FUNDAMENTALS OF CONDUCTING INTERNAL INVESTIGATIONS 2008

D. Jan Duffy
Management Practices Group
355 Bryant St., #207
San Francisco, CA. 94107
Tel: 415 268 0130
Fax: 415 268 0133

20 Old Chesterton Building
110 Battersea Park Road
Tel: 44 (0) 777 367 5251
Fax: 44 (0) 207 498 9876

janduffy@managementpractices.com
www.managementpractices.com

THE EVER-GROWING IMPORTANCE OF INVESTIGATIONS

Internal investigations or fact-finding have always been a feature of good employer decision-making and complaint resolution. Such inquiries have taken on much greater importance in the last decade, however. This is in part because many new laws now directly or indirectly mandate internal investigations in order to avoid liability. These include, for example, Sarbanes-Oxley, new anti-retaliation and whistle-blower protection statutes, and the 2004 Amendments to the Federal Sentencing Commission Guidelines, which is an evaluative framework that applies to a wide variety of statutes such as the Foreign Corrupt Practices Act, securities, antitrust and other laws. Even where they are not legally mandated, effective internal investigations have also become more important as public expectations, the significance of the business interests involved and the reputational and other costs of failing to conduct fair and effective investigations have risen.

Equal employment opportunity matters, specifically sexual harassment complaints, were among the first of the areas in which effective internal investigations became virtually mandatory. The US Supreme Court decisions in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); and Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) were largely responsible. The first two opinions articulate a defense to liability in certain cases if the employer takes appropriate preventive and corrective action, and the plaintiff unreasonably fails to avail him/herself of remedial opportunities. Kolstad made it clear that judges and juries could and should evaluate the effectiveness of the employer's asserted prevention and correction efforts in determining whether or not to award punitive damages.

Since Kolstad, most of the federal Circuit Courts of Appeal have offered one or more close examinations of specific workplace investigations and their impact upon the availability of the Faragher/Ellerth defense and/or punitive damages under Kolstad. Many federal district and state courts have weighed in on the issue as well. None has provided a particularly comprehensive guide to how to conduct workplace investigations

in general, however. Rather, each court has offered specific opinion about what worked or didn't work in the case before it, leaving litigants and their lawyers to glean and organize usable tidbits. Among the decisions are:

- Hatley v. Hilton Hotels Corp. et al, 308 F.3d 473 (5th Cir. 2002). Although the defendants presented evidence that the investigator had interviewed numerous witnesses in the process of conducting the investigation, and the investigator testified that she had done "everything she could" to investigate the complaints, plaintiffs submitted evidence that contradicted that view. The appeals court held that such evidence as that of prior complaints that had "fallen through the cracks" and the defendants' failure to separate the plaintiffs from the harassers after the complaints, supported the jury's finding that the investigation was inadequate and the defendants did not take reasonable measures to correct or prevent the harassment.

- Ogden v. WaxWorks, Inc., 214 F. 3rd 999 (8th Cir. 2000). The employer's sexual harassment policy provided that: "All such complaints will be held in confidence and will be investigated thoroughly. Appropriate action will be taken." In fact, the court held, the Faragher/Ellerth defense was reasonably rejected by the jury because there "was substantial evidence that Wax Works neither conducted the 'thorough investigation' nor took the 'appropriate action' promised by its sexual harassment policy, belying its claim to have exercised 'reasonable care to prevent and correct promptly …sexually harassing behavior'".

- Smith v. First Union National Bank, 202 F.3d 234 (4th Cir. 2000). Plaintiff Smith, while working in the collections department of First Union National Bank, became the subject of verbal harassment and threats based on her gender from her supervisor Scoggins. After about six months, plaintiff made her first formal complaint to First Union's human resources representative. She did not complain earlier because she feared retaliation and because defendant's policy prohibited only sexual conduct harassment, not gender based harassment. The court found First Union's investigation flawed for a number of reasons. First, the investigation focused only on Scoggin's management style and did not ever address the sexual harassment allegations. Furthermore, First Union never reprimanded Scoggins for the harassment; rather, he was put on probation for 90 days and was allowed to remain in his position.

- Hill v. American Gen. Fin., Inc., 218 F.3d 639 (7th Cir. 2000). Two days after the plaintiff wrote a letter to AGF's director of operations detailing allegations of sexual harassment by her supervisor, AGF's human resources attorney and outside counsel began to investigate. They conducted a follow-up investigation about 10 days later. AGF decided to issue a written warning to the accused harasser, provide him with additional training, and transfer and demote him. The court found AGF's response to be reasonable under the first prong of the affirmative defense, and affirmed summary judgment in its favor.

- Hurley v. Atlantic City Police Dept. 174 F.3d 95 (3d Cir. 1999). The court held that the defendant could not assert the affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.

- Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1238-43 (10th Cir. 1999). When the plaintiff reported sexual graffiti about her in the men's restroom, she was told "it would be taken care of." However, nothing was done and more graffiti appeared. Later, the alleged harassers were interviewed but the employer concluded that no sexual harassment had occurred. Despite this, the employer conducted two 45-minute sexual harassment training sessions where the employer reminded employees that sexual harassment would not be tolerated, and such conduct would be punished appropriately, including termination of the harassers. On appeal, the court upheld the jury's verdict, stating that the jury "could have concluded that the small amount of training given [to] the employees was inadequate in light of the severity of the problem. The jury also could have reasonably found that the investigation conducted by the defendant was a sham, given the investigators concluding that no harassment had taken place and the defendant's refusal to discipline its employees."

See also:

- Flockhart v. Iowa Beef Processors, 192 F. Supp. 2d 947 (N. D. Iowa, 2001) Ms. Flockhart argued that she was constructively discharged because she was the victim of pervasive and on-going sexual harassment. The employer mounted a Faragher/Ellerth defense, but the court ruled that the defense failed because the employer was unable to produce any documentation concerning the numerous complaints made by Ms. Flockhart. The court stated: "This is either a gross violation of IBP's own policy (to 'document, document, document'), or worse, a deliberate attempt to hide the facts of the [harasser's] and other investigations which would support Ms. Flockhart's allegations."

