

# Questions—And Answers

## ***Conducting Effective Internal Investigations***

*Kevin J. Smith and Lindsay R. Colvin Stone*

Conducting internal investigations in the wake of an employee complaint can be an overwhelming and challenging experience for employers of all sizes. Performed effectively, internal investigations can be an invaluable tool for correcting problematic behavior, instilling confidence in employees, and heading off potentially damaging litigation. However, ineffective investigations can foster or worsen harassing behavior, deter employees from coming forward to report issues, or even result in a major damage award against an employer. This Q&A describes the importance of effective internal investigations, recommends best practices for conducting such investigations from start to finish, and details potential pitfalls for employers to avoid when preparing to conduct an internal investigation after a complaint.

### **WHY IS IT IMPORTANT FOR EMPLOYERS TO CONDUCT EFFECTIVE INTERNAL INVESTIGATIONS?**

Nearly every employer, at some point, will face an employee complaint of some kind.<sup>1</sup> Whether an employer adequately responds to such complaints is critically important to the employer's security and success in a variety of ways. First, internal investigations can identify violations of company policy and help employers formulate an appropriate response to prevent the offending behavior in the future.<sup>2</sup> Additionally, effective internal investigations can instill confidence in employees and encourage them to come forward to report potentially problematic behavior in the future.<sup>3</sup> Increased employee reporting can help employers spot patterns and identify a need for further training and education.<sup>4</sup>

Effective internal investigations can also minimize or even eliminate employer liability for work-rule violations such as harassment, retaliation, or discrimination.<sup>5</sup> For instance, an employer's comprehensive response to an employee complaint allows the employer to manage and respond to the problem before it can expand into litigation. Further, the US Supreme Court has determined that an employer can avoid liability entirely (or at least limit damages) for unlawful harassment by a supervisor if the employer attempts to investigate and remediate the harassment in good faith.<sup>6</sup> As a general rule, employers are vicariously liable to victimized employees if a supervisor's harassment culminates in a tangible employment action<sup>7</sup> or "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee."<sup>8</sup> But in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court held that employers may rely on an effectively conducted internal investigation or other remedial effort as an affirmative defense to liability under Title VII of the Civil Rights Act of 1964 if no tangible employment action was taken (the *Faragher/Ellerth* defense).<sup>9</sup> Specifically, an employer may invoke the *Faragher/Ellerth* defense and avoid or limit Title VII liability by showing that (1) the employer "exercised reasonable care to prevent and correct promptly any [harassing] behavior," and (2) the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm or otherwise."<sup>10</sup> The *Faragher/Ellerth* defense has been nearly universally accepted by state courts applying the doctrine to their respective jurisdiction's analogues.<sup>11</sup>

## **WHAT CAN EMPLOYERS DO TO PREPARE FOR AN INTERNAL INVESTIGATION?**

Before responding to an employee complaint, employers should first create a plan for how an investigation should proceed. Specifically, employers should make the following decisions before commencing an investigation:

- ❑ *Select who will be interviewed.* At the very least, the complainant, the party being complained about, and close third-party eyewitnesses should be interviewed.<sup>12</sup>
- ❑ *Determine what will be investigated.* Employers should readily identify the purpose and scope of the investigation to avoid complicating it by analyzing facts that are too far afield from the complaint.<sup>13</sup>
- ❑ *Identify what documentary evidence should be collected.* Brainstorm potential documents that might be helpful, including personnel files and e-mails,<sup>14</sup> and establish collection protocols if necessary.

- ❑ *Decide who will investigate.* Selecting the appropriate investigator is one of the most important decisions an employer can make when faced with a complaint.<sup>15</sup> Ideal investigators should be objective to the parties involved and issues raised,<sup>16</sup> familiar with the employer's policies,<sup>17</sup> able to build a rapport with the parties involved while still being perceived as neutral,<sup>18</sup> and familiar with best practices for conducting internal investigations.<sup>19</sup> Employers may use internal staff to investigate (HR staff members are a common choice) or retain a third-party investigator, including outside counsel.<sup>20</sup> Although the use of outside counsel to conduct an investigation can provide the employer with the protection of the attorney-client privilege, employers should remember that the privilege is waived if the employer places the investigation "at issue" in a subsequent litigation (such as invoking the *Faragher/Ellerth* defense).<sup>21</sup>

## **WHAT ARE BEST PRACTICES FOR EMPLOYERS CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS?**

Internal investigations can be complicated and fast moving, and it can sometimes be difficult for employers to keep track of all the steps to follow. Certain step-by-step practices, however, listed below, can guide employers to a prompt and effective investigation and resolution to an employee complaint:

