

New Jersey Law Journal

VOL. CLXXXII—NO. 7—INDEX 948

NOVEMBER 14, 2005

ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

By RICHARD H. BAUCH, KATHRYN V. HATFIELD AND DOUGLASS. ZUCKER

Investigating Workplace Misconduct

Why and how employers should conduct internal workplace investigations

Your client forwards an e-mail detailing a sexual harassment complaint received from an employee and asks, “what do we do?” Another client calls to say she just received an anonymous letter reporting financial improprieties in one of their operating divisions and asked, “what do we do?” In each case, the answer is: “Conduct an investigation.”

When confronted with allegations of workplace harassment or unethical or illegal conduct by the company or its employees or agents, employers are legally obligated to investigate those allegations. Both the U.S. and New Jersey Supreme Courts have decreed that employers must investigate allegations of employment discrimination and workplace harassment, or face certain liability. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 775 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998); *Lehman v. Toys R Us*, 132 N.J. 587 (1993).

When the allegations involve assertions of unlawful or unethical conduct, employers’ legal obligation to conduct prompt and thorough investigations

arise as a matter of law under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. and the federal Sarbanes-Oxley Act of 2002. CEPA protects whistle-blowing employees from retaliation for reporting illegal conduct to supervisors or government entities. Sarbanes-Oxley protects employees who testify or otherwise assist in investigations concerning alleged financial improprieties. The U.S. Department of Labor’s regulations require employers to establish internal complaint procedures for reporting financial improprieties, to investigate promptly all complaints, and to rectify any problems uncovered. 18 U.S.C.A. §1514A(a)(2). Under both statutes, failure to investigate and remediate the problem may expose employers to civil liability, governmental investigation and criminal sanctions. See *Higgins v. Pasckack Valley Hospital*, 158 N.J. 404 (1999)

Having answered why employers must investigate, the question remains how to conduct an effective workplace investigation. The Equal Employment Opportunity Commission, in its Enforcement Guidance: Vicarious Employer Responsibility for Unlawful Harassment by Supervisors, <http://www.eeoc.gov/policy/docs/Harasment.html> (6/18/99) (“Enforcement Guidance”), not only requires that

employers conduct “prompt, thorough, and impartial investigations” of employee workplace harassment complaints, but also provides guidance on how to investigate. The Enforcement Guidance provides an effective framework that is adaptable to nearly all internal workplace investigations. The following is based largely on the Enforcement Guidelines.

Timing — Employers must promptly commence investigations of workplace harassment complaints, generally within 24 to 72 hours following receipt of the complaint. Once commenced, the duration of investigations will vary, depending on the particular circumstances of each. Indeed, the length of an investigation relates directly to the number and availability of witnesses, the quantity and complexity of the allegations, the skills of the investigator and the support of the organization. In all instances, employers should start and complete investigations in the minimum time necessary to be thorough and complete.

Precautions — Sometimes employers may need to take intermediate steps during an investigation to ensure that harassment or other conduct does not continue. Acceptable interim measures for harassment investigations may include: changing schedules to avoid contact between the complainant and the accused; transferring the accused; or placing the accused on paid nondisciplinary leave; and issuing general policy reminders to all employees. To avoid retaliation claims, employers should not involuntarily transfer the complainant or impose any negative consequences

Bauch, Hatfield and Zucker are partners in the labor and employment practice group at Schenck, Price, Smith & King of Morristown.

upon them.

Employers immediately should assure complainants that they will not be subject to retaliation because they filed a complaint. Employers also should caution each complainant's supervisor, the accused and other relevant persons that they may not retaliate against the complainant, or they will be subject to disciplinary action including termination. Prohibited retaliation includes discipline, social stigmatization, adverse assignments, etc. Employers should encourage complainants to report any circumstances they believe constitute retaliation.