- Silver v. General Motors Co., 2000 U.S.App. LEXIS 17752 (4th Cir. July 24, 2000). Plaintiff Silver sued her employer, GM, alleging sexual harassment by her supervisor, Rawlins, over a period of about 1½ years. After plaintiff complained, GM began its investigation, and suspended Rawlins the next day pending the outcome of the investigation. About one week later, GM discharged Rawlins as a result of the investigation. Applying the Faragher/ Ellerth affirmative defense, the Fourth Circuit found it relevant that supervisor Rawlins had attended anti-harassment training at GM. The court affirmed summary judgment, finding that GM established the affirmative defense.

- Edwards v. Connecticut Dept. of Transp., 18 F.Supp. 2d 168 (D. Conn. 1998). Plaintiff alleged racial and sexual harassment by co-workers after incidents of derogatory comments and vandalism of her car and locker. She told supervisors and then contacted Defendant's affirmative action office at least three times. She

declined an offer to be transferred to a different facility because she feared retaliation by her co-workers since there was communication between the facilities. Finally, after her locker was vandalized again, plaintiff quit. The Affirmative Action office investigated and issued a letter *four months* after plaintiff quit that there was at least some evidence to substantiate plaintiff's allegations. However, the harasser received only "written counseling" in the form of a letter informing him that he had violated the defendant's policy and if it continued, he would be subject to disciplinary actions. The Affirmative Action office also sent a memo to all of plaintiff's former co-workers regarding the employer's discrimination policy. Under these facts, the district court denied the employer's motion for summary judgment, holding that there was an issue of material fact as to whether defendant's offer of transfer and the subsequent investigation were sufficiently prompt and effective.

The California courts began considering the issue of the quality of workplace investigations even earlier than the Faragher, Ellerth, and Kolstad decisions because of California's statutory Fair Employment and Housing Act requirement that employers take "all reasonable steps" to prevent and correct harassment in the workplace. Under that rubric, California courts have gone a bit further in defining the qualities of an acceptable workplace investigation. The cases include:

- Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995). The Ninth Circuit criticized the City of Oakland Police Department's handling of a sexual harassment complaint. The investigation was unacceptable, the court said, because investigators failed 1) to interview the accused promptly; 2) to corroborate the truth or falsehood of the accused's version of the facts although it would have been easy to do so; 3) to interview an important witness for the complainant; and 4) to give sufficient weight to evidence in her favor. This case has been widely cited by other courts. *See, e.g.,* Jackson v. Quanex Corp., 191 F.3d 647, 654-55 (6th Cir. 1999) (citing Fuller with approval and finding a "pattern of unresponsiveness" by the employer when, upon being notified of racially offensive behavior in the workplace, the employer's only response was the posting of a bulletin, and where management apparently failed to discipline any employees, either by written warning or discharge, for using racial slurs against other employees).

- Cotran v. Rollins Hudig Hall International, Inc. et al, 69 Cal. Rptr. 2d 900, (1997). Plaintiff Ralph Cotran, senior vice president of Rollins Hudig Hall, an insurance brokerage firm, was accused of sexual harassment by two female subordinates. After an extensive investigation, the company terminated Cotran, and he sued for wrongful termination in violation of an implied for cause contract. At trial, the jury was allowed to consider whether or not Cotran had in fact committed sexual harassment. Concluding that he had not, the jury awarded him $1.7 million for wrongful discharge. On appeal, the Second District Court of Appeal reversed, holding that the trial judge erred in allowing the jury to consider, after the fact, whether harassment had occurred. The court indicated that the

jury's proper role was to determine whether, at the time it fired Cotran, the company had a reasonable belief, based upon an appropriate investigation, that Cotran had committed harassment.

The California Supreme Court affirmed, making it clear that the appropriate question for the jury is not whether the terminated employee did or did not commit harassment. Rather, it is whether the employer's decision to terminate was reasonable. That, the Court said, depends upon whether the employer conducted a reasonable (not just good faith) investigation. Although the Court expressly declined to dictate the specific and finite elements of a "reasonable" investigation, both the majority and concurring opinions considered at some length the importance and nature of an effective and appropriate workplace investigation. These included, among other things, certain aspects of due process for the accused such as the right to know the charge and the right of both parties to respond to negative assertions or evidence. At the same time, the Court indicated that a thorough and reasonable investigation would not require the same level of protections that would be offered at a hearing or trial. It also invited lower courts to explain and expand upon the notion of what, exactly, constitutes a reasonable investigation.

- Silva v. Lucky Stores, 65 Cal. App. 4th 256 (1998). Here, citing Cotran, the Fifth Appellate District Court provided an in-depth analysis of Lucky's investigation of a sexual harassment complaint, and concluded that it met the standards set by Cotran. According to the court: in addition to having a written investigation policy, Lucky designated a "neutral" and uninvolved human resources representative, Szczesny, who had been trained by in-house counsel on how to conduct an investigation into employee complaints of sexual harassment.

  It was apparently Szczesny's practice to interview in a timely fashion the employee making the allegation, the employee against whom the allegation was made, and any employees who might have witnessed the conduct. Over the course of one month, Szczesny interviewed 15 Lucky store employees. After the initial interviews, Szczesny reinterviewed several employees to clarify certain issues. Szczesny asked relevant, open-ended, nonleading questions. He attempted to elicit facts as opposed to opinions or supposition. He maintained confidentiality by conducting a number of interviews off the store premises or by telephone. He encouraged those he interviewed to page him if they wanted to talk with him again. He memorialized his findings on a witness interview form and/or obtained a written statement from each pursuant to his usual practice.

  Furthermore, Szczesny promptly notified the accused, Silva, of the charges and gave him an opportunity to present his version of the incidents. He encouraged Silva to call him if he wanted to talk with him again. Szczesny also provided key witnesses with an opportunity to clarify, correct, or challenge information provided by other witnesses which was contrary to their statements or which cast doubt on their credibility. After interviewing all of the witnesses, Szczesny gave

Silva a final opportunity to comment on the information that he had gathered during the course of the investigation.

