HARASSMENT CLAIMS: INTERNAL INVESTIGATIONS AND LITIGATION

Tyson B. Snow
Manning Curtis Bradshaw & Bednar LLC
170 South Main Street, Suite 900
Salt Lake City, Utah 84111
(801) 363-5678
(801) 364-5678 (Fax)
TSnow@mc2b.com

OVERCOMING CHALLENGES ASSOCIATED WITH INVESTIGATIONS AS THEY RELATE TO LITIGATION

A. Investigations Have Real Power

1. The Best Defense Is a Good Offense

Proactive Investigating. HR Managers who conduct investigations with litigation in mind maximize evidence required to counter the prima facie elements of an employee's claim and establish elements of the employer's affirmative defense. The first key to conducting such an investigation is to know the elements of potential claims that are likely to arise. Prima facie elements are the points that must be proved to succeed on a claim or defense. In the area of employment litigation, federal and state laws evolve, case law continuously defines and redefines statutes, and myriad standards apply to different types of claims. The good news is that compared to other areas of the law, employment laws remain relatively static and can be tracked by conscientious HR Managers. It is a good idea for HR Managers to employ, but not rely too heavily on, a good desk reference manual. A good desk reference manual is frequently updated and will not attempt to define all possible claims with specificity because, otherwise, the manual will too quickly become obsolete.

Know the Basics. Areas of the law that produce employee claims HR Managers are most often charged to investigate are as follows:

- Job Discrimination Laws -- Title VII, the ADA, the ADEA, and the state equivalent of such state discrimination laws
- Health and Safety Laws -- OSHA (workplace safety and violence prevention programs)
- Drug Free Workplace Laws -- Drug Free Workplace Act, ADA, and DOT mandated testing laws (delicate balance between wrongful discharge on one end and negligent hiring or retention claims on the other)
- Laws Protecting Job Security, Wages, and Benefits -- FMLA, FLSA, USERRA
- Laws Governing Background and Credit Checks -- IRCA, FCRA (discrimination claims balanced with protecting interests of employers)
- Whistleblower Statutes

Knowing and keeping in mind the basic legal elements of the above listed claims, and any others that may be particularly relevant to your industry, will greatly enhance the effectiveness of your investigations and increase the likelihood of disposing of claims early in the litigation process.

By way of example only, most employers deal with the very real possibility of facing

sexual harassment claims from employees. HR Managers who are familiar with sexual harassment law know that investigations that keep litigation in mind reduce the risk of liability tremendously, regardless of whether or not the employee can prove the harassment actually occurred. The most common form of sexual harassment is hostile work environment sexual harassment. Two types of liability are associated with hostile work environment claims: coworker liability and supervisor liability. Under both types of liability, an employer has a fair amount of control over the outcome of litigation based on actions taken before and after an employee complaint. Under supervisor harassment claims, an employer can demonstrate the bulk of the *Burlington/Faragher* affirmative defense by having a comprehensive harassment policy in place, by conducting a thorough and timely investigation, and by taking appropriate subsequent remedial actions. Similarly, in co-worker harassment claims, an effective investigation and appropriate remedial action can provide a virtually impenetrable affirmative defense under Tenth Circuit case law.

Wise employers invest in training for all managers and supervisors who will participate in investigating employee complaints. Wise managers set about building a case from the outset of any investigation. Employers and managers that keep the end in mind during the process will avoid litigation, or, at least, will increase the likelihood of success during litigation.

2. Expedience and Thoroughness Are Crucial.

Don't Hesitate. After my son was potty-trained, he would often "forget" to go to the bathroom when he was doing something else he liked more. Luckily, the frustrated parents received help from a cute cartoon character on my son's favorite website. The cartoon character reminded my son that when he felt the urge to go to the bathroom, he was to "drop everything and go!" An important lesson can be learned by HR Managers from this cute cartoon character. When a situation arises that requires an investigation, HR Managers need to act quickly and decisively. Indeed, affirmative defenses in employment matters, almost without exception, have a timeliness component. In general, an employer must be able to demonstrate: (1) it made a timely investigation; (2) it made a thorough investigation; (3) it communicated the outcome of the investigation clearly; and (4) it took prompt and appropriate remedial action based on the outcome of the investigation.

An investigation that takes too long is likely to grow into a retaliation claim or a claim for constructive discharge. As discussed in more detail below, under the new standard by the Supreme Court in *Burlington Railroad v. White*, 126 S.Ct. 2405 (2006), an employer may be liable for retaliation if the employee can demonstrate he or she was mistreated during the investigation process. Commonly, an employee who complains of discrimination or of an infringement upon some legally protected right becomes a target of further mistreatment. Such employees are often regarded as difficult or disloyal by supervisors and co-workers. Sentiments toward complaining employees are more likely to be expressed if an investigation drags on and the rumor mill is allowed time to churn. Insults, removal of perks, and other forms of perceived mistreatment may lead to the employee quitting voluntarily, which is often the unspoken purpose of the mistreatment. If the employee can demonstrate that the environment has become unbearable, an employer may be handing an employee the adverse employment action the

employee needs to complete a claim. Employers must be efficient in conducting investigations to avoid creative claims that will be brought by good plaintiff's attorneys.

