organization. An outside investigator may be the best choice.

There are human resource consultants available who have been trained to conduct investigations and are experienced in this area. Having a human resource background enables the investigator to focus on the appropriate issues. The investigator must understand privacy rights (to avoid any claims such as of defamation and/or disclosure of confidential information), the importance of selecting investigative tools, preserving evidence, interviewing witnesses, confronting the wrongdoer, reaching a conclusion, and properly communicating the results. Often, employees will speak more freely to a neutral, third party, trusting that "inside information," divided loyalties, or prejudice will not affect the evaluation of the evidence. Also, if necessary, a human resources consultant can testify in legal proceedings regarding his/her training and qualifications to conduct investigations, and can establish that the employer performed a timely, thorough, and balanced investigation.

The Investigation

A well-trained investigator will outline a plan tailored to the particular circumstances. The

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SHORT FACTS

- *CPI - The Consumer Price Index for All Urban Consumers (CPI-U) was unchanged in August. The U.S. Department of Labor reported that for the 12-month period ending in August, the CPI- U increased 2.7 percent.*
- *Mass Layoffs - The Labor Department's Bureau of Labor Statistics reported that both the total number of mass layoffs and the number of workers affected rose sharply during the second quarter. For the first half of 2001, the number of worker separations totaled 712,488, up 39% from the same period in 2000.*
- *Unemployment -The August national unemployment rate rose to 4.9%, due primarily to another large drop in manufacturing and a decline in transportation and public utilities. The jobless rate had been about 4.5 percent since April; its most recent low was 3.9 percent in October 2000. Most other major industries showed little or no change in employment over the month. Iowa's unemployment rate held steady at 3.1% in August. The jobless rate was reported at 2.6% for the same period one year ago.*

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plan could include reviewing company policies and practices, talking to the victim and the accused, interviewing third party witnesses, interviewing supervisors, and reviewing documents, phone records, pictures, computer files, personnel files, etc.

After having prepared the investigative plan and familiarizing himself/herself with the circumstances, the investigator should prepare questions for the interviews and conduct them individually in a place that affords privacy. The preservation of evidence is extremely important. The interviews should either be tape-recorded or extensive notes taken.

By properly preparing before the investigation, the investigator establishes credibility, knowledge of company policies and objectivity. An investigator must make sure he/she

appears unbiased and strives to find out all the facts, not just those facts desired by whoever has engaged his/her services.

The Report

Upon completing the investigation, the investigator should prepare a report including his/her findings and recommended actions. The report should be distributed pursuant to the company policies and confidentially. It should contain a precise statement of the issues and a roadmap of the investigation.

The report should contain all factual findings, especially in the areas where there are conflicting statements and credibility assessments. Finally, the report should recommend corrective action, as well as follow-up training he/she believes is necessary. Also, it should

clearly set forth the critical management decisions needed.

The report should contain all written statements from employees and any other tangible evidence relied upon by the investigator.

If properly conducted, the investigation process may be as important to the employer as the result of the investigation. Even more importantly, a properly conducted investigation will markedly improve the chances of reaching the appropriate conclusion.

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DISCRIMINATION IN WAKE OF TERRORIST ATTACKS

In the wake of the recent terrorist attacks here, the U.S. Equal Employment Opportunity Commission (EEOC) has called on all employers and employees across the country to promote tolerance and guard against unlawful workplace discrimination based on national origin or religion.

"We should not allow our anger at the terrorists responsible for this week's heinous attacks to be misdirected against innocent individuals because of their religion, ethnicity, or country of origin," EEOC Chair Dominguez said. "In the midst of this tragedy, employers should take time to be alert to instances of harassment or intimidation against Arab-American and Muslim employees."

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment or the workplace, including bias based on the following:

- Religion, ethnicity, birthplace, culture, or linguistic characteristics;
- Marriage or association with persons of a national origin or religious group;
- Membership or association with specific ethnic or religious groups;
- Physical, linguistic or cultural traits closely associated with a national origin group, for example, discrimination because of a person's physical features or traditional Arab style of dress; and
- Perception or belief that a person is a member of a particular national origin group, based on the person's speech, mannerisms, or appearance.

Reacting to attacks on the U.S, some Americans have vented their frustration and anger against persons of Arab, Middle Eastern, and South Asian national origins and Muslim religious backgrounds. Employees are still dealing with these events, and this often involves discussions with fellow workers. It is inevitable that discussions of terrorists will spill over into the production floor, the nearby cubicle, and the break room.