- ❑ *Take interim action if necessary.* While an investigation is underway, certain protections may be necessary to prevent a tense situation from escalating.<sup>22</sup> Common interim actions include adjusting work schedules or assignments to keep two employees from encountering one another during the pendency of an investigation.<sup>23</sup> However, it is critically important to ensure that any changes made to the complaining employee's work environment are not unfavorable to avoid a retaliation complaint in the future.<sup>24</sup>
- ❑ *Conduct thorough, confidential interviews.* Once an employer has identified the proper parties to interview, properly conducted interviews are essential. Employers should focus on maintaining the utmost confidentiality, although some information may have to be shared with other employees. While employers should inform witnesses that interviews are confidential, they should *not* promise absolute confidentiality to any witness taking part in the investigation.<sup>25</sup> Interview questions should be open-ended and straightforward, and interviewers should be prepared to follow up on any information a witness may

offer.<sup>26</sup> Moreover, interviewers should be armed with as many facts as possible to assist the interviewer in evaluating credibility.<sup>27</sup>

❑ *Make independent credibility determinations.* Some of the most difficult cases to investigate are so-called “he said, she said” cases, or cases where witnesses provide conflicting or self-serving information.<sup>28</sup> In these instances, making a determination at the conclusion of the investigation necessarily requires evaluating the credibility of the witnesses in question. The Equal Employment Opportunity Commission has recommended four factors to consider when evaluating witness credibility:

1. Inherent plausibility: is the testimony believable on its face?
2. Demeanor: did the witness seem to be telling the truth or lying?
3. Corroboration: is there witness testimony or physical evidence that corroborates the party’s testimony?
4. Past record: did the alleged harasser have a history of similar behavior in the past?<sup>29</sup>

Interviewers with prior familiarity with witnesses may consider historical interactions with the parties to evaluate credibility but should take care to do so with the goal of objectivity in mind.

❑ *Reach a determination.* After all relevant evidence has been gathered and reviewed and all witnesses interviewed, employers should reach a determination as to whether the harassment or other complained-of conduct occurred.<sup>30</sup> In cases where an employer is faced with conflicting evidence, the employer should focus on answering the following question, based on its independent credibility determination: is it more likely than not that that the incident occurred?

## **WHAT SHOULD EMPLOYERS DO AFTER AN INTERNAL INVESTIGATION HAS CONCLUDED?**

Once the internal investigation has concluded and a determination has been reached, employers have three primary responsibilities: (1) create a written report; (2) communicate the decision to the employees who are directly affected by the investigation; and (3) follow up to prevent future similar incidents.

A well-drafted written report should be an employer’s ultimate goal at the end of an internal investigation.<sup>31</sup> A thorough written report documents the process the employer took to investigate the complaint, the information received, and the basis for the determination, and is a key tool for future review and even potential litigation stemming from the incident.<sup>32</sup> A complete written report should describe the following:

- ❑ The incident(s) investigated, with specific dates;
- ❑ The parties involved;
- ❑ All key factual and credibility findings, including whether any legal or other sources were referenced;
- ❑ Applicable employer policies and guidelines and how they were factored into the investigation;
- ❑ Specific conclusions and determinations;
- ❑ The party (or parties) responsible for making the determination;
- ❑ Any issues that could not be resolved, and the reason for the lack of resolution; and
- ❑ All actions taken by the employer.<sup>33</sup>

The written report should be submitted to any ultimate decision makers and maintained as a company record.<sup>34</sup> Once the written report has been finalized, the employer should communicate the results of the investigation to the parties involved.<sup>35</sup> If an employee is disciplined (or terminated) for a violation of the employer's policies, that corrective action should be communicated, along with the basis for the action.<sup>36</sup> If the complained-of employee will remain in contact with the complainant, the employer should strictly inform the employee that retaliation will not be tolerated.<sup>37</sup> Further, the employer should promptly notify the complaining employee that his or her complaint has been investigated and, if necessary, that action was taken, even if the details cannot be shared with the complainant due to confidentiality concerns. Such prompt notification shows the complainant that his or her complaint was taken seriously, which may have the effect of limiting future litigation.<sup>38</sup>

Finally, the employer should engage in proactive follow-up to prevent similar future occurrences. Employers should take the opportunity to remind managers that retaliation against any parties involved in the investigation is unacceptable, and encourage them to monitor the workplace to avoid similar instances of the complained-of behavior. Employers should also compare the behavior or incident complained of with other recorded and investigated incidents to determine if a pattern of problematic behavior exists in the workplace. If so, the employer should consider whether additional training or corrective measures are necessary.<sup>39</sup>

## **WHAT SHOULD EMPLOYERS AVOID WHEN CONDUCTING AN INTERNAL INVESTIGATION?**

Employers should take care to avoid particular pitfalls when conducting internal investigations. The practices listed below could expose employers to costly litigation or delayed resolution of complaints. Specifically, employers should avoid:

- ❑ Ignoring employee complaints without commencing an investigation;
- ❑ Delaying investigation of an employee's complaint;
- ❑ Commencing internal investigations without a well-established plan in place;
- ❑ Selecting an investigator that is neither experienced nor objective;
- ❑ Interviewing only witnesses that would be biased, or otherwise favorable to the employer or complainant;
- ❑ Failing to reach a determination and communicate that determination to necessary employees, if such communication would not raise confidentiality concerns; and
- ❑ Failing to create a written report documenting the investigation.

