

# COMMUNICATION AND IMPLEMENTATION OF INVESTIGATION RESULTS:

## Practical Considerations and Common Legal Claims

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### I. INTRODUCTION

Court rulings confirming that employers can use workplace investigations as part of their defense to discrimination and harassment claims as well as wrongful termination claims have caused employers to place greater emphasis on workplace investigations. *See, e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See, e.g., Cotran v. Rollins Hudig Hall Int'l.*, 17 Cal. 4<sup>th</sup> 93 (1998) (in wrongful termination action, jury's role not to determine whether underlying acts proffered by defendant as reason for termination actually occurred, but rather to determine whether defendant's decision to terminate plaintiff was reached honestly and in good faith).

It is important to note, however, that the potential benefits of the most well-planned and effectively conducted workplace investigation can be wasted if due care is not taken in the communication and implementation of the results of the investigation. Put another way, how you develop information and what you discover in an investigation is important, but as important is what you do with the information. *See, e.g., Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11<sup>th</sup> Cir. 2007) (if process by which employer arrives at the remedy is somehow defective, the fact that the remedial result was effective negates complaints about the process); *Huston v. The Proctor & Gamble Paper Products Co.*, 2007 U.S. Dist. LEXIS 37867 (M.D. Pa. 2007) ("If the investigation is lacking, an employer still escapes liability unless the remedial action is also found lacking.")

This paper discusses practical considerations and the common legal claims that arise in connection with the communication and implementation phase of the investigative process.

### II. COMMUNICATION OF INVESTIGATION RESULTS

#### A. When to communicate?

1. Assess whether appropriate/necessary to communicate interim findings with complainant, accused, other witnesses.
2. Interim relief to the complainant should be considered when:
  - a) The complainant is in a highly emotional state.
  - b) The relationship between the parties has become so adversarial that it is disruptive to the workplace, and coming to work has become highly unpleasant to the complainant.
  - c) When the allegations are very serious and believable.
  - d) When the complainant asks for relief.
3. Examples of interim relief include:
  - a) Temporary transfer to a position using the same general skills, with retention of all compensation and benefit levels;
  - b) Paid or unpaid leave of absence until the investigation is concluded;
  - c) Reassignment to a different building, floor, or department, or to a special project that can be completed either at home or in a different work area.

#### B. Who communicates?

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1. Should the person who conducted the investigation be different from the person who determines what the Company's response to the complaint will be based on the investigation?
  2. Should the person who conducted the investigation be present when the results are communicated to the complainant and the accused? Does the answer depend on who (HR, in house counsel, outside counsel, third party consultant) was the investigator?
- C. To whom to communicate?
1. Handle the investigation of a complaint on a "need to know" basis; make sure that facts and opinions are discussed only with individuals who must be involved in the investigation or in deciding the outcome. Complainant? Accused? Supervisor of complainant or accused? Co-workers of complainant or accused? Upper management?
  2. Confidentiality is essential to an effective investigation.
    - a) Keep investigation records separate from other corporate materials.
    - b) Be careful not to put documents into the personnel files of any party.
- D. How to communicate?
1. Attorney-client privilege issues.
    - a) Legal advice likely remains privileged, but attorneys' factual investigation subject to disclosure to extent Company will rely on investigation as defense in discrimination/harassment claims.
  2. In person meeting?
    - a) Who present? Attorney present? Co-worker present? Family member, friend present?
  3. How to document communication?
    - a) Confirming letters to each?
    - b) Notes?
      - (1) Destroy notes once final document (witness statement, report, etc.) upon which notes based prepared?
    - c) Tape recording?
      - (1) Generally not a good idea to record or transcribe verbatim recounts of the alleged discrimination or sexual harassment by complainant since these tend to be emotionally charged and may later reappear as evidence against the Company.
- E. What to communicate?
1. Interim results?

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- a) Witness statements or sworn/unsworn collected?
  - (1) Disclose to complainant?
  - (2) Accused?
2. Final results?
  - a) Written report?
    - (1) Disclose to complainant? Accused?
    - (2) Provide copy or just permit review?
3. Name names?
  - a) Where possible, avoid using the specific party's name. For example, in questioning a witness about Mary's complaint that Bill sexually harassed her, instead of asking, "Did you see Bill touch Mary?" you might ask, "Have you seen anyone at work touch Mary in a way that made her feel uncomfortable?"
4. What if witness requests/demands confidentiality?
  - a) Do not promise absolute confidentiality when interviewing witnesses or complainant.

