

Pitfalls of Ineffective Investigations

Presented by
Bradley W. Howard, Esq.
806-345-6310

bhoward@bf-law.com

© 2018 Brown & Fortunato, P.C.



Conducting Proper Investigations

...

Conducting Proper Investigations

- Conducting proper investigations in the workplace is important because
 - it encourages reporting by employees;
 - enforces company policies and procedures;
 - ensures employee's misconduct is addressed and properly disciplined,
 - and limits liability for employer,which can provide a defense and protect the employer in future litigation.

Conducting Proper Investigations

- Conducting workplace investigations has become one of the most challenging duties for employers now because of shifts in workforce dynamics and new laws being implemented.

Employer Has a Duty to Investigate

...

Employer Has a Duty to Investigate

- Employer should have sufficient policies put in place so employees feel comfortable reporting misbehavior in the workplace, i.e. anti-discrimination and anti-harassment policy enforcement, a policy encouraging employees to submit complaints without fear of retaliation, employee training on policies and procedures, complaint forms, etc.

Employer Has a Duty to Investigate

- Employer must thoroughly investigate alleged harassment, discrimination, or any other misconduct once the employer “knows or should have known” of the alleged misconduct.
- Allegations should be investigated promptly, fully, and fairly.

Formal Investigation May Not
Always Be Required

...

Formal Investigation May Not Always Be Required

- Depending on the type of misconduct, if minor, a formal and full investigation may not be required.
- However, the alleged conduct will still have to be sufficiently addressed in a prompt manner and documented.

Pitfalls of Ineffective Investigation

...

Pitfalls of Ineffective Investigation

- Ineffective investigations can lead to expensive litigation, distrust in the workplace, and bad policies.
- Employers should avoid certain pitfalls in ineffective investigations to ensure they are conducted properly.

Pitfalls of Ineffective Investigation

- Common pitfalls for employers to avoid include
 - Failing to implement adequate complaint mechanisms
 - Failing to investigate
 - Delaying investigation
 - Failing to conduct a thorough investigation
 - Biased investigator/investigation
 - Aggressive and overzealous investigator
 - Failing to reach a conclusion/evaluate evidence

Pitfalls of Ineffective Investigation

- Common pitfalls for employers to avoid include (cont'd.)
 - Failing to take action/inconsistency
 - Inadequate documentation
 - Retaliation

Failing to Implement Adequate Complaint Mechanisms

...

Failing to Implement Adequate Complaint Mechanisms

- Employers should have an adequate complaint mechanism in their company policy for reporting misconduct in the workplace.
- It is important for employees to feel comfortable and for employers to provide a safe environment to bring complaints.

Failing to Implement Adequate Complaint Mechanisms

- Examples of effective complaint mechanisms include
 - Have a standard complaint form and designate multiple people in the workplace to receive complaints
 - Have a strict no-retaliation policy
 - Indicate that complaints of misconduct will be addressed with the proper department and thoroughly investigated
 - Ensure employees that if employer concludes there was misconduct, appropriate action will be taken

Failing to Investigate

...

Failing to Investigate

- Failing to investigate reported misconduct illustrates an indifference to employee's well-being in the workplace and disregard for their legal rights and can lead to significant legal exposure.
 - For example, if an employee reports sexual harassment or discrimination to an employer and/or manager and no investigation is conducted, the employee may be able to sue the employer for damages.

Failing to Investigate

- Failing to investigate also prevents proper discipline and deterrence if the investigation would have led to a finding of misconduct.
- A formal investigation may not always be required in minor misconduct instances, as discussed earlier; however, an inquiry will still need to be made and a result reached to ensure the employer covers its bases and limits future liability.

Failing to Investigate

- Practice Tip

- Even if an employee insists that a matter has been resolved and not to conduct an investigation, an employer should at least look into the matter further and conduct an inquiry if it is serious misconduct. It is important to never ignore complaints of wrongdoing and is simply good business practice to take workplace problems seriously.

Delaying Investigation

...