The court concluded that in light of all of the above measures, Lucky's investigation of the sexual harassment allegations met Cotran's fairness requirements.

- Bierbower v. FHP, Inc., 70 Cal. App. 4th 1 (1999). The court commended the employer's policy of requiring all sexual harassment complaints to be forwarded for "appropriate investigation." It noted that such a policy eliminates the risk of allowing even a single complaint "to fall through the cracks by giving the supervisorial employee discretion to pocket veto any complaint if he or she concluded it was unfounded. Such a policy further promotes neutrality in the investigation…. Whether [the employer] here should get an "A" for its rigid requirement that all complaints be passed on to personnel (which should assure neutrality), or merely a "B-" because the same policy allows possibly meritless complaints to make their way higher up the corporate hierarchy than might otherwise be the case, is a matter on which reasonable minds can disagree. Both approaches, however, obviously pass the course."

Although the holdings of these cases are primarily limited to their specific facts, taken together, the decisions, the related EEOC Guidelines on Vicarious Liability for Supervisors issued in 1999, and subsequent lower court decisions from all over the United States now make it clear that in harassment as well as other discrimination-related matters, employers must take effective and consistent action to investigate promptly and effectively or face serious consequences.

The closer scrutiny and higher standards required by such precedents in the harassment and discrimination areas have also spread to employer investigations of other matters including retaliation, whistle blowing, wrongful termination, and situations that may give rise to possible defamation or other tort claims. In the wake of the Enron and WorldCom scandals, the Sarbanes-Oxley Act, for example, directed the Federal Sentencing Commission to revise its Guidelines concerning sentencing of organizations. The new guidelines, which are found in Chapter 8, require organizations to establish effective complaint mechanisms with respect to fraud and other misconduct and to follow up complaints with appropriate fact-finding and remedial action. Many recent public policy wrongful termination jury verdicts also turn on the employer's failure to conduct prompt, thorough, and accurate fact-finding prior to making the termination decision at issue. Retaliation cases, too, are increasingly bolstered by facts proving the employer's failure to engage in objective investigation prior to taking adverse action against a complainant or whistle-blower, or even for failing to investigate a complainant's allegations of retaliation itself.

Higher Jury Expectations

Another reason for the greater importance of workplace investigations is that jurors and the public are increasingly expecting higher performance levels from investigators and

from those who handle employment complaints. This is perhaps because of television lawyer and forensic shows or high profile trials where the investigations and forensic analysis depicted there have convinced juries that haphazard investigations are neither usual nor acceptable. As a result, for example, it is now clear that an employer's failure to interview all of the obvious potential witnesses or to utilize obviously fair and effective methods will not sit well with TV-watching-jurors-turned-experts-in-how-to-conduct-investigations-and-evaluate-evidence. Employers who fail to investigate matters that end up before a jury, or who investigate half-heartedly or haphazardly do so at their peril. Recent cases that have turned on the employer's failure to investigate effectively have resulted in jury awards as high as $5.5 million.

Increased Use of Expert Witnesses

An additional reason for the higher standard now expected of workplace investigations is that plaintiffs' attorneys and, increasingly, defense attorneys as well, are routinely hiring "management practices experts" in litigation to evaluate the appropriateness of employers' policies and procedures and their conformity to usual and reasonable business practice as well as the significance of any deviations from such practice. Such experts provide juries with information and, in the best cases, insight, into what a reasonable employer can and does do in similar circumstances and therefore what the defendant employer should have done in the circumstances before it. Primary among the regular uses of such experts is to have them opine about the nature and quality of an employers' investigation and evaluation of a particular complaint.

These experts are, of course, particularly useful for plaintiffs, who must counter the defendant's parade of managers and human resources officials who otherwise insist that they "did everything they could" to investigate. On the other hand, defendants who actually have conducted reasonable and effective investigations are now finding that neutral experts can often explain more credibly than insiders, who are viewed as having too much at stake, that the defendant has, indeed, accomplished the best investigation possible under the specific circumstances. Those experts who are investigators and can speak from actual experience as well as theory about what it takes to effectively investigate, evaluate, and appropriately handle a workplace complaint as well as the current employer's conformity to usual and reasonable management practices are particularly in demand.

KEY CONCEPTS IN LEGAL AND EFFECTIVE INVESTIGATIONS

The result of all of these developments is that responsible employers are investing substantial resources in developing the capabilities necessary to conduct effective investigations. This includes reviewing the employer's entire approach to investigations, including resources devoted to the effort; evaluating and if necessary restructuring policies and procedures related to investigations; establishing programs for maintaining effective enforcement of policies, and educating managers and employees about their responsibilities under the employer's complaint and investigation policies and procedures. Particularly in view of Sarbanes Oxley and similar legislation, many larger organizations are creating in-house investigation teams as well as establishing hotlines

and other procedures for making anonymous complaints. Many employers are also developing a network or database of outside investigators to handle complaints that cannot be effectively handled in-house.

A complete description of all of the issues to consider in arriving at an effective workplace investigation program would be beyond the scope of this paper. However, following are some of the most important considerations and concepts in designing investigative policies, procedures, and processes.

