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May 29, 2018

EMPLOYMENT LAW UPDATE

Dear Human Resource Manager:

I am enclosing an article I have drafted regarding sexual harassment investigations.

The law has evolved in the conducting of a sexual harassment investigation to a complex and technical procedure, full of pitfalls and flaws.

As a practical matter, if you are in the midst of a sexual harassment complaint, it is advisable to use either trained investigators that have been trained by professionals or use outside lawyers who have had substantial experience in carrying out these investigations.

It is important to note that if the investigation is carried out in a cursory matter and not promptly and not with detailed findings, your defense to sexual harassment cases will be weakened substantially.

I therefore recommend that you conduct training of the individuals who will conduct your sexual harassment cases who work for the bank or employer or rely on outside professionals.

If you have any questions or are interested in this type of training or use of investigators, please call. We would be happy to assist you in any way possible.

Very truly yours,

Paul I. Weiner

PIW/eb

INVESTIGATING SEXUAL HARASSMENT CLAIMS

THE LAW & PRACTICE

The Equal Employment Opportunity Commission (“EEOC”) has issued in 1999 a guidance called Vicarious Employer Liability for Unlawful Harassment by Supervisors. In it there are sections dealing with “effective, investigative process”.

The EEOC says as follows: “an employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment”. As soon as management learned about the alleged harassment, it should determine whether a detailed fact finding investigation is necessary.

Again, “if a fact finding investigation is necessary, (which may be questionable herein) it should be launched immediately. Contemporaneous with the commencement of the investigation, the employer must take immediate and appropriate action to stop the allegedly improper conduct. The amount of time that it will take to complete the investigation will depend on the particular circumstances”. The case is quoted by the EEOC regarding the timing of the investigation are generally in days or weeks.

The law in New Jersey as well as federal law requires that the investigation should conclude in an “honest report”. See *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524.

What does an honest report mean? As stated in the *Swenson v. Potter*, 271 F.3d 1184, 9th Cir. “when an employee accuses a fellow employee of sexual harassment, the employer must reconcile competing rights: the accuser’s right to a harassment free workplace and the accused’s right not to be disciplined without fair procedures and sufficient proof of wrongdoing.”

What we come down to is that a “fair and honest” investigation should be conducted. It should also be prompt. This investigation, as stated above, has a number of inadequacies some of which go to the very basic core of what is a fair investigation. In summary, if we take the three words “fair”, “honest” and “prompt” one would see that this investigation did not even meet these criteria.

The EEOC guidance contains discuss on how credibility determinations are made. The factors that one should look at are inherent plausibility, demeanor, motive to falsify, corroboration, i.e., witnesses or physical evidence and past record.

Investigators should pursue issues of credibility during the course of the interviews and in connections with his findings.

The investigator should:

- a. Pursue any inconsistencies in an interviewee’s own statements and inconsistencies between statements of one interviewee and another or others.

- b. In making the findings for credibility issues irrelevant, discuss disputed matters and explain the basis for credibility resolutions.

Credibility assessment factors may include:

- a. Bias of the interviewee because, for example, personal dislike, resentment of the alleged harasser's management style, perceived favoritism of another employee or retaliation for a management decision that in some way effected the interviewee.
- b. The demeanor and attitude of the alleged harasser during the course of the investigation and his interview (one who is cooperative and candid during an interview) would be more likely perceived as credible than one who is hostile and evasive.
- c. Inherent implausibility.
- d. Corroboration of the interviewee's account or lack of it.
- e. Past record of the alleged harasser, complainant and other interviews.

We must keep in mind that an investigation of any individual in a sexual harassment case should be made with the most unbiased point of view. In this case, you have an attorney being retained for a fee to do the investigation. I have been involved in these types of investigations and it is my experience that one should act as absolutely unbiased as possible. Some of the ways would be that of a hearing officer, arbitrator or judge during a legal proceeding. References to the Greble article would, I think, be very helpful. He says exactly the same thing.

SUMMARY FINDINGS

The above cases do not go into detail about when these factors are present and when they are not. It is my experience, which in the many cases that I have handled for both plaintiffs and defendants, what should be considered to be fair and impartial investigation, include the following:

1. The investigation should begin promptly and not be unduly prolonged. Simultaneously, with the commencement of the investigation, the employer should take action to stop the allegedly harassing conduct.
2. Meeting with the accuser and the accused as quickly as possible and not let the accused be blindsided to an entire investigation. The alleged harasser should be given a meaningful opportunity to respond to each alleged improper statement or action. The investigator should
 - a. where the allegations are contested, explore possible reasons why an individual would make a meritless complaint or exaggerate or embellish;

- b. give the alleged harasser the opportunity to explain any mitigating circumstances;
 - c. give the alleged harasser the opportunity to identify person he believes should be interviewed and what relevant information each is likely to have;
 - d. allow the alleged harasser the opportunity to contact the investigator if he recalls or learns of additional relevant information.
3. Establish an unbiased approach to the investigation without leading any witnesses one way or another. This interview approach should be documented in the report.
4. Questions of credibility should be discussed especially with key witnesses.
5. Dealing with senior executive issues of retaliation should be carefully discussed and analyzed.
6. Careful notes of the investigation interview should be maintained which in this case is uncertain.
7. Generally speaking the report that is finally made should include the following:
 - Procedural history of the steps the investigator took to complete the investigation.
 - Executive summary of the facts and conclusions.
 - The Fact Section which would first give the source of every factual statement.
 - Only includes facts in this section and of course, not opinion.
 - Include both sides of the story.
 - Describe all relevant facts in a narrative form and not summarize each interview.
 - The conclusion should not recommend discipline; should examine facts and utilize making the five factors when making credibility determinations and describe what happened and why.
 - Any findings of wrongdoing must be bottomed on sufficient proof.
 - Disputed issues should be discussed and credibility determinations explained.
 - The alleged harasser should be given the opportunity to review and respond to the written report before it is finalized.