Delaying Investigation

- Investigations should always be done promptly after employer becomes aware of any alleged misconduct.
- Waiting to investigate a certain allegation can result in
 - evidence disappearing,
 - a witness's memory fading,
 - and potential for misconduct to continue.
- Delaying an investigation can also lead to legal exposure.

Delaying Investigation

- The Fifth Circuit stated that in certain circumstances it has found that an employer took “prompt remedial action” because “it took allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigation.”
Williams-Boldware v. Denton County, Tex., 741 F.3d 635, 640 (5th Cir. 2014).

Failing to Conduct a Thorough Investigation

...

Failing to Conduct a Thorough Investigation

- Employers must be sure to conduct thorough investigations to avoid reaching a conclusion prematurely, performing a sloppy investigation, and overlooking important evidence or key witnesses.
- The consequences of failing to conduct a thorough investigation can lead to inappropriate discipline or no discipline at all where remedial action should have been taken.

Failing to Conduct a Thorough Investigation

- If legal liability results, an employer may be left defenseless in court because it won't be able to rely on the results of its investigation if the investigation was conducted poorly.

Failing to Conduct a Thorough Investigation

- Examples of a thorough investigation include
 - Make a plan for the “scope of the investigation”
 - who will be the investigator?
 - what will be investigated?
 - what evidence will be needed?
 - who to interview?
 - Wait until an investigation is fully complete before evaluating the evidence and making a decision.
 - Avoid other pitfalls that add to the ineffectiveness of the investigation.

Failing to Conduct a Thorough Investigation

- The Fifth Circuit has stated “whether an employer’s response to discriminatory conduct is sufficient will necessarily depend on the particular facts of the case—the severity and persistence of the harassment, and the effectiveness of any initial remedial steps.” *Williams-Boldware v. Denton County, Texas*, 741 F.3d 635, 641 (5th Cir. 2014).

Failing to Conduct a Thorough Investigation

- Practice Tip

- Interview all relevant witnesses and follow the evidence where it leads, even if it uncovers a bigger scheme in the workplace or if the evidence points to a high-level employee.
- While it may be uncomfortable to investigate someone high up in the chain of command (e.g. an assistant city manager, HR Director, or a fire or police department chief), it is part of leading a thorough investigation.

Biased Investigator/Investigation

...

Biased Investigator/Investigation

- Appointing a biased investigator or conducting a biased investigation will definitely lead to an ineffective investigation and can result in legal liability (e.g. asking a subordinate of the accused to head up the investigation of an incident).

Biased Investigator/Investigation

- Having an objective investigator is a principal component in a fair and thorough investigation.
- That is why the employer should be alert to any potential conflicts when choosing an investigator, such as whether the investigator and complainant are friends/enemies or whether the investigator is part of the misconduct.

Biased Investigator/Investigation

- Many employers have been criticized by courts because of who they selected as an investigator, and the results of the investigation can be called into question.
- For example, it would be inappropriate for a supervisor to investigate alleged misconduct by an employee if the employee has previously accused the supervisor of wrongdoing.

Biased Investigator/Investigation

- Appropriate investigators include a Human Resources representative, a supervisor, an outside person, or an attorney.

Biased Investigator/Investigation

- Practice Tip

- If you are selected as the employer's investigator and feel that you might lack the skills or training or otherwise believe you will not be able to stay objective during the investigation, ask if someone else within the workplace can take your place, or maybe the employer will want to hire an outside investigator.
- Unbiased investigations are vital for conducting a proper investigation and for limiting liability of the employer in case of future litigation.

Aggressive & Overzealous Investigator ...

Aggressive & Overzealous Investigator

- While it is the investigator's job to find out certain information and extract the truth from witnesses, it is important that the investigator respect employee's rights and privacy.
- It is not okay to use coercive techniques or restrain employees against their will when questioning them for an investigation. Aggressive questioning and refusal to dismiss employees may result in a legal claim for false imprisonment.

