

Workplace Investigations – Supplement

Alisa B. Arnoff
Scalambrino & Arnoff, LLP
Chicago, Illinois
(312) 629-0545
aba@sacounsel.com
www.sacounsel.com

This Supplement addresses recent cases on various topics covered in Louis Lopez's materials. If you read any of the cases, read the ones marked with an asterisk (*); I found them particularly informative.

Both Louis Lopez' paper and Alisa Arnoff's supplement have been reproduced for this ABA CLE with the permission of the authors – J. Calabrese

I. Timeliness of the Investigation

A. Timely

McCullough v. Kirkum, 2006 U.S. App. LEXIS 31335 (5th Cir. Dec. 20, 2006)(summary judgment for employer affirmed where investigation completed within 11 days of complaint); Williams v. Missouri Dep't of Mental Health, 407 F.3d 972 (8th Cir. 2005)(same where investigation commenced within 3 days of receiving complaint); Hamilton v. Onsite Cos., Inc., 122 Fed. Appx. 283 (8th Cir. 2005) (same where investigation completed within 4 days of receiving complaint); Corbett v. Sealy, Inc., 135 Fed. Appx. 506 (3d Cir. 2005) (same); Collette v. Stein-Mart, Inc., 126 Fed. Appx. 678 (6th Cir. 2005)(same where completed within 6 days); Gross v. White, 173 Fed. Appx. 484 (7th Cir. 2006)(same where employer transferred plaintiff to a facility closer to her home on the day she made her sexual harassment complaint); Edwards v. Midwest Clothiers, LLC, 97 Fair Empl. Prac. Cas. (BNA) 904 (S.D. Iowa 2004) (summary judgment for employer granted where employer responded to complaints within 2 days of receipt); Guider v. Schiff Hardin LLP, 2006 U.S. Dist. LEXIS 71024 (N.D. Ill. 2006) (same); Glenn v. Horgan Bros., 95 Fair Empl. Prac. Cas. (BNA) 1817 (E.D. Pa. 2005) (same where investigation concluded within 9 days of receipt); Aspera v. Copperweld Corp., 2006 U.S. Dist. LEXIS 7546 (N.D. Ill. Feb. 24, 2006) (same where completed within 2 weeks); Adams v. Apple Industries, Inc., 2006 U.S. Dist. LEXIS 78821 (S.D. Ohio Oct. 30, 2006) (same where employer met with harasser the day it received complaint and suspended him 1 week later).

B. Untimely

Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. Jan. 2, 2007) (never); Brandewie v. State of Delaware Department of Correction, 2006 U.S. Dist. LEXIS 89922 (D. Del. Dec. 11, 2006) (3 months); O'Sullivan v. City of Chicago, 2007 U.S. Dist. LEXIS 11456 (N.D. Ill. Feb. 16, 2007)(untimely -investigation took 942 days; verdict for plaintiffs; defense motion for remittitur denied) .

II. Adverse Actions

A. Paid Suspension during Investigation

1. Adverse

Dilettoso v. Potter, 2006 U.S. Dist. LEXIS 2973 (D. Az. Jan. 25, 2006); Singleton v. Potter, 402 F. Supp. 2d 12 (D. D.C. 2005).

2. Not Adverse

Dendinger v. State of Ohio, 2006 U.S. App. LEXIS 28393 (6th Cir. Nov. 14, 2006); Joseph v. Leavitt, 465 F.3d 87 (2d Cir. Sept. 13, 2006); Helmi v. Solvay Pharmaceuticals, Inc., 2006 U.S. Dist. LEXIS 84562 (W.D. Mich. Nov. 21, 2006); Sutherland v. Benton Charter Township, 2006 U.S. Dist. LEXIS 18941 (W.D. Mich. April 13, 2006).

B. Being the Subject of an Investigation

1. Adverse

Velikonja v. Gonzalez, 466 F.3d 122 (D.C. Cir. 2006); *Doucet v. Univ. of Cincinnati, 2006 U.S. Dist. LEXIS 49022 (S.D. Ohio July 19, 2006); O'Neal v. State Univ. of New York, 2006 U.S. Dist. LEXIS 81654 (E.D. N.Y. Nov. 8, 2006).