An effective internal investigation can improve employee confidence, limit or avoid employment law liability for an employer, and create an overall improvement in the employer's work environment. Employers should take note of the best practices and pitfalls described above when conducting internal investigations and conduct investigations accordingly when faced with employee complaints to avoid negative consequences in the future.

## NOTES

1. Turner, P. W. (2010, November 9). Top ten tips for conducting effective internal investigations. Association of Corporate Counsel. Retrieved from <http://www.acc.com/legalresources/publications/topten/internalinvestigations.cfm>
2. Manela, S. S. (2009). Workplace investigations, American Bar Association, at 7. Available at [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2009/ac2009/107.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/107.authcheckdam.pdf); Society for Human Resource Management. (2015, July 23). Investigations: How to conduct an investigation. Retrieved from <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoconductaninvestigation.aspx>
3. See note 2.
4. Meinert, D. (2014, December 1). How to conduct a workplace investigation. Society for Human Resource Management. Retrieved from <https://www.shrm.org/hr-today/news/hr-magazine/pages/1214-workplace-investigations.aspx>
5. Equal Employment Opportunity Commission. (1999, June 18). Enforcement guidance on vicarious employer liability for unlawful harassment by supervisors. Retrieved from <https://www.eeoc.gov/policy/docs/harassment.html>; Equal Employment Opportunity Commission. (2016, August 25). EEOC enforcement guidance on retaliation and related issues. Retrieved from <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>
6. Equal Employment Opportunity Commission, Enforcement guidance on vicarious employer liability, note 5 above; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

7. "Tangible employment actions" include discharge, demotion, or undesirable reassignment. Burlington, 524 U.S. at 764–765.
8. Faragher, 524 U.S. at 807.
9. Burlington, 524 U.S. at 764–765.
10. Id. at 765; Faragher, 524 U.S. at 807.
11. At least one jurisdiction, New York City, has rejected the applicability of the Faragher/Ellerth defense for purposes of sexual harassment claims brought under New York City's Human Rights Law. *Zakrzewska v. The New Sch.*, 14 N.Y.3d 469, 478 (2010).
12. Equal Employment Opportunity Commission, Enforcement guidance on vicarious employer liability, note 5 above.
13. Meinert, note 4 above.
14. Id.; Turner, note 1 above.
15. Meinert, note 4 above.
16. Id.
17. Turner, note 1 above.
18. Society for Human Resource Management, note 2 above.
19. Id.
20. Id.
21. Kelly, T. S. (2012). Ethical issues for employment defense lawyers conducting internal investigations. American Bar Association. Retrieved from [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2012/03/ethics\\_professional\\_responsibility\\_committee\\_midwinter\\_meeting/mw2012\\_perilous\\_tightrope\\_emp\\_perspective.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/ethics_professional_responsibility_committee_midwinter_meeting/mw2012_perilous_tightrope_emp_perspective.authcheckdam.pdf)
22. Turner, note 1 above.
23. Id.
24. Society for Human Resource Management, note 2 above. Id.
25. Id.
26. Id.; Equal Employment Opportunity Commission, Enforcement guidance on vicarious employer liability, note 5 above.
27. Meinert, note 4 above.
28. Id.
29. Equal Employment Opportunity Commission, Enforcement guidance on vicarious employer liability, note 5 above.
30. Id.
31. Meinert, note 4 above.
32. Society for Human Resource Management, note 2 above.
33. Id.
34. Meinert, note 4 above.
35. Id.
36. Society for Human Resource Management, note 2 above.
37. Meinert, note 4 above.
38. Id.
39. Id.

**Kevin J. Smith** is special counsel at Sheppard, Mullin, Richter & Hampton LLP in the firm's Labor and Employment group. He has extensive experience in employment litigation, including trials and appeals in federal and state courts, and conducting arbitrations and administrative hearings. His employment law practice also includes counseling Fortune 500 companies in all types of employment and labor-law matters. He may be contacted at [kjsmith@sheppardmullin.com](mailto:kjsmith@sheppardmullin.com). **Lindsay Colvin** is a labor and employment associate at Sheppard, Mullin, Richter & Hampton LLP and may be contacted at [lstone@sheppardmullin.com](mailto:lstone@sheppardmullin.com).