Aggressive & Overzealous Investigator

- Investigators should ask straightforward questions and always be respectful and fair. If the employee refuses to answer questions for a workplace investigation, there are other ways to appropriately discipline them for obstructing the investigation.
- Investigators should not automatically make the assumption that employees alleged of misconduct did, in fact, commit wrongdoing. They should be fully prepared to hear both sides of the story.

Aggressive & Overzealous Investigator

- Practice Tip

- When conducting an interview, allow the witness/employee to feel comfortable in the environment first by asking open-ended and easy questions. Employees accused of the misconduct will most likely be nervous and possibly defensive; therefore, the investigator should start with a casual dialogue and build up to the tougher questions. However, the investigator should focus on the facts and keep an open mind, which goes back to conducting an unbiased investigation.

Failure to Reach a Conclusion

...

Failure to Reach a Conclusion

- Failure to reach a well-reasoned and informative conclusion is a common mistake made by investigators when conducting investigations.
- Decisions should be reached by evaluating all of the evidence as a whole and determining whether the allegations of misconduct have been substantiated.
- Investigators often must make witness credibility determinations and identify if certain evidence is corroborative or contradictory.

Failure to Reach a Conclusion

- Reaching a well-informed conclusion is also necessary to create a final investigation report detailing the decision reached.
- The report should include a detailed analysis of the investigator's conclusion, reasons for reaching that conclusion, credibility determinations, and all relevant facts.

Failing to Take Action/Inconsistency ...

Failing to Take Action/Inconsistency

- Failing to take action when employee misconduct has been determined and an investigation report has been issued is another common pitfall of ineffective investigations.
- When an employer fails to take action after a conclusion affirming the misconduct is reached, the victim is left with no administrative recourse and the problematic behavior is likely to continue.

Failing to Take Action/Inconsistency

- A court will often look into whether remedial actions were taken and if the action is consistent with company policy and is a similar response to infractions in the past.
- The two main objectives of corrective action should be
 - end the discrimination, harassment, or unsavory conduct and
 - put the victim in the position s/he would have been had decisions been made appropriately.

Failing to Take Action/Inconsistency

- Practice Tip

- Discipline imposed on the wrongdoer must be appropriate to correct the problems the investigation uncovered and should be coupled with positive management practice, such as a reinforcement of the employer's policies or special training to address that specific conduct.
 - It is important for an employer to be consistent with its disciplinary actions because too much or too little discipline can create tension in the workplace and affect employee performance.
 - Inconsistent discipline and accusations that “the punishment did not fit the crime” are often at issue in litigation.

Inadequate Documentation

...

Inadequate Documentation

- Failure to keep adequate documentation during and after the investigation is over can really hurt an employer if an employee brings suit as the investigator's notes, documents, and reports are essential to its findings.
- The investigation alone is not enough.

Inadequate Documentation

- The employer must show that an investigation was thorough and conclusive with sufficient documentation as evidence; otherwise, the investigation can be determined by the court to be ineffective or biased.
- Documentation can include notes from interviews, emails, any evidence obtained, and an investigation report.

Inadequate Documentation

- Practice Tip

- Employer should create a confidential investigation file in which all the documents relating to the investigation will be kept: copy of the complaint; copies of evidence used to reach the conclusion; copies of any notes taken during the investigative process; witness information; copies of remedial action taken, if any; the investigation report; and any other policies or documents pertaining to the incident and/or investigation.
- Investigators/Employers should NEVER throw away or get rid of any documents created or uncovered during an investigation without conferring with legal counsel. If a lawsuit were to ensue after the conclusion of the investigation and some documents or notes were thrown away, this could potentially be considered as destruction of evidence.

Retaliation

...

Retaliation

- If an employer takes any adverse action against an employee for reporting a complaint of harassment or discrimination or participating in a related investigation, it can be considered retaliation.
- Retaliation can be anywhere on a spectrum to firing or demoting an employee to mistreating an employee or transferring them to a different department.

Retaliation

- A retaliation claim can be brought by employees under Title VII.
- Under Title VII of the Civil Rights Act of 1964, an employer is prohibited from retaliating against an employee for reporting a claim of harassment or discrimination.