Drill to Bedrock. A common mistake among HR Managers is to shy away from the gruesome details underlying a potential claim hoping that ignorance will, indeed, produce bliss. Experience demonstrates otherwise. HR Managers need to learn, to the extent possible, the "truth" of what happened. An employer must conduct a sufficient number of interviews, obtain a sufficient number of written statements, and review a sufficient number of files to gain a clear picture of events that actually transpired. Often, different versions of events will obscure the truth to the point that a conclusion as to the facts and culpability cannot be reached. Some HR Managers prefer this outcome because they may avoid the difficult step of terminating an offending employee or taking some other disciplinary action. Such HR Managers often fail to dig sufficiently deep to learn the facts. Some HR Managers are quick to believe a manager or supervisor accused of wrongdoing. Make no mistake, *bad facts always come back to haunt the employer*, whether in the instant case or in a future conflict. Getting such facts out early, and dealing with them appropriately, is always preferable to allowing a jury to decide the fate of the employer who learns of facts through litigation rather than through its own investigation. Set a distinct precedent in your investigating procedures that includes prompt and complete investigations.

Don't Believe Everything You Hear. Recently the United States Supreme Court denied certiorari of the Tenth Circuit case involving the "cat's paw doctrine." The Tenth Circuit held in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006) that a company was liable for relying on the allegations of a supervisor who harbored discriminatory bias against an African-American employee. The "cat's paw" theory of liability makes an employer liable for wrongfully disciplining or censuring an undesirable employee using as justification the statement of another biased employee (a supervisor in this case), even when the biased employee is not involved in the decision to discipline or censure the employee in question.[1] This theory is similar to the "rubber-stamp" theory of liability which refers to an employer who follows a biased recommendation of a subordinate without an independent investigation of a complaint by the employer. To prevail on such claims, an employee must demonstrate that the employer initiated an adverse employment action by simply relying on unreliable information. The "cat's paw" theory and the "rubber-stamp" theory make clear that an employer must not jump to conclusions, particularly to conclusions that are self serving for the employer or that serve the agenda of a particular employee.

Remain Above Board. All too often, employers feel it is none of the employee's business what the investigation revealed--the employee should just feel lucky he still has a job. Experience, again, reveals that communicating the outcome of an investigation is generally a

---

[1]The "cat's paw" theory derives its name from a fable made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull roasting chestnuts from a hot fire. The cat scoops the chestnuts from the fire, and the monkey delightedly eats the chestnuts. All the cat derives from the exercise are singed paws. "No different are the princes of those smaller lands Who, hoping to please their greater neighbors, Do their hot jobs but for their labors Get nothing more than well singed hands." *See* http://www.lafontaine.net/lesFables/fableEtr.php?id=453

preferred approach. Often, a letter closing the investigation sent to both parties that outlines the allegations, the scope of the investigation conducted, the conclusions of the employer, and the employer's course of action makes an excellent exhibit, at the appropriate time, to demonstrate the employer met its obligations in taking prompt and appropriate remedial action. Again, thinking through possible litigation from the beginning helps shape the outcome of the litigation.

3. Avoid Retaliation Claims

First Do No harm. One particular risk of conducting investigations has multiplied since the summer of 2006. The Supreme Court handed down its *Burlington Northern* opinion striking fear into the hearts of cognizant employers. The new standard enunciated by the Court is, technically speaking, "squishy." It states that an adverse employment action in the retaliation context is not the same as an adverse action in other Title VII contexts (which also affects retaliation standards in ADA and ADEA cases). Adverse employment actions in retaliation cases now mean: "That a reasonable employee would have found the challenged action materially adverse," *i.e.*, that the action "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 126 S. Ct. at 2415. *In dicta*, the Court went so far as to identify circumstances under which an employee might feel dissuaded to complain to an employer, including reassignment to a more strenuous or less desirable job or excluding an employee from a weekly lunch meeting with other managers. *Id*. at 2415 - 16.

Circuit courts have rushed to interpret *Burlington Northern* as evidenced by over 2,000 citing references since the opinion was published since last year. Some basic principles have started to become clear. For example, the Supreme Court established that suspension without pay may be considered an adverse action depending on the circumstances of the employee. *Id.* Circuit Courts have clarified that suspension *with pay* is not likely to constitute an adverse action, although the duration of the suspension and lost opportunities may be a factor. *See e.g. Peltier v. United States*. 388 F.3d 984, 988 (6th Cir. 2004); *Trujillo v. Board of Education Educ. of Albuquerque Public Schools*, 377 F. Supp. 2D 1020, 1035-236 (D.N.M. 2005) (stating that a timely investigation with full pay and benefits is not an adverse employment action). Courts are also attempting to draw the line on the forms of discipline that constitute employment actions short of termination and demotion. Unfortunately, the Circuits are not always consistent. The Supreme Court's approach of considering all factors of the particular employee makes for a standard that is easy to demonstrate issues of fact. Some commentators have wondered whether an employer can ever prevail on summary judgment under the new standard. One way to increase the likelihood of success is to provide a complaining employee with options as to remedial actions. In some scenarios, employers can place the onus of making employment decisions on the employee so that employment actions are chosen rather than imposed, making it somewhat more difficult to sustain a claim for retaliation. Employers should train managers on the new law and consult with an employment attorney if this issue is a concern.

