



## Virginia Workplace Law

# Conducting Workplace Investigations

By: Phyllis Katz. Tuesday, January 8th, 2013

Recently, when advising a client who was investigating a complaint of sexual harassment, I had the opportunity to revisit the EEOC's Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (issued on June 18, 1999). <http://www.eeoc.gov/policy/docs/harassment.html> The information contained in the Enforcement Guidance provides a useful tool for employers engaging in workplace investigations.

The first steps to be taken, when a complaint is made, are (1) assure that the person making the complaint is protected from any continuing possible adverse action and (2) selecting the right person to investigate. The investigator should be one who can objectively gather and consider the relevant facts without any subtle operational or managerial pressures being applied to the assigned tasks. The investigator should be experienced in the skills required for interviewing witnesses and evaluating credibility.

Each investigation must be tailored to the particular facts. The complainant, the alleged harasser, and third parties should be interviewed. Other than the questions of who, what, where, when, and how did the harassment occur, the person should be asked what was the response to the described actions, are there any others to collaborate, and are there any notes, documents, or physical evidence regarding the incident. Most advisedly, the investigator should refrain from offering his or her opinion.

The Enforcement Guidance recognizes that investigators will face conflicting versions of the relevant facts, and suggests the investigator use the following factors to weigh credibility:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

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None of the above factors are determinative as to credibility and each must be weighed against the environment in which the described events occurred. For example, the fact there is a record of similar behavior in the past does not necessarily mean that it was engaged in at the situation under investigation.

A determination should be made as soon as possible and once made the parties should be informed. If the evidence is inconclusive, the employer still has the obligation to institute preventive measures such as monitoring and training. The follow-up action(s) should be immediate and appropriate to the situation and should not adversely affect the complainant. Even if the complainant's facts do not bear out, be sure that decision makers know not to retaliate either against the complaining party or those who participated in the investigation. While the underlying complaint may lack merit, the employee complaining is under most circumstances now protected against retaliation for bringing the complaint.

When conducting workplace investigations, employers need to also be aware of the requirements under the Fair and Accurate Credit Transactions Act of 2003 (FACTA) <http://www.gpo.gov/fdsys/pkg/PLAW-108publ159/pdf/PLAW-108publ159.pdf> , which amends the Fair Credit Reporting Act (FCRA). <http://www.ftc.gov/os/statutes/031224fcra.pdf> FACTA allows employers to retain third parties to conduct workplace investigations without first notifying the target of the investigation or obtaining their consent (i.e. as required in background checks). However, if the third party conducting the investigation provides information on which the employer takes adverse action against the employee, the employer must disclose to the target of the investigation a summary of the third-party investigator's report. The summary must include the nature and substance of the report, but need not identify the individuals interviewed or other sources of information.

If you need assistance with workplace investigations or have other employment law concerns, the **Sands Anderson PC employment law team** would be pleased to hear from you.

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