Retaliation

- In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the Supreme Court held that Title VII not only protects employees who launch complaints, but it also protects witnesses and others who oppose an illegal practice during an investigation. 555 U.S. 271 (2009).

Retaliation

- Practice Tip

- Employers have to be careful about what they do with an employee after they report workplace misconduct, especially harassment or discrimination.
- Even if the employer moves the employee out of proximity of the alleged wrongdoer during the investigation or, otherwise, unintentionally treats the employee differently, it can be seen as retaliation and the employee may bring a retaliation claim.

Other Considerations

...

Failure to Comply with Employee's Due Process Rights

- Public sector employees have certain constitutional rights as a public employee that an employer should always be cognizant of when conducting an investigation.
- These rights include First amendment protection in specific situations, protection against self-incrimination (*Garrity*), and due process before termination or discipline (*Loudermill*).

First Amendment Protection

- Government employees enjoy protection for statements they make as citizens on issues of public concern.
- The First Amendment protection does not extend to statements made by a government employee acting in his/her official capacity or while on the job.

Garrity Rights

- *Garrity* rights protect a public employee from being compelled to incriminate themselves during investigatory interviews conducted by their employers. *Garrity v. New Jersey*, 385 U.S. 493 (1967).
- The *Garrity* right is derived from the Fifth Amendment's protection against self-incrimination, which prohibits the government from compelling a person to be a witness against him/herself.

Garrity Rights

- *Garrity* protects public employees in workplace investigations and provides that the fruits of such inquiry during an administrative investigation cannot be used against the employee in a court of law for criminal case purposes.

Loudermill Hearings

- *Loudermill* rights involve the right of a public employee to receive “some type of hearing and reasonably have a chance to respond to charges/allegations” prior to disciplinary action that removes the employee or takes away some tangible benefit (i.e. suspension, demo in pay). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Loudermill Hearings

- *Loudermill* may be satisfied when the employer provides an adequate opportunity to respond, but employee fails to take the opportunity to respond.
- A *Loudermill* hearing will generally come into play when the investigator has reached a conclusion and the employer decides to take remedial action that affects the employee's employment property right in some way, as described above.

Union Employee Rights (*Weingarten* Rights)

...

Union Employee Rights (*Weingarten* Rights)

- Under *Weingarten*, a unionized employee who reasonably believes that an investigatory interview could lead to discipline is entitled to have union representation at that interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
- The employee must unequivocally request representation, and an employer must cease the interview until a union representative is present.

Union Employee Rights (*Weingarten* Rights)

- Employers are not required to inform employees of their *Weingarten* rights.
- Currently, *Weingarten* rights only apply to employees who are in a union. However, a few years ago the National Labor Relations Board (“NLRB”) extended the right to all employees for a short period.

Confidentiality of Workplace Investigations

...

Confidentiality of Workplace Investigations

- In *Banner Health Systems*, 362 NLRB No. 137 (June 26, 2015), the NLRB disapproved of employer's practice of informing employees to keep information related to internal workplace investigations confidential from other employees.
- This ruling prevents employers from having a blanket confidentiality policy when conducting investigations and employers must prove why a particular investigation requires confidentiality before directing employees to keep quiet.

Confidentiality of Workplace Investigations

- The D.C. Circuit on, March 24, 2017, denied enforcement of the NLRB's *Banner Health Systems* decision that sanctioned Banner Health for maintaining a policy of confidentiality for HR investigations, but only because it found there was no evidence that Banner Health had a specific policy at that time. *Banner Health System v. National Labor Relations Board* No. 15-1245 (March 24, 2017).

Confidentiality of Workplace Investigations

- Therefore, according to the court's ruling, the NLRB's position requiring a case-by-case approach to justify confidentiality in workplace investigations may still be in place because it was not explicitly overruled or rejected.

Workplace Investigation Case Law

...