Hallmarks of Reasonable Investigations

Review of investigations-related legal decisions and investigators' experiences, as well as common sense, suggests that judges and juries expect workplace investigations and internal handling of complaints to evidence the following:

a. <u>Planning and organization</u>

The need for investigation often arises suddenly, but a panicky, ill-considered response creates more problems than it resolves. Thoughtful, proactive planning will reduce mistakes, ensure conformity to other important investigatory standards, and help persuade judges and juries that the employer made a sincere effort to identify and fairly resolve an actual problem. Pre-investigation planning should include:

(1) Assessment of the actual purpose and objectives of the investigation.
(2) Review of relevant law and employer policies and procedures.
(3) Identification of the specific factual and legal questions to be resolved.
(4) Careful selection of an appropriate investigator or investigation team.
(5) Preliminary identification of relevant witnesses and information sources.
(6) Establishment of a preliminary logical order and timeline for interviews.
(7) Preparation of a tentative list of questions and matters to cover in interviews.
(8) Documentation of this organizational effort in the form of a " Preliminary Investigation Plan."

b. <u>Commitment</u>

Reasonable investigations also require demonstration of serious commitment to resolving the problem and doing so in a fair and appropriate way. Accordingly, employers must be willing and prepared to devote sufficient attention, skill and resources to these investigations. Ignoring a complaint or telling a complainant to "just learn to live with it" is, of course, disastrous when it comes to after-the-fact scrutiny. Similarly dangerous, however, is a half-hearted or slapdash effort or one designed to make a mere show of compliance. Juries are particularly good at sniffing out evasion and may be even harder on an employer that they believe to be dishonest. Appropriate "commitment" includes:

(1) Giving investigations immediate attention and high priority;
(2) Carefully selecting investigators (in terms of their skill, knowledge, impartiality, and personal qualities);

(3) Identifying skilled, outside investigators and/or thoroughly educating in-house investigators in investigations-related skills and relevant laws;
(4) Preparing a sufficient number of investigators so that the inquiry is not dependant upon the availability of a single individual;
(5) Preparing investigators at all levels of the hierarchy so that the investigator is not of a markedly lower level of authority than (ordinarily) the accused;
(6) Allowing investigators sufficient authority, time and access to achieve a reasonable conclusion;
(7) Taking action in conformance with the findings and conclusions.

c. Promptness

The U.S. Supreme Court, in Meritor Savings Bank, F.B. v. Vinson, 497 U.S. 57, 106 S.Ct. 2399 (1986), directed employers to take "prompt" and effective action to remedy sexual harassment in the event of a complaint. More important, perhaps, juries seem almost instinctively to demand promptness not only in initiating but also in concluding an investigation. See, for e.g., Baker v. City of Oceanside, supra, where more than a year's delay in finishing the inquiry resulted in a $1.2 million award.

How "prompt" is "prompt" depends upon many circumstances, but most important is probably the situation of the parties. If the accused is supervising the accuser and/or the accuser is experiencing significant distress, "prompt" means "immediate." Even in a situation that does not necessitate extraordinary speed, employers must proceed more expeditiously than with other matters: juries are not impressed with employers' arguments such as "a key manager was out of town" or "I left a message but he didn't get back to me."

d. Thoroughness

Jurors are also especially quick to notice - and disapprove - when an employer fails to perform a thorough inquiry. An employer's omitting an important witness or neglecting to pursue an important contradiction, however inadvertent, looks to a suspicious jury like evasion or cover up.

Creating a preliminary investigation plan will help reduce mistakes but it is also important to check and recheck during the course of an investigation for gaps in needed information, for avenues which remain to be pursued and concluded, or other oversights. It may also be useful to "brainstorm" with another or others (only those who have a "need to know," of course) to get additional perspective during the course of the inquiry. Certainly, a careful review of the entire investigation must be undertaken - and oversights corrected - before any final conclusions are drawn. Investigators must remain painstaking but flexible until the real end of the inquiry.

e. Fairness

Fairness, and more precisely, the appearance of fairness, is to jurors the single most important requirement for workplace investigations. While "fairness" is a relative term, jurors are surprisingly capable of detecting its absence and united in their antipathy toward an employer whose investigation deviates from their standard.

Fairness must apply to all phases and details of an investigation. An employer who promptly and properly initiates a needed investigation can still fail in the jurors' eyes if, for example, it unfairly neglects to follow up with appropriate discipline and/or protection for the accuser or witnesses. Lawsuits filed by alleged harassers or targets of an investigation who have been treated unfairly, for example, disciplined more harshly than similarly situated individuals, defamed or otherwise unnecessarily humiliated, are also on the rise.

Jury consultants are unanimous: in this era of downsizing, mergers, outsourcing, and increasing gaps between haves and have nots, jurors are angry and eager to ameliorate their increasing sense of powerlessness in their own or their families' employment situations. If they believe that an employer has behaved "unfairly" regarding any but the least significant details of workplace complaint handling, they will lash out to the best of their ability. Employers must bear in mind that the standard of requisite "fairness" to each of the employees involved in a workplace investigation and/or complaint handling is set extremely high. Employers must check and recheck each of their actions in this context against that very high standard.

f. Accuracy and precision

To withstand later scrutiny, investigations must be accurate and precise. Conclusions must be backed by sufficient and specific facts, and investigators must reject euphemisms and pin down evasive answers. Witnesses must be pressed for details such as times, dates, places, and the exact facts underlying their "feelings" or "beliefs."

Whether or not they create a written report, investigators should identify findings of fact and link them to conclusions. Findings and related conclusions should be reviewed for accuracy, preferably by someone other than the fact finder if an in-house investigator is used, before an ultimate decision is reached.

g. Minimizing intrusiveness/maximizing confidentiality

The "privacy" of public employees is protected by the federal Constitution, California employees' by the California constitution and other employees, to varying degrees, by a combination of common law and juror expectations. Achieving the balance between obtaining requisite information for taking action and avoiding invasion of privacy is often difficult.