2. Not Adverse

Dendinger v. State of Ohio, 2006 U.S. App. LEXIS 28393 (6th Cir. Nov. 14, 2006); Mora v. Ashcroft, 142 Fed. Appx. 206 (5th Cir. 2005); Moore v. Tribune Co., 2006 U.S. Dist. LEXIS 66470 (N.D. Ill. Aug. 31, 2006); Singleton v. Potter, 402 F. Supp. 2d 12 (D. D.C. 2005); Dilettoso v. Potter, 2006 U.S. Dist. LEXIS 2973 (D. Az. Jan. 25, 2006); Taylor v. CSX Transp., 418 F. Supp. 2d 1284 (M.D. Ala. 2006) (no tangible employment action because no negative consequences); Johnson v. Nicholson, 2006 U.S. Dist. LEXIS 59673 (W.D. Mo. Aug. 23, 2006); Runkle v. Gonzales, 391 F. Supp. 2d 210 (D. D.C. Sept. 28, 2005).

C. Miscellaneous

1. Adverse

Aden v. Life Care Ctrs. of Am., Inc., 2007 U.S. Dist. LEXIS 699 (D. Kan. Jan. 3, 2007)(employer's summary judgment motion on retaliatory discharge claim denied where it considered plaintiff to have abandoned her job after she told employer she did not wish to work while investigation was being conducted).

2. Not Adverse

Roney v. Illinois DOT, 2007 U.S. App. LEXIS 1008 (7th Cir. Jan. 18, 2007): An employer's truthful statement to the police about an employee is not an adverse action.

III. Evidentiary Issues

A. Witness Statements from Workplace Investigation Admissible

Haughton v. Orchid Automation, 2006 U.S. App. LEXIS 29068 (6th Cir. Nov. 20, 2006) (properly used to demonstrate state of mind and motive of managers in discharging plaintiff). See also Azimi v. Jordan's Meats, Inc., 456 F. 3d 228, 243 n.3 (1st Cir. 2006).

B. Reports

*Chambliss v. Illinois Dep't of Corrections, 2007 U.S. Dist. LEXIS 10534 (S.D. Ill. Feb. 15, 2007) Evidence Investigation reports can be used to who existence of investigation and the information received during the investigation. They are inadmissible for the truth of their substance under FRE 803(8)(C) or FRE 803(6).

C. Attorney-Client Privilege

Ziner v. Cedar Crest College, 2006 U.S. Dist. LEXIS 34858 (E.D. Pa. May 30, 2006): Materials created by outside attorney to investigate gender discrimination claim protected.

D. Bias – “Cat’s Paw”

1. The Biased Investigator

Young v. Dillon Cos., 468 F.3d 1243 (10th Cir. 2006) (summary judgment for employer affirmed where no suggestion that limited scope of investigation was result of investigator bias).

2. The Biased Subordinate

A subordinate bias claim may arise when an individual responsible for the investigation, or a key player in the investigation, makes, or contributes to, a biased report to the ultimate decisionmaker.

***E.E.O.C. v. BCI Coca-Cola Bottling Co.**, 450 F.3d 476 (10th Cir. 2006) (summary judgment for employer reversed); Downes v. Potter, 2006 U.S. Dist. LEXIS 51132 (E.D. N.Y. July 26, 2006) (employer's motion for summary judgment denied); Roundtree v. Johanns, 382 F. Supp. 2d 19 (D. D.C. 2005) (same); Vantassel v. Brooks, 355 F. Supp. 2d 788 (W.D. Pa. 2005) (same); Harlow v. Potter, 353 F. Supp. 2d 109 (D. Me. 2005) (same).

--/--/The **United States Supreme Court** has agreed to hear the **BCI Coca-Cola Bottling** case, Case No. 06-341. The question presented to the Court is:

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee.

Oral argument is set for Wednesday, April 18, 2007.

***Byrd v. Illinois Dep't of Public Health**, 423 F.3d 696 (7th Cir. 2005): Discussion of proper jury instructions in subordinate bias cases.

Foroozesh v. Lockheed Martin Operations Support, Inc., 2006 U.S. Dist. LEXIS 77179 (W.D. Pa. Oct. 10, 2006): Discussion of treatment of subordinate bias claims by various federal appellate courts.

IV. Adequacy of Investigation

Castillo v. Manzo, 2007 U.S. App. LEXIS 2361 (7th Cir. Jan. 17, 2007)(inadequacy of investigation does not give rise to section 1983 claim); Haughton v. Orchid Automation, 2006 U.S. App. LEXIS 29068 (6th Cir. Nov, 20, 2006); Andrews v. Lockheed Martin Energy Systems, 2006 U.S. Dist. LEXIS 68027 (E.D. Tenn. Sept. 21, 2006); Forrester v. Rauland-Borg Corp., 453 F.3d 416 (7th Cir. 2006)(even if an investigation is "shoddy," it does not necessarily follow that pretext exists); Reynolds v. Metropolitan Life Ins. Co., 2007 U.S. Dist. LEXIS 1227 (W.D. Pa. Feb. 20, 2007) (same); Linson v. Lockheed Martin Energy Systems, 2006 U.S. Dist. LEXIS 44662 (E.D. Tenn. June 29, 2006); Pate v. West Publishing Corp., 416 F. Supp. 2d 1275 (M.. Ala. 2006) (okay as long as process not discriminatory); Reed v. Rolla 31 Public School Dist., 374 F. Supp. 2d 787 (E.D. Mo. 2005); Toiler v. American Drug Stores, Inc., 2006 U.S. Dist. LEXIS 84927 (D.

