Investigating Employee Harassment Claims in the Workplace

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In the wake of the #MeToo Movement and as again recently seen in media headlines, sexual harassment continues to be a prevalent problem in today's culture, and no employer is immune from the duty to prevent and resolve harassment claims in the workplace. These claims include not only sexual harassment, but harassment based on race, national origin, age, disability, and any other status protected by law.[1] However, with this duty comes an opportunity for employers to create open communication about sexual harassment and clearly define the boundaries of acceptable workplace conduct. The purpose of this article is to provide guidance on how to recognize and investigate a claim of workplace harassment.

Duty to Investigate. Once a harassment complaint arises, an employer has the affirmative duty to investigate. This duty arises whether the complaint is made formally pursuant to an established grievance procedure or harassment policy or made in some informal manner. The employer's duty to investigate a complaint of harassment was highlighted in two Supreme Court decisions. In *Burlington Industries. Inc. v. Ellerth*,[2] the court stated that the "[e]mployer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it". In *Faragher v. City of Boca Raton*,[3] the court added that an employer can avoid or minimize liability for actionable harassment by investigating and taking prompt remedial action to end the harassment.

Under *Ellerth* and *Faragher*, an employer is absolutely liable for any harassment which results in a "tangible employment action" (defined to include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits") regardless of its policies or remedial efforts.[4] When there is no tangible employment action, the employer becomes vicariously liable for the actions of its supervisors, but can prevail on an affirmative defense by showing (a) "that it exercised reasonable care to prevent 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 to avoid harm otherwise."[5]

An employer may lose the opportunity to prevail on these affirmative defenses by failing to investigate. A fact finder may find that the employer failed to "exercise reasonable care to prevent and correct [harassment] promptly" if the employer fails to investigate. Further, when an employer is known to be reluctant to investigate, it has more difficulty showing that the complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. For example, the U.S. Court of Appeals for the Eighth Circuit, applying *Ellerth*, upheld a jury verdict on a sexual harassment claim, where the employer minimized the employee's complaint, performed a cursory investigation, and failed to discipline the harasser. [6]

Every employer should have a written internal complaint procedure such as a harassment policy which contains a complaint procedure designed to encourage victims of harassment to come forward. Obviously, complaints made pursuant to the complaint procedure must be investigated. However, informal reports of harassment or indications from an aggrieved or third person that inappropriate conduct is occurring must be investigated, even if the term "harassment" is not used. Further, an employer may be held to have had “constructive knowledge’ of the harassment if it is so pervasive that an employer “should have known of it.” [7] Thus, an employer's obligation to investigate is triggered by a supervisor's observations of inappropriate comments or conduct, general office knowledge of harassing behavior, and requests that inappropriate conduct cease.

In most cases the employer has a duty to investigate instances of harassment even where the alleged victim does not request or consent to the investigation. At a minimum, an employer should continue to monitor the situation by checking with the victim of the alleged harassment to determine whether or not the conduct has ceased and whether the victim still stands by the request not to take action.

The employer's investigation should commence and conclude promptly. In some circumstances it may be necessary to take interim measures before the conclusion of the investigation. This might include a temporary transfer of the alleged harasser or placing the alleged harasser on leave of absence pending conclusion of the investigation. Care should be taken not to disadvantage the victim of the alleged harassment in order to avoid the perception of retaliation. Delay in commencing an investigation can be considered as indifference on the employer's part to a hostile working environment. Further, as time passes, memories fade and evidence may disappear. More importantly, the opportunity to put a prompt end to inappropriate conduct is lost. As a result the complainant is less likely to be satisfied with the employer's responses to his or her complaints.

Conducting the Investigation. The aim of every investigation is to determine certain basic facts: what happened, who the alleged harasser(s) were, where and when the incident took place, how the complainant's work was affected, whether anyone else witnessed the incident, whether the incident was isolated or part of a continuing practice, what the reaction of the complainant was, how the complainant has been affected, whether the complainant has talked to anyone else about the incident and whether there is any documentation of the incident. The adequacy of an investigation will be judged on the facts and circumstances of each situation.