Workplace Investigation Case Law

- Reviewing case law is an important part of understanding and conducting proper investigations because the court always determines whether a proper investigation was conducted by the employer when the employer uses its investigation to defend itself against claims by employees.
- Case law can help determine what the court is looking for in workplace investigations from the employer and can point out the specific mistakes in improper investigations.

*Mendoza v. Western Medical
Center Santa Ana*

• • •

222 Cal. App. 4th 1334, 166 Cal. Rptr. 3d 720 (2014)

Mendoza v. Western Medical Center Santa Ana

- Facts

- Romeo Mendoza, a nurse at Western Medical Center, reported to his manager that he was being sexually harassed by another male employee, Erdmann, who also happened to be Mendoza's supervisor when they worked the same shift. The human resources department started investigating after the complaint was brought to their attention.
- Mendoza stated that Erdman made inappropriate comments, physical contact, and lewd displays to him while on the job. Erdmann testified that Mendoza consented to the conduct and participated in other mutual interactions to which Mendoza denied.

Mendoza v. Western Medical Center Santa Ana

- Facts

- The employer did not prepare a formal investigation plan nor did it take written statements from Mendoza or Erdmann. Furthermore, both Mendoza and Erdmann had their investigatory interview together by an employee who was not trained to conduct investigations.
- After the investigation concluded, the employer fired both Mendoza and Erdmann for “unprofessional conduct.” Mendoza sued for wrongful termination in violation of public policy and the jury awarded Mendoza for past economic loss and emotional distress.

Mendoza v. Western Medical Center Santa Ana

- **Holding**

- The court remanded the case, declining the hospital's request to direct a judgment in its favor, noting that there was sufficient evidence for a jury to conclude that Mendoza's report of sexual harassment was a substantial motivating factor behind Mendoza's firing.
- The court also noted specific inadequacies in the hospital's investigation which included
 - lack of a formal investigation plan
 - failure to take witness statements
 - delay in interviewing the employees and conducting their interview at the same time
 - allowing investigation to be completed by an untrained supervisor

Mendoza v. Western Medical Center Santa Ana

- Holding

- The court stated that “lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of truth so much as a way to clean up the mess that was uncovered.”

*Handy-Clay v. City of Memphis,
Tennessee*

...

695 F.3d 531 (6th Cir. 2012)

Handy-Clay v. City of Memphis, Tennessee

- **Facts**

- In July 2007, Handy-Clay was appointed as the public records coordinator for the City of Memphis. Handy-Clay used to submit requests directly to City Attorney Jefferson; however, his administrative assistant, Porter, restructured the office organizational chart so that she was directly supervising Handy-Clay.
- Handy-Clay began receiving complaints from the local daily newspaper regarding the delay. She stated that her efforts to comply with the requests were thwarted by Porter and record requests were intentionally being routed to another employee who was not in a position to respond to such requests.

Handy-Clay v. City of Memphis, Tennessee

- **Facts**

- Handy-Clay was also concerned about conduct of other employees in the City's Attorney's Office, violation of city policies, and possible nepotism and favoritism.
- Handy-Clay met with an HR representative and "reported the abuse of city leave policies" and that some employees were "stealing city time", so she made her own records request and also requested an investigation .
- Later that same day, Handy-Clay was terminated. She filed a complaint against the City alleging, among other things, retaliatory discharge and wrongful termination.

Handy-Clay v. City of Memphis, Tennessee

- Holding

- With respect to the retaliatory discharge, the court found that Handy-Clay pleaded factual allegations sufficient to establish that she engaged in constitutionally-protected conduct when she spoke to city public officials and that the City's termination of Handy-Clay constituted an adverse action.
- The court defines adverse actions as "actions such as discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote."

Handy-Clay v. City of Memphis, Tennessee

- Holding

- The court also determined that Handy-Clay's complaints over the years of various members of the Mayor's staff and the fact that she was terminated the day after she made her own records request was "a substantial motivating factor in the employer's decision to take the adverse employment action against her."

E.E.O.C. v. Rite Way Service, Inc.

...

819 F.3d 235 (5th Cir. 2016)

E.E.O.C. v. Rite Way Service, Inc.