### III. IMPLEMENTATION OF INVESTIGATION RESULTS

#### A. Prompt effective remedial response is the touchstone.

1. The purpose of any response is to ensure that the conduct stops and does not repeat itself in the future. *See, e.g., Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9<sup>th</sup> Cir. 2001) (employer failed in its remedial obligations where following the complaint, human resources merely asked complainant to report any subsequent offensive conduct and then conducted a handful of spot checks in the two weeks after the complaint, but made no affirmative efforts to investigate complaint); *Knabe v. The Bowry Corp.*, 114 F.3d 407, 412 (3d Cir. 1997) (to shield an employer from liability, a court must determine if the remedial action was "reasonably calculated to prevent further harassment").

"The reasonableness of the remedy depends on its ability to: (1) 'stop harassment by the person who engaged in harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.' When the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment."

*Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 876 (9<sup>th</sup> Cir. 2001), *citing Ellison v. Brady*, 924 F.2d 872, 882 (9<sup>th</sup> Cir. 1991).

2. Examples of ineffective remedial responses.

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- a) *Ellison v. Brady*, 924 F.2d 872, 882 (9<sup>th</sup> Cir. 1991) (employer's response was inadequate, where employer only told accused to stop harassing complainant, did not reprimand or put on probation accused, and did not inform accused that repeated harassment would result in suspension or termination).
  - b) *Speedway Superamerica, LLC v. Dupont*, 933 So. 2d 75 (2006) (employer's remedial measures that included no disciplinary action, no verbal or written reprimands, and instead a recommended promotion for being a "good worker" were not effective).
3. Examples of effective remedial responses.
- a) *Schmansk v. California Pizza Kitchen, Inc.* 1122 F. Supp. 2d 761 (E.D. MI 2000) (where managers responded within days each time plaintiff complained about co-workers by interviewing employees, counseling and, where appropriate, suspending culpable parties and re-educating the staff about company's sexual harassment policies, response was sufficient).
  - b) *Hodoh-Drummond v. Summit County*, 84 F. Supp. 2d 874 (N.D. OH 2000) (where employer immediately placed alleged harasser on unpaid leave pending an investigation which occurred a week later, and 2 weeks after that, placed the harasser on 30 days of unpaid leave, the investigation was sufficient).
- B. When to implement?
1. Assess appropriate/necessary to implement interim measures with complainant, accused, and other witnesses.
  2. Otherwise, implement after investigation completed and decision-makers able to evaluate results.
- C. Who implements?
1. Company investigator (e.g., human resources)
    - a) What if Company counsel investigated?
    - b) Company outside counsel as investigator?
    - c) Non-lawyer consultant as investigator?
    - d) Supervisor of complainant? Accused?
  2. Company legal counsel present? Note: Attorney-client privilege issues.
    - a) Legal advice likely remains privileged, but attorneys' factual investigation subject to disclosure to extent Company will rely on investigation as defense in discrimination/harassment claims.
- D. To whom should employer communicate measures taken in response? *See MacGregor v. Mallinckrodt*, 373 F.3d 923 (8<sup>th</sup> Cir. 2004) (general failure to communicate results of

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investigations to complainants may discourage similarly-situated victims from making additional complaints about civil rights violations).