However, courts treat most privacy questions as a matter of balancing the need for the intrusion with the nature and degree of the invasion. Thus, employers have several important avenues for reducing privacy invasions. First, they can minimize problems by intruding, especially into delicate or personal matters, only when the need is substantial. Second, they should seek always to utilize the least intrusive form of information collection, e.g., consulting, where possible, company-held files and documents for a given piece of information rather than interviewing a non-party witness. Third, they should seek to reduce the degree of the invasion by collecting only that information, if it is of a personal or delicate nature, that they absolutely need to know to accomplish their appropriate objective. Finally, they can reduce the degree of the invasion by disclosing information only to those with a clear need to know it.

h. Adequate documentation

"Documentation" poses difficulties in many aspects of management and workplace investigations are no exception. It is generally the case that some written record of an investigation is required - juries are too aware of the concept of "documentation" to accept it when none is made or retained in a matter as important as a workplace investigation. The key to determining what is required, however, is to remember that fact-finding is not undertaken for its own sake; rather, it is undertaken to obtain sufficient information that the decision maker can make a good decision. Particularly when the investigator is an experienced outside professional who is merely finding facts to present to the ultimate decision maker, a written report may be unnecessary because the investigator will be able to remember and recreate for after-the-fact scrutiny the methodology and the essential findings of the investigation and thus the basis of facts underlying the decision.

Whatever outside lawyers think, it has proven very difficult effectively to protect much of the documentation associated with any investigation from later outside scrutiny. Not only are attorney-client and work-product privileges ordinarily difficult to apply to workplace investigations, but given the employer's normal obligation to take prompt corrective action with respect to most workplace complaints (which ordinarily includes an investigation), and to demonstrate that it has done so, it is difficult to imagine why, if not how, an employer would seek to avoid disclosure. Certainly, all workplace investigations should be performed with the idea in mind that whatever the early determination respecting disclosure, disclosure will almost certainly ultimately be made if the matter proceeds to litigation.

Accordingly, employers should prepare well in advance for careful, effective documentation of each stage of an investigation. This includes creating a preliminary investigation plan; documenting adjustments and amendments as the inquiry progresses; documenting complaint and/or response; witness statements; findings and conclusions; (possibly) a report; and follow up discipline and subsequent monitoring efforts. Each type of document carries particular benefits but possible risks, so employers would do well to pay careful attention to training potential investigators in this area.

PRACTICAL ISSUES IN CONDUCTING WORKPLACE INVESTIGATIONS

General Suggestions

The following are general suggestions only and each may not be appropriate in every case.

1. **First Response**.

   Workplace crises that require investigation usually begin with a complaint from the alleged "victim" or "accuser." Whether the issue begins that way or through a supervisor's observation or some other form of learning about misconduct in the workplace, it is extremely important that the employer take the problem seriously and give it top priority.

> **PRACTICE TIP:** What constitutes "notice" to the employer is frequently litigated. It is now clear that notification of sexual harassment to an employer need not come solely from the victim of the harassment for knowledge to be imputed to the employer. *See* Young v. Bayer Corp., 123 F.3d 672, 675 (7th Cir. 1997) (finding it sufficient for a plaintiff to give notice to a person who should reasonably be expected to stop the harassment or refer the complaint up the chain of command to someone who can stop it); *See also* Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir. 1998) (holding that if a direct supervisor who had the responsibility to stop harassment knew of harassment and failed to act, the plaintiff has no further obligation to bring it to the employer's attention). *See also* Miller V. Woodharbor Molding & Millworks, Inc., 80 F. Supp. 2d 1026 (N.D. Iowa 2000) (employer's failure to investigate the allegations of sexual harassment made by the plaintiff-employee to a supervisor precluded the employer from establishing the first prong of the Faragher and Ellerth affirmative defense, even where the employee herself did not directly report the conduct to the personnel director, and failed to request that a supervisor complain on her behalf).

> The EEOC guidelines (which can be found at www.eeoc.gov) state: "An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures. For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an

internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint."

We would add that management should, on its own accord, conduct a through, effective investigation to determine the identity of the responsible parties, and proceed further if appropriate. It simply is not enough for an employer to decide that it will be impossible to identify the perpetrator. The message is clear: employers have a duty to try to conduct an effective investigation even when no complaint has been filed and/or even when they are not guaranteed success.

2. Choosing the Proper Investigator.

Using An Outside Attorney: Many employers prefer to use attorneys to conduct critical workplace investigations. Although this can be costly, attorneys, at least those who have specialized knowledge and experience of employment and workplace investigations–related law and can be genuinely characterized as impartial, usually make excellent investigators. The difficulty is, however, to make sure that a jury would agree as to the employer's assessment of neutrality.

Employers often turn to attorneys because of their view that, under certain circumstances, it may be possible for an attorney/ investigator to establish an attorney-client or work-product privilege. The courts are divided in their approach to investigation privileges:

1) The Attorney-Client Privilege

The attorney-client privilege protects the functioning of the attorney and client relationship and, in essence, requires a) an attorney; b) a client; c) a relationship between them for the purpose of rendering and receiving legal advice; d) a communication between them; and e) an intent that the communication be confidential.

While employers in most employment law cases will wish to disclose the results of an investigation as a basis for their actions and thus will end up waiving the privilege anyway, in the unusual case where protection is strongly desirable, employers must take careful precautions from the beginning. Not all courts have been receptive to assertion of the privilege in investigations, either on the ground

that investigations need not be performed by attorneys but can also be performed by laymen, or do not constitute the rendering of legal advice. The better view, however, is that use of an attorney to perform an investigation is *prima facie* evidence of the purpose to secure legal advice, because, although laymen can perform investigations, only a lawyer has the "training, skills, and background necessary to make the independent analysis and recommendations" which an employer would desire.

In such cases, in addition to undertaking to keep communications confidential, it is critical that a lawyer-investigator's notes and report contain "advice" rather than mere facts. Since this privilege protection is rather fragile, and often undesirable in employment cases, the risks usually outweigh the benefits, at least in employment discrimination cases.

2) The Work-Product Privilege

The work-product privilege, which is qualified rather than absolute, protects from discovery the mental impressions, conclusions, opinions, and legal theories of an attorney (or his/her delegate), created in anticipation of litigation.

While work-product privilege offers more reliable protection than the attorney-client privilege in investigations, it also may prove difficult to establish as well as ultimately undesirable in most employment cases. Written statements by witnesses will almost certainly not qualify as "mental processes" of the attorney; even oral statements, if recorded in notes or a report, must contain liberal amounts of attorney analysis and opinion. Again, the difficulties of establishing and the likely desirability of ultimate disclosure ordinarily outweigh the advantages of using this privilege in employment cases.

