CONDUCTING LAWFUL AND EFFECTIVE INVESTIGATIONS REGARDING ALLEGATIONS OF DISCRIMINATION AND HARASSMENT

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I. INTRODUCTION

A. A prompt, thorough, and confidential investigation of all claims of discrimination (including harassment), and appropriate action in the event that discrimination has occurred, can protect an employer against liability under Title VII of the Civil Rights Act of 1964.

1. In the context of sexual harassment, the Supreme Court recently explained that, if the harassing conduct does not culminate in a tangible employment action, the employer can avoid liability if it demonstrates: (a) that it exercised reasonable care to prevent (i.e., trained its employees and had a policy in place against sexual harassment) and correct promptly any sexually harassing behavior; and (b) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer (i.e., did not report the harassment to the appropriate person) or to avoid harm otherwise. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Center of Boca Raton, 524 U.S. 775 (1998).

2. Courts have expanded this defense to other types of illegal harassment (i.e., racial, religious, disability). E.g., Flowers v. S Reg’l Physician Servs., 247 F.3d 229 (5th Cir. 2001).

B. A poorly conducted investigation, on the other hand, may subject the employer to suit by either the complainant or the accused harasser under several other possible theories, including defamation, breach of contract, intentional infliction of emotional distress and invasion of privacy.

C. Fortunately, an employer (and individual supervisors) can greatly reduce its (and their) risk of liability by establishing and following detailed procedures which provide for the prompt and thorough investigation of claims of discrimination. The following materials are designed to assist in the process of conducting an investigation regarding such allegations. Although no single investigative process will be appropriate in every case, there are a number of guidelines an employer should follow to fulfill its statutory duty to conduct a prompt and thorough investigation of a discrimination complaint.

II. INTERVIEWING THE COMPLAINANT

A. Any number of occurrences can trigger the need to conduct an investigation of a claim of discrimination, including:

1. Complaints made pursuant to an internal complaint procedure;

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2. Complaints filed with the EEOC;

3. Informal reports of harassment;

4. Indications from an aggrieved or third person that inappropriate conduct is occurring;

5. General office knowledge of harassing behavior; or

6. Virtually any other signal which would put the employer on notice of possible discrimination.

B. Pursuant to an employer’s internal complaint procedure, most complaints of discrimination will be brought to its Human Resources Department. The names, responsibilities, work locations, and phone numbers of the appropriate individuals in Human Resources should be readily available to employees so that an employee seeking such information can remain inconspicuous to other employees in the area in which he or she works.

C. Upon learning of the complaint, the employer should promptly conduct an interview with the complainant, keeping the following goals in mind:

1. Explain the investigation process to the complaining employee, including the need to:
   a. Conduct witness interviews;
   b. Obtain any available evidence of discrimination;
   c. Inform the accused of the allegations raised against him or her; and
   d. Allow the accused the opportunity to present any exculpating or mitigating evidence or witnesses.

2. Assure the complainant that the employer takes complaints of discrimination seriously and, in fact, has a legal obligation to investigate all complaints of discrimination, and take prompt corrective action upon discovering evidence that the accused engaged in discrimination;

3. Assure the complainant that the employer will not retaliate against employees who raise legitimate complaints of discrimination and encourage the complainant to report any ensuing incidents of retaliation;

4. Obtain the facts underlying the employee’s complaint, including the time and place of each incident, the conduct in detail, the persons involved in the conduct, and the complainant’s response to the conduct;
5. Identify potential witnesses who can verify the allegations (including asking the complainant who he or she would like interviewed);

6. Ask open-ended questions;

7. Avoid editorial comments during the interview;

8. Obtain any documentation prepared by the complainant reflecting the issues (e.g., memos, diary entries, calendar notations, etc.);

9. Identify any “hard” evidence (photographs, notes, letters, gifts, medical reports) — even if the complainant no longer has these in his or her possession, attempt to secure a detailed description of them;

10. Determine if the complainant discussed the discrimination with other employees, especially supervisors;

11. Ask the complainant what measures he or she believes would solve the problem or what action he or she would like the employer to take as a result of the alleged discrimination, but inform the complainant that the decision as to what action will ultimately be taken remains with the employer;

12. Determine whether the complainant (or any other alleged victim identified by the complainant) should be referred to an employee assistance plan or health care provider;

13. Request that the complainant meet with the employer’s investigator again to discuss the complaint further. Many times the complainant may be emotional, or the investigator needs to evaluate the facts initially presented;

14. Explain that the employer will attempt to protect confidentiality, but only consistent with conducting an effective investigation. However, you should not guarantee confidentiality because, of necessity, some information will need to be revealed during the course of the investigation; and

15. Give the complainant a time frame within which the investigation should conclude and when the results will be conveyed.

