

EMPLOYMENT LAW

Choose the Right Investigator for a Sexual Harassment Complaint

By Marc H. Zitomer

A critical mistake for any employer investigating a sexual harassment or other workplace discrimination claim is to select the wrong investigator. If the employer lacks confidence that the investigator will impartially, expeditiously and thoroughly investigate the complaint, he or she may be deemed to have *reasonably* failed to utilize the employer's complaint mechanism. This is significant because our Supreme Court in *Anguas v. State*, 220 N.J. 494, 523-24 (2015), adopted the affirmative defense to sexual harassment claims articulated by the United States Supreme Court in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Specifically, if no tangible action has been taken against a plaintiff, such

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as a demotion, improper transfer or termination, the defendant employer may assert the two-pronged affirmative defense by proving by a preponderance of the evidence that: (1) the employer exercised reasonable care to prevent and to promptly correct sexually harassing behavior; and (2) that the plaintiff employee *unreasonably* failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Anguas v.*

State, citing *Faragher, supra*, 524 U.S. at 807; *Ellerth, supra*, 524 U.S. at 746.

Oftentimes, when an employer receives a discrimination complaint alleging sexual harassment or some other form of workplace harassment/discrimination, its knee-jerk reaction is to assign the investigation to the company's Human Resource Director or Affirmative Action Officer. This is done without carefully analyzing whether that person is well-suited to conduct a

proper investigation that will withstand legal scrutiny if challenged in a court of law or with an agency charged with enforcing our civil rights laws such as the New Jersey Division on Civil Rights or the Equal Employment Opportunity Commission.

It is widely recognized that a poorly conducted investigation is as detrimental to an employer and the victim as having conducted no investigation at all because the purpose of the investigation is to: (1) gather facts; (2) correctly apply the laws and the employer's policies; (3) reach conclusions about what occurred; and (4) recommend appropriate remedial action. If the investigator is unable to properly perform these functions, he or she may reach the wrong result and the problem may never be remedied, exposing the employer to significant legal liability.

There is no one size-fits-all approach to selecting the correct investigator. In a relatively straightforward case where there is one perpetrator and one victim, and where the facts are not hotly disputed, the complaint may be easily investigated in-house. Conversely, an overly complicated case, with multiple victims spanning many years, may require a more sophisticated investigator, such as an attorney, from outside the company. However, when selecting an investigator for *any* case, the following principles should generally apply.

- *Trained.* The investigator should be well-trained on how to conduct investigations. The person should understand the purpose of the investigation, what is alleged, who to question

first and last, how to write a report at the conclusion of the investigation, etc. Oftentimes, the person conducting the investigation has never done so before and does not even know where to begin. Employers assume that just because somebody has a background in human resources, he or she knows how to conduct a meaningful investigation. This is not always the case. A workplace harassment/discrimination investigation is not the place where you want your investigator to learn on the job.

before the investigation begins. Selecting an investigator who is biased or has a conflict of interest will render the entire investigation meaningless. For instance, an investigator cannot investigate somebody to whom he or she reports in the company chain of command. The investigator must be neutral and not beholden to anyone. The investigator's goal is not to exonerate the employer, but rather to reach the correct result in a fair and impartial manner. If there is any doubt about the neutrality

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- *Knowledgeable about law and company policy.* Because sexual harassment and other discrimination claims are based upon anti-discrimination laws and company policy, the investigator should have a good working knowledge of what those laws and policies say. This also includes having a clear understanding of the EEOC guidelines on conducting investigations of this nature. Otherwise, when it comes time to apply the facts discerned during the investigation to the appropriate legal standards, the investigator may reach the wrong conclusion about whether the claim is substantiated.

- *Unbiased.* It is extremely important that the investigator not have any preconceived notions of what occurred

of the investigator, somebody else *must* be selected to do the job.

- *A good listener and interviewer.* The investigator must be somebody who will not intimidate witnesses, but rather somebody to whom people will feel comfortable disclosing important and sometimes embarrassing facts. This requires a gentle approach on the part of the investigator, but at the same time, the investigator must be strong enough to keep the interviewees focused and on track through direct questioning. Otherwise, the investigator may not be able to truly ascertain what occurred.

- *A skilled writer.* At the conclusion of the investigation, the investigator will be required to distill his/her findings into a cogent well-written report

which: (1) summarizes the allegations; (2) provides a comprehensive overview of the witnesses' testimony; (3) assesses credibility; (4) applies the law and policy to the facts; (5) reaches conclusions about what occurred; and (6) makes recommendations to management. That report will likely be discoverable and the subject of intense scrutiny if any party to the investigation files suit. Therefore, the importance of having an investigator who can prepare a comprehensive well-written report that will withstand legal and factual scrutiny cannot be minimized.

- *Well-spoken.* There is a strong likelihood that the investigator will have to testify about his/her investigation if the matter is litigated. The investigator must be somebody who will be able to clearly articulate his/her findings. Importantly, the investigator must also be somebody who will be able to stand up to intense cross-examination by a skilled litigator who will do everything possible to poke holes in every facet of the investigation. If the investigator does not have the fortitude to stand up to this type of scrutiny, somebody else should be strongly considered to conduct the investigation.

- *A good judge of people.* Oftentimes sexual harassment and other discrimination claims involve one person's word against another. The investigator must be somebody who is able to assess credibility and reach

a conclusion about what occurred. An investigator who is indecisive, afraid to ask difficult questions and/or is afraid to reach a conclusion at the end of the investigation does a disservice to the victim, the perpetrator and the employer. While sometimes the evidence will be inconclusive, this should be the exception to the rule if the investigator does his or her job correctly.

- *Diligent, thorough and responsive.* As the old expression goes, "the devil is in the details." Sexual harassment complaints are no exception. The investigator must be somebody who is able to sort through a plethora of information to reach the right result. At the same time, the investigator cannot be somebody who loses sight of the forest for the trees. Moreover, these investigations must be completed in a timely manner. The failure on the part of an employer to conduct a timely investigation can demonstrate that the employer is not serious about enforcing its own policies. For every day that passes after the complaint is filed, memories fade and there is a greater likelihood of collusion and retaliation among the players involved. Therefore, the investigator must have the time to put everything else aside and dedicate all his/her energy to completing the investigation in a timely manner. If the investigator does not have the time to investigate the claim and/or has a proclivity to procrastinate, he or she is the wrong candidate for the job.

- *An attorney or not?* Some employers are reluctant to use their own counsel because there is the possibility that counsel may be subpoenaed to testify if the matter proceeds to trial. There are concerns that may exist about having your own counsel as a witness in the case. Therefore, whether to use your own counsel to investigate the complaint is something you should discuss with your own attorney before making a decision so that the pros and cons can be carefully considered.

Employers must take seriously their responsibility to investigate discrimination/sexual harassment claims in an impartial, thorough and timely manner. Investigations of this nature are oftentimes complex and will take a significant amount of company time and resources. Choosing the correct investigator to perform the job is critically important to instill confidence in employees that their complaints will be heard, investigated properly and that the investigator will reach the correct result. It may also minimize the employer's liability and help keep the employer's reputation intact. On the other hand, selecting an investigator who is ill-suited for the task will ultimately do more harm than good if employees justifiably believe that their complaints will fall on deaf ears through an investigation process that is nothing more than smoke and mirrors. It is essential for employers to choose their investigators wisely. ■