- Facts

- Tennort was employed as a general cleaner for Rite Way Service, Inc., a janitorial services contractor. While working, Tennort observed interactions between her supervisor, Harris, and another janitor, Quarles. She witnessed Harris pretending to hit Quarles' bottom while making a lustful comment. Another time, she overheard Harris say he "could tell what was in Quarles' pants pocket" and stated that "somebody must be looking real hard at [Quarles'] behind.

E.E.O.C. v. Rite Way Service, Inc.

- Facts

- Quarles complained and identified Tennort as an eye witness. Tennort submitted a written report about the second incident after which Harris was transferred and replaced with his brother-in-law as supervisor. Tennort began to receive written and oral warnings for job performance and was fired for alleged neglect of duty.
- The EEOC sued Rite Way on Tennort's behalf, claiming that her termination was in retaliation for her report.

E.E.O.C. v. Rite Way Service, Inc.

- Holding

- For protection under Title VII's anti-retaliation provision, courts have generally required that the employee had an objectively reasonable belief that the practice "opposed" was illegal.
- While the district court concluded that Tennort did not engage in protected conduct under Title VII's anti-retaliation provision, the Fifth Circuit reversed and concluded that the "reasonable belief" standard applies equally to persons cooperating in an investigation and not just the person who brought the claim.

E.E.O.C. v. Rite Way Service, Inc.

- Holding

- Furthermore, that Tennort's "belief" was formed from a pamphlet provided by the employer that sexual harassment or conduct of a sexual nature should be reported. The court said this satisfied reasonable belief that opposed activity was illegal under Title VII.

*Jones v. Evergreen
Packaging, Inc.*

...

536 Fed.Appx. 661 (8th Cir. 2013)

Jones v. Evergreen Packaging, Inc.

- Facts

- Jones, an African-American supervisor, was accused by two employees he supervised of making a statement that he “might go postal” if a mandatory meeting with human resources regarding a disagreement with a subordinate resulted in his termination.
- Jones denied these statements, but his employer placed him on unpaid leave and required Plaintiff to complete an anger management class and obtain an evaluation from a doctor showing he did not present a threat of workplace violence before coming back to work.

Jones v. Evergreen Packaging, Inc.

- Facts

- Prior to this incident, on two occasions, a Caucasian employee that Jones supervised, Conner, intentionally caused Jones to be sprayed with water; however, Conner was not disciplined. On another occasion, Conner approached Jones with a wood hook and acted as if he were going to hit Jones; Jones reported it, but Conner again received no discipline because the investigation concluded that it did not threaten Jones's life.
- Jones brought a claim of discrimination against employer.

Jones v. Evergreen Packaging, Inc.

- Holding

- While the court agreed that the employer proffered a “legitimate, nondiscriminatory reason for suspending Jones,” the employer’s disparate treatment of Jones as opposed to Conner could give rise to an inference of discrimination.
- Because both Jones and Conner were similarly situated and both used threatening conduct (Conner’s being physical threat with a potentially deadly tool), the employer did not treat the employees the same in terms of investigation and punishments, i.e. Jones was suspended without pay and without giving him a chance to explain and Conner was not disciplined at all.

Jones v. Evergreen Packaging, Inc.

- Holding

- Therefore, there was sufficient evidence for a fact finder to decide whether the differential treatment of Jones in this situation was a pretext for discrimination.

Pryor v. United Airlines, Inc.

...

791 F.3d 488 (4th Cir. 2015)

Pryor v. United Airlines, Inc.

- Facts

- Pryor, an African American flight attendant at Dulles Airport, found a racist death threat left in her company mailbox which was located in a secure area where only United Airlines employees had access.
- Pryor reported it to her supervisor, but her supervisor responded that nothing could be done because there were no cameras in that area. Furthermore, the incident was not reported to Employee Service Center (“ESC”), which is required by United Airlines’ discrimination policy.
- An investigation was conducted; however, no witnesses were interviewed and no documents or physical evidence were obtained. The investigation was concluded without identifying the culprit or informing Pryor.