D. Document the interview:

1. Take full and complete notes of the facts disclosed during the interview; and

2. Record exact words of the complainant where possible.
III. PREPARING FOR THE INVESTIGATION

A. The law requires that employers take “prompt and immediate” measures to investigate any complaints of harassment. As a general guideline, an investigation into any complaint of misconduct should be commenced within a few days following the receipt of the initial complaint.

B. The investigator should review the notes of the initial interview with the complainant prior to taking any other action. The investigator should also review the personnel files of the persons involved, as well as any relevant company records (i.e., time records, expense reports, notes, or letters between employees, e-mail or voice-mail communications, and telephone records).

C. The investigator should draft a timeline for the investigation that sets deadlines for completing witness interviews and the summary report. In so doing, the investigator should decide on the order of the witnesses, taking into account the availability of the witness and determining which witnesses, if any, might try to influence the testimony of others (which would require that their interviews be scheduled last).

D. Maintaining investigation files: The investigator must carefully document each aspect of the investigation, and maintain all documents in an organized manner.
   1. Establish a confidential investigatory file for all notes and records created during the interview process, as well as any documents reviewed or received during the investigation.
   2. Do not destroy any documents in the investigatory file without first consulting with counsel.

E. The investigator should prepare a general outline of questions for each witness interview. As the interviews proceed and more information is discovered, the interview outlines should be revised accordingly.

F. The investigator should review all relevant policies relating to the alleged discrimination, as well as the work area where the misconduct allegedly occurred.

IV. CONDUCTING WITNESS INTERVIEWS

A. As set forth above, preparation of interview outlines for each witness prior to the interview is essential. During the course of the interviews, however, the investigator should remain flexible and ask logical follow-up questions to discover all relevant information.
B. Each witness should be interviewed separately in a relaxed atmosphere in a location removed separate from the workplace, if possible.

C. Do not tape record the conversation. There are legal limitations on your ability to tape record, and tape recording will likely inhibit the conversation.

D. At the outset of each interview, the investigator should explain to the witness the following details:

1. The conversation is part of an internal company investigation that is intended to be confidential, and that any breach of the confidentiality can result in discipline.

2. The company maintains an anti-retaliation policy, and the employer will respond promptly to any action the witness believes was taken in retaliation for providing information during the investigation.

3. The investigator should not promise absolute confidentiality, explaining that the employer has an obligation to investigate alleged misconduct and take appropriate corrective action. In so doing, the employer needs to allow the accused to know the allegations that have been made against him or her and respond accordingly.

E. An attempt should be made to obtain the witness’ own description of relevant events in his or her own words. In order to accomplish this goal, the investigator should take the following approach:

1. Ask open-ended questions to allow the witness to provide a narrative (as opposed to the witness adopting the investigator’s version of facts by simply answering “yes” or “no”);

2. Remain neutral at all times and avoid expressing — either by words or body language — approval or disagreement with the witness’ statements;

3. Do not divulge information previously gathered; and

4. Do not express any opinion, or make any promises, regarding the outcome of the investigation. The investigator’s opinion might change during the investigation, but any hint of a likely outcome might influence the witness’ testimony.

F. If the witness is a member of a collective bargaining unit, and there is any chance that the witness could be subject to disciplinary action, determine whether the witness is entitled to union representation during the interview. Under the Labor Management Relations Act, there is generally an entitlement to representation during any investigation that may result in discipline. Under the Railway Labor
Act, there is no general entitlement to union representation although such an entitlement may exist as a result of past practice or a specific collective bargaining agreement. If the employee is entitled to union representation, the investigator should inform the witness of his rights, and ask whether he or she wants a union representative present. If the witness answers in the affirmative, the investigator should allow the witness to re-schedule the interview within a short time period for the witness to make appropriate arrangements with the union.

G. Take thorough and accurate notes of every interview, carefully noting the source of each statement or fact gathered. The notes should distinguish between statements based on personal knowledge, attributable hearsay, mere gossip, and pure speculation. In addition, the notes should detail the credibility of each witness and such evaluations should be made throughout each interview. *Finally, the investigator should keep in mind that the original notes may be used in evidence and, therefore, should look professional and organized and should contain only relevant information.* Do not destroy any notes without first consulting with counsel.

H. Evaluate the credibility of each witness. Research personnel records or any other source of information that might suggest that the witness has a general reputation for dishonesty or a motive to misrepresent facts in the investigation at issue.

I. Explore inconsistencies in the information gathered from different witnesses so that, as much as possible, you can put together an accurate and consistent account of the events that took place.

J. At the end of the interview, the investigator should express gratitude for the witness’ cooperation, and ask each witness to report any further information that is discovered after the interview, or that the witness failed to report.

V. INTERVIEWING THE ALLEGED PERPETRATOR

A. In general, the guidelines for conducting an interview of the alleged perpetrator are similar to those guidelines outlined above for the complaining party and potential corroborating witnesses.