Kan. Oct. 11, 2006) (failure could lead jury to conclude investigation was a sham; therefore, employer's summary judgment motion denied); Alexander v. Potter, 2006 U.S. Dist. LEXIS 48568 (D. Kan. July 17, 2006) (failure to speak with plaintiff's witnesses); Cooper v. Am. Airlines, Inc., 2007 U.S. App. LEXIS 1628 (10th Cir. Jan. 23, 2007).

Humphries v. CBOCS W., Inc., 2007 U.S. App. LEXIS 446 (7th Cir. Jan. 10, 2007)(failure to conduct an investigation, and then discharging the complainant, sufficient to defeat employer's motion for summary judgment on retaliation claim).

Rainer v. Refco, Inc., 2007 U.S. Dist. LEXIS 6635 (S.D. Ohio Jan. 30, 2007) (failure to conduct thorough investigation fatal to employer's summary judgment motion).

Lake v. AK Steel Corp., 2006 U.S. Dist. LEXIS 25118 (W.D. Pa. April 27, 2006) (employer's summary judgment motion denied where investigation interviews lacked confidentiality, investigator failed to consider discipline in connection with discrimination complaint where discriminatory discipline alleged).

V. Criminal or Other Proceedings Stemming from Workplace Investigation

Cowdrey v. Allen, 2006 U.S. Dist. LEXIS 81839 (N.D. Okla. Nov. 7, 2006): Plaintiff police officer filed a civil lawsuit for abuse of process, malicious prosecution and other relief after she was charged with criminal wrongdoing following an internal investigation; the criminal case was dismissed. Her civil claims were all dismissed in connection with the police department's motion for summary judgment.

Reed v. Rolla 13 Public School Dist., 374 F. Supp. 2d 787 (E.D. Mo. 2005): Plaintiff failed to prove the elements of a malicious prosecution case with respect to the cancellation of the administrative hearing.

VI. Faragher/Ellerth Issues

A. Privileges

Austin v. City and County of Denver, 2006 U.S. Dist. LEXIS 32048 (D. Colo. May 19, 2006): Employer hired an outside investigator. Plaintiff sought production of investigator's notes. Employer asserted privilege, stating that investigator essentially functioned as a member of its Human Resources Department in conducting investigation and consulting with its legal counsel. The court initially held that third-party investigator's notes were protected by the attorney-client privilege. However, the employer alleged that it exercised reasonable care and was entitled to the affirmative defense, and the court found that discovery of the investigator's notes was necessary to determine whether it did really exercise reasonable care, so the privilege was not

applied. Further, given that the employer also alleged alternatively that the affirmative defense was inapplicable, fairness dictated that the materials be produced.

Jones v. Rabanco, Ltd., 2006 U.S. Dist. LEXIS 58178 (W.D. Wash. Aug. 18, 2006) (attorney-client privilege does not attach where employer “plans to use evidence of its remedial efforts to evade liability”); Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005) (lose attorney-client and work product privileges); Floeter v. City of Orlando, 2006 U.S. Dist. LEXIS 19577 (M.D. Fla. Apr. 14, 2006).

*Trejo v. Broadway Plaza Hotel, 2006 U.S. Dist. LEXIS 2605 (S.D. N.Y. Jan, 25, 2006)(employer’s counsel said it did not intend to use his investigation into plaintiff’s complaint to support affirmative defense; employer was required to answer interrogatories concerning whether witnesses told defense counsel during the investigation whether certain profanities were said).

B. Employee’s Request Not to Investigate

Hardage v. CBS, 2006 U.S. App. LEXIS 3017 (9th Cir. Feb. 8, 2006) (employer not barred from asserting affirmative defense where employee twice said he did not want employer to intervene).

C. Miscellaneous

Lake v. AK Steel Corp., 2006 U.S. Dist. LEXIS 25118 (W.D. Pa. April 27, 2006): Defense unavailable where investigation inadequate.

*Jackson v. County of Racine, 2007 U.S. App. LEXIS 1635 (7th Cir. Jan. 25, 2007): Defense available where response adequate.