Pryor v. United Airlines, Inc.

- Facts

- Ten months later, Pryor, along with nine other employees, received another death threat. United installed cameras ten days later, but did not ever identify the suspect. Pryor filed a complaint against United alleging she was subject to a racially hostile work environment in violation of Title VII.

Pryor v. United Airlines, Inc.

- Holding

- The Fourth Circuit reversed the district court's granting of summary judgment to United holding that although anonymous harassment presents challenges for the employer to identify the culprit and protect victims, the employer still has a duty to investigate.
- The court stated that United failed to promptly respond to Pryor's first complaint in a manner that was reasonably calculated to end the harassment given the severity of the threat.

Pryor v. United Airlines, Inc.

- Holding

- Furthermore, it failed to follow its own policy by reporting the incident to ESC, did not conduct any interviews or obtain evidence, and did not provide Pryor with any security or protective measures.
- Because this investigation was poorly conducted, the court found that a jury could conclude that United's actions (or lack thereof) failed to deter future acts of harassment.

Smith v. Rock-Tenn Services, Inc.

• • •

2016 WL 520073 (6th Cir. 2016)

Smith v. Rock-Tenn Services, Inc.

- Facts

- Plaintiff worked as a support technician on a plant in which he ran machinery. While on the job, an employee back from leave, Leonard, slapped Plaintiff on his tail as he went by. Several other occasions of harassment occurred in which Leonard grabbed his behind and also simulated a sexual act on Plaintiff.
- Plaintiff notified his supervisor and was sent home for the day. The next day he reported it again to his supervisor, but the supervisor responded that he would have to wait another week and sent him back to his work station. Plaintiff then submitted a written request and was granted sick leave because of Leonard's harassment.

Smith v. Rock-Tenn Services, Inc.

- Facts
 - After Plaintiff's written request, management questioned Plaintiff, Leonard, and other employees who made complaints. However, no witness statements or investigatory reports were generated; and Leonard was only suspended for less than two days. Plaintiff did not return to work due to a diagnosis of post-traumatic stress disorder; and his short-term disability ran out.
 - Plaintiff brought suit against the employer for sexual harassment, wrongful termination, and retaliation. The jury found for the Plaintiff because the employer failed to promptly and adequately investigate Plaintiff's claims of sexual harassment.

Smith v. Rock-Tenn Services, Inc.

- Holding

- The Sixth Circuit affirmed the jury's verdict holding that the jury was reasonable, in its determination, that the employer did not promptly initiate an investigation upon Plaintiff's report of Leonard's misconduct and sexual harassment towards him which, in fact, created a "hostile or abusive work environment."

Vandegrift v. City of Philadelphia

• • •

No. CV 16-2999, 2017 WL 105747 (E.D. Pa. Jan. 11, 2017)

Vandegrift v. City of Philadelphia

- Facts

- Vandegrift, a female police detective, reported complaints to Philadelphia's police department of sexual assault and harassment by Chief Inspector Holmes. The harassment took place over the course of her employment with the city, but the sexual assault by Holmes occurred in 2007. The city was also in receipt of an additional complaint from another female employee alleging sexual assault by Holmes.
- During her time employed at the police department, Vandegrift witnessed and experienced coworker and supervisor's making inappropriate sexual comments to and about her that are sufficiently detailed in the opinion.

Vandegrift v. City of Philadelphia

- Facts

- In 2014, Vandegrift made an internal EEO complaint alleging sexual harassment and retaliation; and shortly thereafter, the city moved Vandegrift to a different unit. The city began conducting its internal investigation in which Vandegrift underwent five interrogations. After conclusion of its investigation, the city found only one employee that violated its policy; and Holmes did not receive any discipline as a result of the sexual assault allegations against him.

Vandegrift v. City of Philadelphia

- Facts

- Vandegrift hired an expert in internal investigations to review the city's investigations procedures. The expert concluded that the city's investigation practices and procedures for sexual harassment reports failed to meet appropriate workplace investigation standards.