What can you do to prevent these discussions from disrupting employee relations or creating liability for the Employer when employees make negative or discriminatory remarks to or about people of Arab, Middle Eastern, or South Asian descent or of the Muslim religion? How can you prepare for the complaints and requests of these employees, and others who may feel ostracized? The following will assist you in protecting your Employer from potential liability

The EEOC encourages all employers to do the following:

- Reiterate policies against harassment based on religion, ethnicity, and national origin;
- Communicate procedures for addressing workplace discrimination and harassment;
- Urge employees to report any such improper conduct; and
- Provide training and counseling, as appropriate.

Develop, Communicate and Enforce Your Harassment Policy

Employers must update their harassment policy to include all types of illegal harassment including on the basis of race, color, religion, and national origin, in addition to sex. Many companies have not updated their policies to include all forms of unlawful harassment. The EEOC's policy guidelines make clear that illegal harassment applies to national origin claims. If you have not already done so, revise your company's policy to include all protected categories and include a complaint procedure. Periodic reminders of the Employer's strong stand against discrimination and harassment is helpful and necessary to maintain enforcement. At times like this, employees should be reminded of the importance of religious and ethnic tolerance.

A harassment policy that offers a clear complaint procedure is necessary for defending any claim of harassment, including a claim based on hostile work environment, which is the type of claim likely to arise in the current climate. The Supreme Court has made it clear that for an Employer to defend itself against claims of harassment, an Employer must demonstrate that it took steps to prevent and correct harassment and that the employee claiming harassment failed to take advantage of the Employer's written harassment policy. The Employer's harassment policy should include a written complaint procedure that is properly communicated to employees, properly investigated, and properly enforced by trained supervisors.

Encourage employees to bring complaints and concerns to the attention of management. In these emotional times, employees may be highly sensitive to remarks of coworkers and unduly prone to fear. They may be afraid to deal directly with coworkers and tell them that such remarks are unwelcome.

Clearly communicate the complaint procedure for all employees. An Employer's policy should provide at least one other avenue for complaints in addition to the employee's supervisor. If a complaint is made to any supervisor or manager, the Employer is considered on notice

and obligated to respond. The policy should let employees know that when a complaint is made it will be promptly investigated in accordance with the Employer's policy and appropriate action taken.

Be Prepared for Harassment Complaints

Complaints of religious discrimination in general, and of discrimination claims by Muslims in particular, have increased sharply in recent years. The Council on American Islamic Relations (CAIR) reports that complaints reported to CAIR rose 15 percent in 2001, even before September 11.

Train supervisors. You must conduct supervisor training on the proper way to handle harassment complaints. All the effort involved in creating and disseminating an unlawful discrimination and harassment policy is lost when a supervisor ignores or fails to recognize a complaint. Supervisors may not be aware of the breadth of matters that implicate national origin, ethnicity, culture, or religious beliefs that may be brought up in the context of the terrorism threat. It may be necessary to acquaint supervisors with the culture and beliefs of minority groups that may be targeted by employees.

Investigate. Since immediate response to harassment claims is very important, the availability of trained unbiased investigators is required. (See page one of this newsletter regarding employment investigations). Supervisors are not always the best investigators, so many companies use outside investigators to avoid bias or any claim of bias. It is necessary that the investigator be trained to investigate harassment and discrimination. Even a trained investigator may need additional tips on handling investigations regarding Arab or Muslim employees in this sensitive and volatile atmosphere. Requests by those of the Muslim faith seeking accommodation of their prayer needs in the workplace have greatly increased over the past few years. Muslim claims for religious accommodation include requests for prayer times, Friday services, deviations from the dress code, and facilities for prayer in the workplace. Religious beliefs and observances must be accommodated, unless the accommodation presents an undue hardship to the employer.

Working with an employee requesting an accommodation requires a careful

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Military Leave/Employer's Obligation

As a result of the September 11, 2001, tragedy and our government's resolve to bring to justice those responsible, many employees in the armed services will be called to duty.