The arguments against using an outside attorney are similar to those against using other outsiders—except perhaps that labor counsel who has had long experience with a particular client may actually be a good choice in terms of a combination of knowledge of the organization and skill. The problem with such a choice, however, is that an attorney or firm that serves as an investigator will ordinarily be unable to serve as the client's representative in later litigation. This is because opposing counsel will frequently allege a conflict of interest, or the need to serve as a fact witness, or even name the attorney/investigator as a defendant. Accordingly, regular outside counsel are often reluctant to serve as investigators.

Attorneys who are not regular labor counsel may be well-trained or competent, but have the attendant disadvantages of high cost, lack of familiarity with the organization, and possibly being intimidating or otherwise unable to get to the heart of an issue. Employers selecting attorneys as investigators - often a good choice because of their analytical abilities - must also nevertheless be very careful to accurately assess the degree to which the attorney possesses sufficient "people skills" to conduct a good investigation as well as how well he or she will

play to a jury.

Many organizations are also turning to non-regular outside lawyers, accountants, and security firms. These types of investigators, who typically act in multi-disciplinary teams, are a growing phenomenon in the US, at least. They offer the advantage of availability and extensive expertise.

Although their prime disadvantage is usually extreme cost, for bet-the-corporation reputational, liability, or criminal investigations, they are the usual investigators of choice. For certain other circumstances, however, particularly in the US where, for example, discrimination, wrongful termination, and many retaliation cases are determined by juries, investigations conducted by such outside investigators may also suffer from apparent lack of impartiality and independence. This is because even though investigators from such firms do not have the same responsibilities to their clients that regular counsel, accountants, or security professionals may have, they are often perceived by juries or critical outside parties such as regulators to possess experience and mindsets that are not conducive to independence and impartiality in investigations. Further, they can be tainted by the suspicion that they are seeking future business in undertaking such investigations and may be inclined as a result to avoid difficult findings and conclusions.

Using a Company Insider: If a company decides to conduct its own investigation, it is crucial that the person chosen to undertake the investigation be well trained not only in the techniques of proper investigation but also as to relevant law and applicable concepts. Traditionally, organizations have tended to rely on Human Resources personnel for the conduct of many investigations. More recently, a new breed of in-house investigator has arisen; these are in-house compliance and ethics personnel or specially-designated and trained internal investigators. For the organizations that have sufficient resources to train and support these types of employees, the disadvantages are few and the advantages great. Such professionals possess all of the attributes of the in-house employee, and, at least if the organization is willing and able to afford them the authority, access, and independence that effective internal investigations require, few of the disadvantages. Finding, training, and supporting such professionals as regular employees is still difficult for many organizations, however, as dedicated compliance and ethics professionals are a relatively new phenomenon in many industries. Nevertheless, the number of these employees is increasing and as investigations continue to grow in frequency and importance, such professionals will often prove to be the most appropriate selection for achieving effective internal investigations.

Using a Professional Investigator: Although there are certain situations where an employer's regular attorney (particularly in-house attorney) will prove a reasonable choice as investigator, and many other situations where it is simply overkill to use an outsider at all, the increased quality standards demanded of effective investigations means that in many situations, employers are now looking to outside, professional

investigators. This particularly happens in cases involving highly placed executives or high stakes public relations issues.

This does not necessarily mean finding a "private eye" – who may not in any case have sufficient knowledge of the law and concepts related to workplace issues like retaliation, harassment, or discrimination, to know it when he or she sees it. Rather, a number of professional security firms have started to offer workplace investigation services. Better, a number of former employment lawyers have also begun to offer such services. They can generally be found on the Internet, through expert witness and consultant directories, or through employment lawyers, who increasingly maintain their own database of likely candidates for important investigations services.

Like in-house compliance and ethics personnel, these investigative professionals are a relatively new phenomenon. They tend to possess the disadvantages of any other outsiders such as high cost, lack of deployment speed, and lack of familiarity with the organization. Qualified and experienced independent investigators are also sometimes difficult to identify and vet, and they often lack ready availability.

These investigators possess the advantages of specialized investigative expertise and are well grounded in the concepts they are handling. The successful ones, at least, also tend to possess the personal characteristics required of effective investigators and generally produce high quality results. Most important, they provide the assurance and appearance of impartiality and independence. Like in-house compliance and ethics professionals, the numbers of such investigators are growing, and, at least in circumstances placing a premium on independence, will likely often in future be the professionals of choice for effective internal investigations.

3. Planning.

Following selection of an appropriate investigator, his or her next step should be carefully planning the investigation. An investigator should take the following steps before proceeding with the investigation:

a. Review the employment policy and procedures at issue thoroughly.

b. Review appropriate documents such as the accuser's complaint, the parties' personnel files, and any investigations files or relevant company archives.

c. Identify key issues and provisionally determine what will need to be discovered and what are likely sources of needed information. Utilize the least intrusive methods where possible (e.g. documents, rather than witnesses)

d. Identify and appropriately sequence as many likely witnesses as possible. Establish an appropriate method of contacting them, and plan what will be communicated to them in advance of the meeting

e. Document the planning stage carefully but be prepared to adjust the plan during the investigative process.

4. Interviewing the "Accuser."

When interviewing the complainant or accuser, among other things, investigators should:

a. Assure the accuser that the company takes the matter seriously and is working to affect an appropriate resolution; however, the investigator should not promise specific results.

b. Refrain from using words like "illegal harassment" or "victim" - at the outset, there is at most potential "misconduct' or "violation of company policy".

c. Start with open-ended questions but later move to planned and pointed questions, making sure to cover everything that is needed to proceed.

d. Refrain from promising strict confidence or anonymity; it can't be given. The investigator should explain that every effort will be made to keep the matter confidential and that there will be no retaliation by the employer or supervisors against the complaining party. It is very important that the investigator never agree to refrain from "doing anything" or using the "victim's" name.

e. Remember that it will almost certainly be necessary to interview the complainant again, and possibly multiple times, as conflicting or corroborative evidence is obtained. Establish that idea in the complainant's first interview and provide a way that the complainant can contact you if he or she thinks of additional helpful information.