Vandegrift v. City of Philadelphia

- Facts

- The expert found that the investigators failed to
 - investigate all claims, including Vandegrift's retaliation complaint
 - interview or investigate or even attempt to interview/investigate anyone not currently employed by the police department
 - review or consider background information about alleged harassers
 - failed to judge the credibility of the complainant, witnesses and alleged harassers
- The city charged Vandegrift with misconduct; and she sued for gender discrimination, hostile work environment, and retaliation.

Vandegrift v. City of Philadelphia

- Holding

- The trial court found that Vandegrift presented sufficient evidence to show a genuine issue of material fact with respect to her hostile work environment claim.
- The trial court further found that based on Vandegrift's expert's opinion regarding the city's investigations, the city knew of its specific problems with sexual harassment and assault in the police department but did nothing to stop or prevent the conduct from occurring. The court stated that a reasonable jury could conclude that the city's police commissioner had acquiesced to a custom of sexual harassment by failing to address the offensive conduct of its employees.

*Hanson v. Colorado
Judicial Department*

• • •

564 Fed.Appx. 916 (10th Cir. 2014)

Hanson v. Colorado Judicial Department

- Facts

- Hanson, a support clerk in the probation department of Colorado's Fourth Judicial District, reported in an email to human resources that her immediate supervisor and another supervisor were harassing her and treating her differently because of her race. Hanson said she felt her job was in jeopardy.
- The department assigned a senior HR analyst to conduct the investigation immediately in response to the complaint. The investigator interviewed seven witnesses and found that one of the supervisors contributed to problems between the clerks; however, she concluded that the claims of discrimination and harassment were unsubstantiated.

Hanson v. Colorado Judicial Department

- Facts

- Months later, a volunteer in the department filed a sexual harassment complaint against Hanson. The department then assigned two senior HR investigators to conduct the investigation. During this time, a co-worker brought the investigators' attention to Hanson's fraudulent use of FMLA time, which they independently verified.
- The investigators did not substantiate the sexual harassment claims against Hanson; however, they found that Hanson attempted to interfere in the investigation and also uncovered inappropriate emails sent by Hanson.

Hanson v. Colorado Judicial Department

- Facts

- The investigators recommended that Hanson be terminated. The Chief Judge held a hearing in which Hanson admitted the fraudulent use of FLMA time, and she was terminated.
- Hanson sued alleging that her termination was a retaliatory action for raising her claims for racial discrimination.

Hanson v. Colorado Judicial Department

- Holding

- The court found that any retaliatory motivation by supervisor Hanson accused of harassment was mitigated by the fact that the department conducted two independent investigations, and the decision was made by an independent decision maker who adequately verified facts to reach her conclusion.

Hanson v. Colorado Judicial Department

- Holding

- The court emphasized the importance of thorough and independent investigations into alleged misconduct in the workplace. The fact that the employer assigned independent investigators who conducted interviews and prepared reports with all relevant information found in conjunction with employer's policies, really insulated the employer from allegations of bias or improper conduct in its decision to terminate Hanson.
- Therefore, the employer's thorough and separate investigations independently uncovered Hanson's violations of employer's policies, and her termination was not motivated by retaliation.

Summary

...

Ways to Prevent Ineffective Investigations

- Develop effective and clear policies for reporting, anti-harassment, anti-discrimination, and use complaint forms
- Train managers and employees on policies and procedures
- Avoid common pitfalls
- Be aware of employee rights

Keys to a Successful Investigation

- Prompt, defensible response to all claims
- Select an unbiased investigator
- Conduct a thorough investigation
- Evaluate all relevant evidence obtained in the investigatory process to reach a well-reasoned conclusion
- Appropriate response to allegations
- Preserve a comprehensive investigation file

Questions?

...

The End



Bradley W. Howard, Esq.

Brown & Fortunato, P.C.

905 S. Fillmore, Suite 400

Amarillo, Texas 79101

806-345-6310

bhoward@bf-law.com

www.bf-law.com