B. It is a good idea to obtain as many facts as reasonably possible before interviewing the alleged perpetrator.

C. With the alleged perpetrator, it is important to stress that no conclusions have been reached and the company is using this interview to secure his or her responses to the allegations made.

D. It is equally important to acknowledge the possibility of false accusation and to stress to the alleged perpetrator that the company takes false allegations of
misconduct seriously and the investigation is designed to determine, to the extent reasonably possible, whether the particular allegations are true or false.

E. Explain the employer’s policy regarding discrimination, and the disciplinary procedures, including discharge, that may be invoked if the investigation results in a finding that discrimination did occur.

F. Ask questions in a non-accusatory manner. Inform him or her that the investigation will be conducted fairly and impartially.

G. From the outset of the interview, the alleged perpetrator should be advised of each contention made and asked to respond to each contention with as much information as possible.

1. During the interview, there is no need to identify the source of information presented to the alleged perpetrator — it should be sufficient to introduce a topic with a statement such as: “It has been reported . . .” That introduction, however, should be followed by all the details at the investigator’s disposal. In many instances, those details may reflect the source of information but that cannot be helped.

2. Show the alleged perpetrator any of the “hard” pieces of evidence uncovered in the investigation (or, if not available, then provide the alleged perpetrator with as detailed a description as possible).

3. The alleged perpetrator should be asked to identify any witnesses that could support his or her version of the facts, as well as any documentary or other physical evidence relevant to the allegations.

4. If there has been any complaints about the particular individual in the past, the outcome of those complaints, including disciplinary actions should be referenced.

5. As with all other witnesses, the investigator should:
   a. Take thorough and accurate notes during the interview;
   b. Explain (in no uncertain terms) that retaliation against any individual who provided information during the investigation will not be tolerated and will result in appropriate discipline;
   c. Stress the confidential nature of the investigation; and
   d. Remind the individual to immediately report any additional information that may not have been discussed during the interview.
VI. IDENTIFY OTHER SOURCES OF INFORMATION AND CONDUCT FOLLOW-UP INVESTIGATION

A. Interview witnesses identified by the alleged perpetrator. These interviews should follow the same format as those with the witnesses identified by the complainant.

B. Even though a particular individual was not mentioned as a potential witness, if documents or other circumstances indicate that the person may have information to offer, he or she should be interviewed.

C. Review the interview notes to identify any inconsistencies in eyewitness accounts or other information gathered from other witnesses. Certain witnesses (especially individuals who were initially interviewed) may have to provide subsequent interviews to explore new areas of inquiry or confirm later-reported evidence. Although it may be difficult to determine with certainty what actually occurred, it is critical for the investigator to take all reasonable steps to put together a complete and consistent picture of the events.

VII. PREPARATION OF A FINAL INVESTIGATIVE REPORT

A. After the investigator determines that all necessary interviews have been conducted and all other sources of information have been reviewed, he or she should prepare a final investigatory report for use by the decision-makers with respect to any necessary remedial action.

B. The final investigation report must necessarily be thorough and accurate regarding the scope of the investigation and the facts ascertained through the investigation.

C. The report should include a summary of the nature of the charges, the scope of the investigation, the findings reached, and the reasons therefore. The investigator should keep in mind that the complainant, the alleged harasser, the EEOC, and/or a jury may eventually see the report. It is therefore imperative that the written report be reviewed with counsel prior to dissemination to ensure that all statements are supportable factually and that no admissions are made which could injure the employer’s legal position.

D. Carefully consider whether the investigator should actually conclude that discrimination occurred. This is basically a legal conclusion and may limit the employer’s litigation strategy unnecessarily. A conclusion that inappropriate conduct and/or a violation of Company policy occurred may be preferable to a finding of discrimination.
E. *It is very important that the investigator does not include discussion of any information that is not directly relevant to the specific allegations under investigation.* For example, do not make gratuitous comments regarding a supervisor’s ability to manage. If new information surfaces during the investigation which is important but not directly relevant, conduct a separate investigation or draft a separate memo regarding this information.
VIII. MAKING AND COMMUNICATING THE DECISION

A. Making the Decision

1. The investigator and the decisionmaker(s), as well as in-house counsel and possibly outside counsel, should carefully review the final investigative report and assess whether there is substantial evidence to conclude whether or not the alleged misconduct actually occurred.

   a. The employer should evaluate the credibility, as well as the potential admissibility, of the evidence it deems most significant in reaching its conclusion.

   b. The employer need not be absolutely certain that its conclusion is objectively correct. Rather, the employer must have a good faith and reasonable belief that its conclusion is based on substantial evidence and more likely than not supports what occurred.