B. Respecting Participants' Rights.

Unfortunately, investigations have the potential of unintentionally handing claims to employees that employers would not normally expect. While the instances are not frequent, the

way an employer handles an investigation may have repercussions that include claims for defamation or privacy torts. Defamation refers to claims brought for the communication of a statement that makes a false claim, expressly stated or implied to be factual, that may harm the reputation of an individual or entity. Privacy torts refer to claims that arise from intentional and unreasonable invasions upon solitude or seclusion that is highly offensive to a reasonable person. The most common privacy torts in Utah include intrusion upon seclusion claims and public disclosure of private facts. Employers should be careful about how information is disseminated, who has access to information about investigations, and how personal information is secured.

Keep Files Secure. If HR Managers are not careful, informality in an investigation can easily lead to personnel and other files being shared with individuals who are not in a job-related need-to-know position. Facts from an investigation generally constitute information that should only be disclosed on a need-to-know basis, or in the case that the law requires the release of such information. Information can be leaked or disseminated unwittingly during the course of investigation, and can cause an employer much grief. To avoid chances that confidential information is mistakenly disseminated, it is recommended that HR Managers segregate information about an employee. Employee files that are commonly maintained separately include:

- General personnel files
- Medical Records
- I-9 Records
- Safety Records
- Grievance and Investigation Records

Further, some employers require that any files about an employee be routed through one HR Manager that can control the flow of personnel information.

Loose Lips. The most common mistake made by employers is to allow an investigation to become so informal that managers and employees learn about the content of an investigation. The individuals who learn of such facts directly or through the rumor mill often relay embellished or false facts about the employee under investigation. With the explosion of blogging in recent years, this problem has been exacerbated. Millions of individuals blog regularly, and some of your employees are likely posting information about their jobs on their personal blogs. The internet allows for publication of information to the general public for which employers may be liable. *See e.g. Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000). Rumors and other confidential information shared about an employee learned during an investigation can damage an employee's reputation and an employee's ability to further function in a company or in an entire industry. While employers are limited to some degree with respect to rank and file employees, employers can control managers' statements and how managers control information. Strict policies should govern the manner in which investigations are

conducted. Information gathered should be identified as confidential information and employees sharing such information in an unauthorized manner should be subject to discipline.

Covert Ops. If it becomes necessary to conduct searches or use more invasive investigation techniques, some general rules can be applied. Typically, an employer must have a reasonable business purpose for conducting searches and for using investigative techniques. Further, in any claim brought by the employee, the employee must demonstrate a legitimate expectation of privacy in the area being searched. These common law principles are only general rules of thumb. Greatly expanded and specialized prohibitions and limitations have been developed in statutory and regulatory regimes. Such areas of the law should be investigated and employers should promulgate and communicate employment policies dealing with such areas including: policies regarding access to credit reports, telephone use policies, drug testing policies, computer use policies, video surveillance policies, and policies governing company property. These policies should appropriately dispel employees' expectations of privacy at work. Employee handbooks and company policies will go a long way to prevent litigation and to increase the probability of successful litigation with respect to this issue. It is recommended that employers consult with an attorney when developing employee handbooks and other employment policies.[2]

C. Use Common Sense.

While general legal principles can be distilled into a short outline such as the one above, the greatest risk is that HR Managers will actually rely on such outlines in making day-to-day decisions. The reality of the workplace is that every complaint, every conflict, every investigation will stem from unique facts that will require a fresh approach. While common themes constantly emerge in employment law, the fact scenarios never cease to amaze and befuddle. Such is the joy of working in HR. Become conversant in the main areas of law and know the basic elements of the claims and defenses. Develop a consistent but flexible protocol for conducting investigations that suits the size and the particular dynamics of your workforce, and use that protocol time and time again so employees know what to expect. Incorporate as much or as little of the above information into your protocol that is helpful. But more importantly than anything else, use the sense God gave you to conduct investigations appropriately, and consult an attorney if and when questions arise. Good luck!

---

[2] Employers should also be aware of both federal and state policies that preclude polygraph testing and DNA or genetic testing of private employees. Some exceptions apply to these statutes and may provide employers some options in investigations that are not widely used, particularly in areas that involve health and safety of the general public. Consultation with an attorney regarding these matters is a must.