1. Need to know basis?
  2. What if witness requests/demands confidentiality?
  3. Due process rights of accused?
  4. Okay to announce to entire company discipline of accused and grounds?
- E. How to implement?
1. In person meeting?
  2. Who present? Attorney for employee? Co-worker? Union? Family member, friend present?
  3. How to document communication?
    - a) Confirming letters to accused and complainant acknowledging complaint and investigation, and confirming resolution.
      - (1) Letter to complainant assures no retaliation and urges reporting of any further problems.
      - (2) Letter to accused encloses copy of anti-discrimination/harassment policy, admonishes against retaliation, and confirms corrective action.
    - b) Notes?
    - c) Tape recording?
- F. What to disclose?
1. Name names?
  2. Written report? Because cases involving allegations of harassment or other inappropriate conduct frequently lead to litigation, report of investigation should be done in coordination with counsel and be limited in circulation.
    - a) Provide copy or just permit review?
    - b) Report may/should include:
      - (1) Summary of allegations.
      - (2) Summary of accused's response.
      - (3) List of persons interviewed and summary of statements.
      - (4) List of undisputed facts.
      - (5) List of disputed facts.
      - (6) Conclusions, including findings regarding credibility determinations.

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- G. What are the available, likely measures (corrective actions) to implement in response?
1. Termination
  2. Suspension
  3. Demotion
  4. Reduction in pay/delay in increase
  5. Transfer
  6. Reprimand
  7. Counseling/EAP
  8. Training
  9. Probation
  10. Rearrange work schedules so accused and complainant do not have to work together
  11. Provide closer supervision of parties involved and work group
  12. Redistribute discrimination/harassment and internal complaint policies
- H. What if investigation is inconclusive?
1. It is important for the employer to take some remedial action (*e.g.*, training, distributing policies) even if short of discipline. *See, e.g., Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11<sup>th</sup> Cir. 2007) (summary judgment for employer upheld, where employer unable to substantiate harassment claims, but nonetheless warned accused that if conduct had been proven or did occur in the future, accused could be terminated).

### IV. FOLLOW-UP

- A. After corrective action or other response has been implemented, it is critical to follow-up with complainant periodically to ensure no retaliation or repeat of offending behavior.
1. Ensure that any penalties, corrective actions are actually being complied with.
  2. Document complainant's responses to follow-up efforts, even if complainant indicates no further problems. *See, e.g., Hardage v. CBS Broadcasting, Inc.* 427 F.3d 1177 (9<sup>th</sup> Cir. 2005) (employer's response was appropriate, where, in pertinent part, response included human resources meeting with complainant two weeks after company had addressed complainant's concerns).
- B. Employer ratification. *See Hart v. National Mortgage & Land*, 189 Cal. App.3d 1420, 1430 (1987) (employer's failure to investigate and follow up on claims of harassment could constitute "ratification," making employer a "joint participant" in supervisor's misconduct).

### V. COMMON LEGAL CLAIMS

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### A. Defamation

1. A workplace that implies that the accused engaged in the wrongdoing alleged may give rise to a claim for defamation if the claim is later proved false.
2. With that said, an employer has a qualified privilege to do and say what is necessary to conduct its business--in this case, investigate the complaint. *See, e.g., Dent v. Smith*, 414 So. 2d 77 (Ala. 1982) (defendant's statement regarding plaintiff in course of theft investigation privileged even though plaintiff found not-guilty of stealing). The privilege, however, can be lost by:
  - a) Discussing the situation with too many people. *See Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) (defamation where persons who have no need to know of the results of an investigation are told about them). *But see, Colboch v. Morris Communications Company, LLC*, 2007 U.S. Dist. LEXIS 7621 (D. Kan. 2007) (company president's announcement at all-hands staff meeting that accused was no longer associated with company, company did not tolerate harassment, and that company had a 1-800 number for employees to report any type of harassment, were not defamatory).
  - b) Acting or appearing to act out of malice toward the complainant.
  - c) Making statements believed to be truthful but with no factual basis for the belief in their veracity.
  - d) Conveying information for no proper purpose.
3. In the workplace, statements made in connection with an investigation may be defamatory *per se* because they involve the plaintiff's competence at work. *See Loughry v. Lincoln First Bank*, 494 N.E.2d 70 (1986) (holding accusations of cocaine use and larceny supported claim for defamation).
4. Statements made to co-workers can serve as a basis for defamation actions. *See, e.g., Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001) (employee's contention that slanderous statements were made to her by coworkers and managers and her demotion from server to busboy created an issue of fact as to whether employer deliberately created intolerable working conditions as perceived by a reasonable person with the intention of forcing complainant to quit); *Jones v. J.C. Penny*, 297 S.E.2d 339 (Ga. App. 1982) (statements of reasons for an employee's discharge); *McCone v. New England Telephone*, 471 N.E.2d 47 (Mass. 1984) (statements made in internal performance evaluations); *Loughry*, 494 N.E.2d at 70 (statements made during corporate meetings); *Gordon v. St. Joseph's Hosp.*, 496 A.2d 132 (R.I. 1985) (statements made in internal correspondence and memoranda); *Sturdivant v. Seabound Sys.*, 459 A.2d 1058 (D.C. App. 1983) (statements made in internal security reports).
5. Truth as a defense can protect an employer from liability even if the precise literal truth of the defamatory statement cannot be established. *See, e.g., Wehling v. C.B.S.*, 721 F.2d 506 (5th Cir. 1983) (holding that the television