5. Interviewing the Accused or Target Employee.

Promptness is sometimes an issue in interviewing an accused employee, but sometimes it is more conducive to an accurate investigation to obtain and be prepared with other corroborating or conflicting evidence before tackling the accused. Certainly, however, the accused employee must be thoroughly interviewed before you reach a conclusion, as well as be given an opportunity to respond to the charges in detail. When interviewing the target employee, the investigator should:

- Be especially careful about observing the accused individual's rights, such as the right to a representative.

> In NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975), the Supreme Court held that employees in unionized workforces are entitled to representation in interviews that the employee reasonably believes could result in disciplinary action. The employee also has a limited right to consult with that representative before the interview occurs. If the employee makes this demand, the employer can either (i) conduct the investigation without interviewing the employee or (ii) accede to the demand. In 1985 the National Labor Relations Board construed Weingarten rights as applying only to unionized employees. However, in Epilepsy Foundation, 331 NLRB No. 92 (July 10, 2000) the Board ruled that non-union employees **are** entitled to Weingarten rights. It stated that "[t] he right to have a co-worker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern that the employer does not initiate or continue a practice of imposing punishment unjustly." The decision has recently been questioned however, and the issue, even if again in flux, must be treated with caution.

- Indicate to the accused the seriousness with which the employer views the situation and its intention to effect a thorough, fair, accurate investigation and appropriate solution.

- Approach the interview with an open mind, making sure the accused employee has an opportunity to fully explain before the investigator reaches a conclusion

- Refrain from communicating any conclusions to the accused. Rather, the investigator should indicate that he/she will be contacted upon completion of the investigation. If it is necessary to protect one or the other of the parties, the investigator should recommend that the employer suspend the accused (never the complainant) "pending investigation." Ordinarily this should be with pay, but each case is different.

6. Interviewing Other Employees.

When interviewing others, the investigator should:

- Determine whom to interview on a case-by-case basis and involve only those who have a genuine "need to know" in this case.

• Refrain from unnecessarily disclosing information to witnesses or others from whom information is being sought.

• Prepare uniform confidentiality and other requests, warnings, and explanations and utilize them consistently.

APPROPRIATE REMEDIES

Ordinarily, it is best to separate the ultimate decision maker from the fact finder. In all cases, however, a competent investigator will evaluate all of the results of the investigation carefully before deciding what to recommend or "find". In this evaluation, the investigator should weigh all of the evidence (i.e., consider it for what it is worth) not just that which is provable in a court of law. The investigator should also consider key employees' situations, possible motives, and work records, while being careful not to carelessly make faulty assumptions. A good investigator will critically examine all alternatives and possible consequences of each of those alternatives.

PRACTICE TIP: Employers and their attorneys must remember that each situation is unique; workplace investigations are important, delicate, and difficult and each one should be handled open-mindedly and with close attention to its specific circumstances. The key is careful "critical thinking" in each case, whether by the employer's own internal investigator, outside investigation professional or legal counsel.

TIPS FOR ATTACKING OR DEFENDING WORKPLACE INVESTIGATIONS

A. Generally

Because painstaking coverage of this topic would require a near endless supply of time and paper, the following is a somewhat arbitrary and certainly idiosyncratic selection of key points for attacking or defending a workplace investigation after it has been performed. Some of the most obvious points are simply omitted to save space. Also, since it is possible in most cases to take the converse of one point for use on the other side, such points will not be restated and the contrary should simply be presumed to apply to the other side.

B. Attacking Workplace Investigations: Key Weaknesses

1. Absence to a significant degree of any of the previously stated "Hallmarks." They include:

    a. Planning and organization
    b. Commitment
    c. Promptness

d. Thoroughness
e. Fairness
f. Accuracy and precision
g. Minimizing intrusiveness/maximizing confidentiality
h. Adequate documentation

2. Insufficient training or preparation of investigators

This issue makes the majority of workplace investigations vulnerable to very successful attack. Effective investigations usually require significant knowledge of law, relevant management concepts and prevention techniques, which many outside investigators, but fewer inside investigators, possess. They also require some knowledge of an organization's history, current policies, culture, and employees (which insiders but few outsiders possess). Even more important, effective investigations require substantial skills, acquired through education and/or experience, and very few current workplace investigators have as yet obtained them. These skills include, at the minimum:

a. Planning and preparing for an investigation

(1) identifying its real purpose;
(2) assembling and instructing an appropriate investigation team;
(3) identifying potential conflicts;
(4) identifying and assembling appropriate documentary information sources including policies, procedures, personnel files, expense reports, telephone records, e-mail, and the like;
(5) identifying and properly sequencing witnesses and other potential sources of information.

b. Conducting interviews

(1) providing appropriate explanation and warnings to witnesses;
(2) asking open-ended, non-leading questions;
(3) persistent pursuit of specific, accurate, and complete information;
(4) following up hints and contradictions;
(5) closing logical gaps;
(6) appropriately consistent technique;
(7) appropriate recording technique.

c. Evaluation skills

(1) evaluating credibility of witnesses;
(2) identifying inconsistencies, contradictions, and gaps in information;
(3) identifying potentially corroborative and contradictory information;
(4) weighing evidence;
(5) understanding and applying standards of evidence and burden of proof;

(6) drawing inferences;
(7) identifying alternatives and consequences;
(8) weighing and choosing solutions.

d. At present, many workplace investigators have received little or no significant education in these matters. In fact, a great many employers have yet to realize that such skills are needed, let alone that they are crucial to an effective investigation. Accordingly, early and tough deposition questioning of the actual investigator and those who make decisions based on their findings will yield substantial fruits:

(1) Press such deponents hard about the actual time devoted in their harassment prevention or other education and experience to investigation and complaint handling; how much of that related to technique and skills acquisition; what exactly they learned; and what they remember.