Confidentiality — It is essential that employers maintain confidentiality throughout an investigation, to the fullest extent possible. Complete confidentiality is impractical because employers must reveal certain information to the accused and to witnesses, but employers should not disclose information except on a "need-to-know" basis. The complainant, the accused and all witnesses must be instructed not to discuss anything about the investigation with anyone inside or outside the company, except the investigator. Confidentiality protects the integrity of each witness' personal knowledge of facts by not confusing them with other's recollections or perspectives. Confidentiality also protects the employer from external media exposure, and protects the complainant and the accused from internal gossip.

At times, an employee may request that his or her identity or complaint be kept confidential or that no action be taken. When faced with such requests, employers should explain that it will try to keep the employee's identity confidential, but that the primary obligation is to uncover unlawful conduct, and that failure to act will not prevent its recurrence and could expose the employer to liability and other adverse consequences.

The Investigator — Selecting a qualified investigator is essential to an effective process. While an employee may serve as the investigator, several limiting factors affect employers' choices. First, neither the accused nor the

complainant may have supervisory authority over the investigator or any direct or indirect control over the investigation. Second, the investigator must have sufficient training in interviewing witnesses and evaluating credibility. Third, if the investigation is particularly complex or sensitive due to the facts or the people involved, and some specific expertise is necessary, the employer may prefer to retain outside counsel or an independent consultant, who is skilled in conducting workplace investigations.

While in-house human resources professionals may have an advantage of knowing the people, the organizational structure and culture, they may be more effective as a resource and support for the investigator, rather than performing the investigation themselves. This allows the HR professional to maintain objectivity and credibility, and by not having any stake in the outcome, they can counsel senior management in understanding the results of the investigation and in recommending disciplinary or corrective responses. Thus, it is often most effective to team an internal person with an external investigator, to maximize knowledge and expertise.

Preparation — A legally sufficient investigation requires a combination of advanced planning to limit the scope and flexibility to modify the plan as necessary. The scope of the investigation includes issues as to who should be interviewed and in what order, and what subjects should be covered. At a minimum, the investigator should interview the complainant(s), the accused and any witnesses reasonably expected to have relevant information. Throughout the investigation, the investigator must avoid making any statements that may indicate that a final decision was reached before the investigation is complete. The appearance of objectivity and integrity is critical to any investigator's effectiveness.

An effective investigator will prepare the questions he will ask of each witness, focusing on both content and sequence. Some questions will apply to all witnesses, while other questions will be tailored to specific individuals.

Questions must be open-ended so they elicit as much information as possible from each interview, without disclosing any more information than absolutely necessary to each witness. The investigator may refresh, but not enhance, each witness's knowledge of the allegations and facts. Investigators also must be prepared to deviate from their prepared list of questions depending on the responses provided by each witness.

Essentially, the interviewer must address the questions of who, what, when, where and how. Simultaneously, the investigator must access nonverbal signals and body language to evaluate each witness' credibility and any motivation behind allegations and responses.

Report — All investigations should generate a written report that details the allegations, the process, the witnesses, any standard questions, the responses and the investigator's conclusions. Witness statements may be summarized to exclude nonessential or irrelevant information, and any credibility assessments, and the basis for those assessments, should be noted. The report also should identify the investigator and his/her qualifications.

The report may include recommendations for disciplinary and corrective action, including recommendations on how to prevent recurrence of the underlying problem. At times, employers may prefer to receive these recommendations only orally, so management has flexibility to craft its own response. In all instances, the investigator must prepare the report with the understanding that it is discoverable in any subsequent litigation or administrative action.

Finally, the employer must report back to the complainant and the accused, to give them an explanation of the process and the conclusions, but not necessarily all of the details. Most important, employers must report to complainants all remedial action taken, so the person achieves closure and is less likely to continue to pursue the matter through outside counsel or a government agency.

The effective implementation of

an anti-harassment/anti-retaliation policy including effective investigation of complaints will serve both as an effective deterrent to unlawful con-

duct, provide employers with the legal ammunition to defend against many discrimination lawsuits with a minimum of legal expense, and bolster

employee's confidence in an employer's commitment to operating a workplace free from invidious discrimination. ■