VII. Polygraph Examinations

A. Definition of “Employer”

Fernandez v. Moja-San Miguel Electric Cooperative, Inc., 462 F. 3d 1244 (10th Cir. 2006) (third party polygraph examiner not an “employer” under EPPA).

Watson v. Drummond Co., Inc., 436 F.3d 1310 (11th Cir. 2006) (Union not an “employer” as it lacked sufficient control over the Company).

B. “Ongoing Investigation” Exemption

Watson v. Drummond Co., Inc., 436 F.3d 1310 (11th Cir. 2006) (exemption met where Company and Union had four-step grievance procedure).

Polkey v. Transtecs Corp., 404 F.3d 1264 (11th Cir. 2005) (exemption inapplicable where employer conceded plaintiff no longer under suspicion when it requested exam a second time).

Taylor v. EPOC Clinic, Inc., 437 F. Supp. 2d 1323 (M.D. Fla. 2006) (exemption applied).

Campbell v. Woodard Photography, Inc., 433 F. Supp. 2d 857 (N.D. Ohio 2006) (inapplicable where no particularized suspicion and all employees to be examined).

Schiro v. S. Printing, Inc., 2007 U.S. Dist. LEXIS 4361 (M.D. Fla. Jan. 22, 2007)(jury to determine whether reasonable suspicion existed).

C. “National Defense” Exemption

Polkey v. Transtecs Corp., 404 F.3d 1264 (11th Cir. 2005) (private contractor cannot rely on exemption).

D. Miscellaneous

Richardson v. Dougherty County, 185 Fed. Appx. 785 (11th Cir. 2006) (summary judgment affidavits admissible where affidavits referred to polygraph test to show motivation for investigation).

Watson v. Drummond Co., Inc., 436 F.3d 1310 (11th Cir. 2006) (no EPPA violation where Union requested exam to exonerate employee).

Lyles v. Flagship Resort Dev. Corp., 371 F. Supp. 2d 597 (D. N.J. 2005)(employer entitled to new trial on EPPA claims where it was prejudiced by evidence relating to racial discrimination claim plaintiffs voluntarily dismissed at the end of their case-in-chief, and where damages were excessive).

VIII. Fair Credit Reporting Act

*Kelchner v. Sycamore Manor Health Center, 135 Fed. Appx. 499 (3d Cir. Feb. 10, 2005): The plaintiff sued under the FCRA when she was fired after refusing to sign a blanket authorization to allow the employer to obtain an investigative consumer report. The court found that the employer had a valid employment purpose in seeking the authorization because investigations could be impaired if the employer had to wait until an investigation was commenced before seeking the authorization. The court further said that it was proper to seek a blanket, one-time authorization report. Further, it was appropriate to terminate plaintiff for refusing to consent.

Millard v. Miller, 2005 U.S. Dist. LEXIS 16809 (W.D. Wis. Aug. 9, 2005): The former employer obtained a copy of plaintiff's credit report in connection with its investigation regarding whether she was committing worker's compensation fraud, and provided it to

its insurer. The former employer never sought plaintiff's permission to get the report nor disclosed that they were seeking it. Plaintiff sued under the FCRA. The lawsuit was dismissed because the investigation involved compliance with state worker's compensation regulations, and because the insurer was an agent of the employer.

Woodell v. United Way of Dutchess County, 357 F. Supp. 2d 761 (S.D. N.Y. 2005): The employer's motion for summary judgment was denied where it failed to provide plaintiff with a copy of the credit report it procured in connection with its investigation of her employment history; she was terminated after the report was received. However, the individual sued under the FCRA was dismissed from the lawsuit because there was no evidence he acted as anything other than the employer's agent; he did not obtain the report for a personal reason.

IX. Miscellaneous Cases

*Cottrill v. MFA Inc., 443 F. 3d 629 (8th Cir. 2005) (plaintiff's participation in investigation to catch "peeping Tom" consensual, and thus work environment not objectively hostile).

Hogan v. England, 159 Fed. Appx. 534 (4th Cir. 2005)(summary judgment in Navy's favor affirmed on Privacy Act claim where employee alleged he should have been interviewed first and eyewitnesses need not have been interviewed about his alleged intoxication because he had objective proof of his sobriety).

Tisdale v. Federal Express Corp., 415 F. 3d 516 (6th Cir. 2005)(employer's motion to set aside jury verdict denied where it failed to investigate other employees in addition to plaintiff who could have been involved in theft).

*Colboch v. Morris Communs. Co., LLC, 2007 U.S. Dist. LEXIS 7621 (D. Kan. Jan. 31, 2007) (investigation procedures in employee manual do not give rise to an implied contract).