2. In determining what corrective action to take, the decisionmaker(s) should review previous disciplinary actions taken in conjunction with similar instances of misconduct. It is essential that consistent forms of discipline be administered when confronting employee misconduct, not only to instill confidence in the process but to avoid charges of favoritism or even discriminatory bias.

3. Remedial options to consider include:

   a. Providing training to supervisors and subordinates;

   b. Private counseling for the employees involved;

   c. Appropriate disciplinary action;

   d. Reinforcing the employer’s policy prohibiting discrimination and retaliation;

   e. Reiterating to all employees in the shift/department/station the employer’s intent to enforce strictly the policy with appropriate disciplinary action.

B. Communicating the Decision

1. Once the employer has reached a decision about the manner in which it intends to respond to the results of the investigation, a “closure”
memorandum should be prepared and provided to both the alleged victim and the accused.

a. The closure memorandum should be reviewed by legal counsel prior to being forwarded to the alleged victim and the accused.

b. The alleged victim and accused should be provided with the closure memorandum during an in-person discussion with the decisionmaker.

c. The decisionmaker should remember that the employer’s good faith will be partially evaluated on the reason given to the employee for his or her termination.

2. The closure memorandum should include:

a. A brief summary of the investigation, e.g., the individuals interviewed, documents reviewed, etc.

b. The employer’s findings and decision.

3. If the employer determines that no discipline is necessary, the employer should consider the following measures:

a. Advise the complainant that the employer has discussed its prohibition against the misconduct at issue (e.g., sexual harassment) at length with the accused.

   (1) Emphasize that the company expects the complainant to report promptly any future occurrences of perceived misconduct; and

   (2) Reiterate that the company will not tolerate any form of retaliation against the complainant and he or she should report any such conduct immediately.

b. Remind the accused that even though the company did not conclude that the alleged misconduct occurred, such misconduct is prohibited by the employer. Reiterate that the company will not tolerate any form of retaliation against the complainant or any other individual that participated in the investigation, and that if any such conduct occurs, appropriate discipline, up to and including termination, will be imposed.

4. If the employer determines that discipline will be imposed, then the alleged perpetrator should be advised of the pending discipline and any
internal review procedures that might be available to him or her under company procedures (or collective bargaining agreements). In addition, the employer should notify the alleged victim of the discipline that was imposed upon the alleged perpetrator.

5. The closure memorandum should be maintained with the investigative report in a segregated file, not the employees’ respective personnel files. If a decision is made to impose some form of disciplinary action, then that action should be documented and the documentation retained in the individual employee’s personnel file.

6. Maintain communications with the complainant (regardless of the employer’s conclusion) in order to monitor the absence of any retaliatory misconduct or the reoccurrence of any other inappropriate conduct.
   a. This continued follow-up will reinforce in the complainant’s mind that the employer took the complainant seriously and intends to prevent such occurrences in the future.
   b. Caveat: make sure the follow-up cannot be perceived as “retaliation.”

C. Timeliness of the investigation and decision is critical. The entire process should take no more than two to three weeks – any longer and the “promptness” of the investigation will be questioned.

IX. BALANCING NEED TO DETER FUTURE WRONGDOING WITH NEED TO AVOID EXCESSIVE PUBLICATION.

A. While truth is a defense to defamation, a false complaint or report concerning wrongdoing (or statements of any witness who unnecessarily “exaggerates” the truth) may lead to a possible defamation suit by the alleged wrongdoer.

B. Allegations of wrongdoing inevitably are disclosed to some extent during the investigation of the wrongdoing. Statements made during investigations may be protected by a qualified privilege. A qualified privilege generally protects company investigators and witnesses who make defamatory statements in good faith and for a proper purpose to one who has a legitimate interest in or duty to receive the information. There are actions that should be taken to maximize the availability of the qualified privilege including:
   1. Aim to protect the reputation of the complaining party (if any) and the alleged wrongdoer;
   2. Be mindful of potential liability for defamation on the part of the investigator, witnesses, and the parties directly involved;
3. Keep the investigative file separate from personnel files (see discussion above) and limit access to those persons required to have access;

4. Discuss allegations and information only with interested parties; and

5. Admonish each witness not to discuss the matter with others, and inform each of the risk of defamation if the incident is discussed outside the confines of the investigation.

X. CONCLUSION

A. When properly conducted, confidential, prompt, and thorough investigations are the best way for the employer to reduce liability for claims of discrimination.

B. The employer is more likely to be shielded from liability in a harassment suit if it can demonstrate that established harassment complaint procedures were in place, the complaints of harassment were promptly and thoroughly investigated, and that appropriate remedial actions were taken.

C. The employer can also greatly reduce liability for invasion of privacy arising out of a harassment investigation by maintaining confidentiality to the extent possible, and by ensuring that those persons selected to conduct investigations are experienced, well-trained, and sensitive to the privacy expectations of the company’s employees.