As an employer you are covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA). Highlights of the act are as follows:

- a. USERRA prohibits an employer from discriminating against individuals who are members of, apply to be members of, perform, apply to perform, or have service obligations in a uniformed service.
- b. An individual is covered if he/she is absent from work because of "service in the uniformed services". "Uniformed Services" has been broadly defined to include the Army, Navy, Air Force, Marines, Coast Guard, Army National Guard and Air National Guard when engaged in active duty for training, inactive duty training or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President of the United States as such in time of war or national emergency. Please remember that coverage exists whether the employee volunteers or is ordered to duty.
- c. The employer is not required to pay the employee during absence due to military service however, an employer at their discretion may compensate an employee at any rate if they so desire. However, the employer is obligated to provide the same benefits it provides employees who take other types of unpaid leave. If an employee's period of leave does not exceed thirty-one days, the employee cannot be required to contribute more than the employee's normal share of any premium. 38 U.S.C. § 4317(a)(2). If military service exceeds thirty-one days, the employee may be required to contribute up to one hundred two percent of the full

premium under the health plan; the extra two percent can be added to cover an employer's administrative costs. In the case of multi-employer plans, the plan may allocate the responsibility to pay for this coverage. However, if the plan does not make this allocation, the last employer assumes the liability. 38 U.S.C. §(a)(3)(B). If the last employer is not functional, the plan retains the liability. If an employee's coverage under a health plan was terminated because the employee was on military leave and not working, USERRA mandates that a waiting period or exclusion period cannot be imposed upon reinstatement if health coverage would have been provided had that individual not been absent for military leave. 38 U.S.C. § 4137(b)(1).

- d. The employee is required to provide notice (oral or written) of their service obligations in order to be entitled to reemployment rights under USERRA. The notice requirement can be waived if it is unreasonable or impossible under the circumstances. Notice can consist of a copy of military orders, training notices or induction information. We at HR-OneSource recommend that you use understanding and flexibility under the present circumstances.
- e. After an employee completes his service, he/she is entitled to reinstatement. The law differentiates between those employees who served less than ninety one (91) days and those who serve more than ninety one (91) days. Specifically, For employees who served less than ninety one days in the military, they must be reemployed in the position that he or she would have attained if they had been continuously employed, so long as the individual is qualified for the job or can become qualified after reasonable efforts. If the individual is not qualified

for that position, the individual must be reemployed in the position he or she left prior to military service or in a position that is the nearest approximation of that position. An employer may not offer "other jobs" of equivalent status.

The employer's reemployment obligations for employees who served ninety one days or more days in the military requires that "they be reemployed in a position that they would have attained if continuously employed, so long as they are qualified or can become qualified for the job. If an individual cannot become qualified, the employer is obligated to reemploy that employee in his or her former position, or in a position of equivalent seniority, status, and pay. Those individuals who served more than ninety one days who cannot qualify for the position they would have attained, their former positions, or a position of equivalent seniority, status and pay must be placed in a position of "like status" for which they are qualified."

- f. Employers must also provide the option of COBRA-like health plan coverage to the employee and all eligible dependents. 38 U.S.C. § 4316(b)(1)(B). For example, if an employer provides employees on other types of unpaid leave with continued health insurance, life insurance, disability insurance, or other benefits, then these same benefits must be provided to employees on military leave. The same analysis applies to paid vacation. If employees on other types of leave continue to accrue vacation, then employees on military leave must continue to accrue vacation. At a minimum, an employee returning from military leave is entitled to any vacation accrued at the time the leave began and the employee is entitled to begin accruing vacation at the rate the employee would have attained if the employee had not taken military leave. Employees returning from military leave are entitled to "the seniority and other rights and benefits determined by seniority" that they would have attained with reasonable certainty had they not gone on leave. 38 U.S.C. § 4316(a).

Since September 11, 2001, our country has been going through substantial pain, suffering, anger and grieving. Also, the economy has gone through great turbulence and fear of a recession. Regardless, the law imposes strict obligations protecting individuals in the armed services, which must be adhered to. Now would not be the time to present obstacles to these employees who are called to military duty.

A more complete analysis of military leave requirements will follow in a future newsletter. In the meantime, if you have any questions or concerns, the staff at HR-OneSource is available.

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Responding to Religious Accommodation Claims

step-by-step process, and employees often do not understand that the employer does not automatically have to meet their demands. The employer needs to have a set policy and procedure to follow, such as forms for employees to put in writing the requested accommodation(s), to acknowledge that they received a response to their request, to document accommodation(s) provided or offered, and to document the undue hardship created by those not provided, if any.

Summary

Employers can protect themselves from discrimination lawsuits by having a clear policy against both religious and national origin discrimination, properly explaining and communicating the policy to employees, conducting special training classes for supervisors, conducting prompt and thorough investigations of all complaints and swift remedial action when a problem is detected.

HR-OneSource is available to answer questions or assist Employers in developing policies, check lists, forms or to provide training for both supervisory and non-supervisory employees. (515)-221-1718