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station's statements about accused's wrongdoing were sufficiently close to the truth not to be defamatory).

### B. Invasion of Privacy

1. Various types of surveillance can give rise to invasion of privacy claims. *See, e.g.,* R. A. Smolla, *The Law of Defamation* § 10.03[2][a] (1998); *Pinkerton Nat'l Detective Agency v. Stevens*, 132 S.E.2d 119 (Ga. App. 1963) (invasion of privacy may result by employer taking investigation outside of the workplace, *e.g.,* peeping through windows of a home); *Reitmaster v. Reitmaster*, 162 F.2d 691 (2d Cir. 1947) (eavesdropping by means of wiretap or microphones); *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (surreptitiously opening one's mail).
2. An employee may, by accepting employment, give implied consent to his employer to maintain surveillance of him in the workplace. *See Schibursky v. IBM Corp.*, 820 F. Supp. 1169 (D. Minn. 1993) (extensive workplace surveillance was not outrageous); *See Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973); *Ribas v. Clark*, 696 P.2d 637 (1985) (wiretaps, electronic monitoring, and eavesdropping on telephone extensions have been held to be an invasion of privacy).
3. Unreasonable intentional intrusion into another person's private affairs, which would be offensive to a reasonable person, may violate the right to privacy. *Compare Anderson v. Low Rent Housing Commission of Muscatine*, 304 N.W.2d 239 (Iowa 1981), *cert. denied*, 454 U.S. 1086 (1981) (responses to press inquiries as to reasons for her termination was privacy violation), with *Cangelosi v. Schwegmann Bros. Giant Super Markets*, 379 So. 2d 836, *aff'd*, 390 So. 2d 196 (La. 1980) (no invasion of privacy where employer had sufficient basis to investigate, investigation was in good faith, brief, and reasonable).
4. Some jurisdictions also recognize a "false light" invasion of privacy tort, based upon the disclosure of true facts which create a false and damaging impression. *See Johnson v. K Mart Corp.*, 5 IER 1605 (Ill. App. 2000) (reversing summary judgment for employer on privacy claims arising from intrusive tactics of private investigators posing as employees in an investigation of employee workplace vandalism, drug use and theft).

### C. Intentional Infliction of Emotional Distress

1. An employer may be liable for intentional infliction of emotional distress if:
  - a) Employer acted intentionally or recklessly;
  - b) Conduct was extreme and outrageous; and
  - c) Employer's actions caused plaintiff severe emotional distress. *See, e.g.,* Restatement (Second) of Torts § 46 (1977); S.M. Speiser, C.F. Krause, and A.W. Gans, *The American Law of Torts* § 16:13 (1999).

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### 2. Illustrative cases

- a) *Kentucky Fried Chicken Nat'l Management Company v. Weathersby*, 607 A.2d 8, 14 (Md. 1992) (employer's removal of keys and suspension of employee in front of customers not extreme conduct; "The workplace is not always a tranquil world where civility reigns. Personality conflicts and angst . . . [and] even a certain amount of arbitrary nastiness may be encountered . . . it is not enough to show that one has suffered emotional distress . . . the conduct complained of must have crossed the threshold of decency into a realm of atrocity. . .").
- b) *Russ v. TRW, Inc.*, 570 N.E.2d 1076, 1082 (Ohio 1991) (misleading employee to believe company pricing practices were legitimate; discharging employee to convey impression he was responsible for practices and targeting employee in federal investigation was outrageous).