(2) If deponents don't recall specifically what they said to or asked a particular witness, ask about another witness. Keep asking until you have established patterns, gaps, and inconsistencies in their interviews or their interviewing techniques.

(3) If deponents don't recall much or anything they asked or told any witness, ask them what techniques they use and standards they apply in witness interviews in general. Press for examples, e.g., "What should you/would you say if the witness did not appear credible?" Or say: "Tell me what you consider important in interviewing witnesses."

(4) Don't give up easily. A great many employer fact finders and decision makers are weak (and consequently, defensive) on these issues. (Of course, you also need to know how to conduct workplace investigations yourself in order to reap the harvest of this approach.)
(5) Also, do not buy the argument that these matters, especially witness interviews, are privileged. They're almost surely not and the company will eventually wish to disclose the substance anyway, to establish that they took appropriate corrective action.

3. Inappropriate investigator

Employers who fail to recognize the importance of effective workplace investigations and complaint handling and fail to provide for adequate training of investigators may also select the wrong person(s) as an investigator. Accordingly, opposing attorneys should explore and expose weaknesses in the circumstances or personal qualities of the investigator. These include such matters as:

a. Are/were you subordinate to in any sense, or reliant upon, or related to, any key witnesses, parties, or managers?

b. Did you reach any conclusions about how well manager X understood the company's policies or complaint procedure? About how committed he or she was to workplace equity? How well he or she performed his/her job?

c. How do you describe yourself (or your strength/weakness) in terms of:

(1) analytical ability;
(2) knowledge of company policies/law;
(3) persistence;
(4) quickness;
(5) empathy;
(6) patience;
(7) perceptivity;
(8) impartiality;
(9) sensitivity;
(10) common sense;
(11) gullibility;
(12) tough-mindedness;
(13) fairness, etc.

d. How would others describe you?

e. How much effort did you devote to this investigation? What else were you working on at the time?

f. Did you discover anything at all that contradicted the ultimate conclusion? How did you feel about that? What did you do about it?

4. Insufficient time and attention to the investigation

Closely question investigators on the details of how they conducted the investigation. Most investigators are under-prepared and overworked and will be aware that they have not accomplished a perfect investigation, thus easily put on the defensive. Or, you may discover that an investigator (perhaps an owner or executive unfamiliar with the nuance of workplace investigations) is unduly confident about the inquiry he or she performed. That will look bad if he or she has made significant mistakes. Consider eliciting such information as the following in deposition of investigators:

a. How much time did you devote to this investigation overall?
b. How much time did you spend organizing and planning?
c. How much time reviewing policies and procedures?
d. How much time interviewing witnesses?
e. How much time evaluating your results?

f. How much time pursuing contradictions, etc. What are some of them?
g. Is there anything that you sought but failed to learn, failed to pursue, failed to explain? How did that affect your conclusion?

5. Insufficient review, evaluation, or documentation

Probe investigators about what they knew and when; why their notes deviate from their report, if any; why they accepted one explanation and rejected another; why they believed some witnesses and not others, etc.

C. Defending Workplace Investigations: Key Strengths

1. Be prepared.

Most of employers' legal and practical mistakes, and resultant weaknesses described above, stem from a single problem: employers have not given sufficient advance thought and/or engaged in adequate preparation for conducting workplace investigations. Many executives and managers are as yet unaware of how important workplace investigations have become, let alone how difficult they are to conduct properly.

The best defense to any of these costly new claims arising from workplace investigations is quite obviously to "do it right." To "do it right" - to avoid legal and practical mistakes; to reach reasonable, supportable conclusions; to have a strong defense to the inevitable claims; employers, human resources staff and managers must acknowledge:

a. the importance of conducting these investigations properly;
b. the difficulties of doing so;
c. the need for careful advance thought; learning; discussion; policy and procedure development; and
d. the need to identify and educate investigators in advance of a particular need.

2. Educate investigators and managers

Related to and crucial to becoming prepared is, of course, education. Doing these investigations right takes substantial particularized knowledge and very sharp skills: most existing managers, human resources professionals, in-house attorneys, or other potential in-house investigators at the least need to sharpen and update both.

Some employers assume they can rely on professional investigators or regular counsel should the need for an investigation arise. In addition to the fact that such professionals are costly, they are still somewhat scarce. Most regular labor counsel ordinarily will not (and ordinarily should not) conduct these investigations: they will almost assuredly be "conflicted out" of representing their client in any subsequent

litigation over the matter and it is increasingly probable that they will be named as defendants themselves. (Few things are more detrimental to an attorney-client relationship than costly liability depending even in part on the issue of bad advice vs. failure to follow good advice.) Those neutrals who are willing to perform such investigations are often well booked into the future and unable to respond as quickly as necessary to a complaint. Additionally, although they (usually) posses the necessary knowledge about investigation techniques, they don't know the organization, its history, the players, etc., and can't hit the ground running.

For once, the in-house vs. out-of-house debate, in my view, can reasonably clearly be resolved in favor of keeping investigations in-house IF in-house investigators are thoroughly and properly educated. An increasing number of providers will (or should be) getting on the bandwagon (bookmobile?) to present this training. The employer who takes advantage of it before the need arises is the employer with the strong DEFENSE to investigations-related complaints.

3. Invest sufficient resources to do it right

The above discussion is replete with opportunities to spend time and money. "Develop policies"; "invest in education"; "give investigators the time, access, and resources they need to do it right" - each of these exhortations is costly.

The simple counter is: so is litigation. The newness of this field; its vastness in terms of the number and type of things that can go wrong and the legal liabilities that attach; the fact that claims can arise even if the underlying complaint is weak; and, most of all, the close relationship to the "fairness" issues that jurors hold dear, makes workplace investigations cases likely to become one of the most important litigation frontiers. The employer who recognizes the potential challenge; prepares to meet it; and invests sufficient resources to handle it properly when it does come, is the employer who will:

4. DO IT RIGHT. (See above)