Normally, harassment policies advise the complainant to either contact a supervisor or a designated official in the Human Resources Department. It is critical that supervisors and managers have instructions with respect to reporting to the Human Resources Department any complaints they receive so that a decision can be made about the appropriate person to investigate the complaint. Having the wrong person investigate can discourage harassment victims from reporting meritorious claims and cause the employer to make decisions based on faulty or incomplete information. Ideally, the investigator should be a person who has the respect of employees and who has an understanding of the issues under investigation. Perhaps most importantly, the investigator must be willing and able to devote the time necessary to the investigation. The investigator must not appear to advocate for either the complainant or the alleged harasser. If objectivity may be difficult for those within the business, it may be a good idea to bring in an outside investigator to protect the fairness and impartiality of the investigation.

Interview with the Complainant. During the initial interview with the complainant, the interviewer should prepare a list of open-ended questions to establish as to each alleged incident of harassment:

1. When and where the incident occurred;
2. What was said or done by both parties;
3. Whether there were any witnesses;
4. The effects of the incident;

5. Whether there are any documents containing information about the alleged incident; and
6. Whether the complainant has knowledge of any other person who has been similarly harassed.

Under normal circumstances the complainant should be asked to put this information in writing or should be requested to sign the interview prepared by the interviewer. This is necessary in order to make sure that the proper information is being investigated and that the complainant stands by the allegations down the line.

The complainant should be assured at the outset that he or she will be protected from any unlawful retaliation and that during the course of the investigation the employer will limit the disclosure of the information to those with a need to know. However, the complainant must understand that it will be necessary to discuss the information with the alleged harasser(s) and others. Only in rare circumstances will it be possible to investigate the charge of harassment without identifying the complainant to the alleged harasser. However, it may be possible to avoid disclosure to third party potential witnesses. If the complainant is reluctant to divulge names and details or sign a statement, the adequacy of the investigation will obviously be limited, as the employer can only go forward on the basis of what the complainant provides.

Interview with the Alleged Harasser. Whether the alleged harasser is interviewed prior to other witnesses will be dependent on the factual circumstances. In some instances it may be helpful to interview other witnesses prior to talking to the alleged harasser.

The alleged harasser should be informed of the purpose of the investigation, assured that no conclusion has been made regarding the investigation, and told that the investigation will be conducted as confidentially as possible. The alleged harasser should be told the allegations of harassment in enough detail to allow him or her to respond fully to the claim(s). Further, the alleged harasser should be made aware that he or she must avoid any appearance of reprisal against the complainant and that any reprisal could serve as an independent basis for discipline. If the alleged harasser believes there is a motive for the complainant making the claim(s) to lie, then facts supporting that belief should be explored as should any claim that the harassment was not unwelcome.

Additional Interviews. All persons with knowledge of the facts including those identified by the complainant and the alleged harasser should be investigated. In many cases it may be necessary to re-interview the complainant after talking to witnesses and particularly after talking to the alleged harasser. In serious cases, signed written statements should also be obtained from the significant witnesses. In addition, the alleged harasser should be provided with an opportunity to respond to adverse statements made by witnesses.

Additional Evidence. Beyond interviews, it is also important to gather any information that may corroborate or negate the complaint. For example, this could include e-mails, text messages, social media posts, etc. In addition, some employers may have key card access or security camera systems that could also provide evidence. Finally, it may also be helpful to review past performance evaluations or complaints to determine whether there is any pattern of behavior.

Concluding the Investigation. In reaching a conclusion of the investigation, the investigator should evaluate whether the facts given are based on first-hand knowledge, hearsay, rumors or gossip and should assess the parties motivations to lie or embellish. It may be helpful to draft a written report that documents the investigation and conclusions.

Documenting the investigation will enhance the credibility of the investigation, particularly if it is documented as it progresses with signed statements from the witnesses interviewed. Employers should remember that a written record will be discoverable when litigation follows. Having written statements will be of great value should a disciplined harasser later challenge the action and will give a basis for establishing that the employer in fact had an appropriate basis for taking such a disciplinary action.

Likewise, if no action is taken as a result of the investigation, the various statements should be helpful in supporting that there was insufficient evidence to support discipline.

The sexual harassment investigative file should not be kept in the personnel file. However, if there is discipline imposed, a copy of the discipline should be placed in the alleged harasser's file. A copy of the investigative report can be kept in corporate counsel's office or filed separately by the human resources manager.

Taking Prompt Remedial Action. When the investigation has been completed, a conclusion should be reached and some specific action should occur. First and foremost, the results of the investigation should be communicated promptly to the complainant as well as the alleged harasser. The employer should always be mindful of potential liability for defamation when specific harassment allegations are disseminated and such information should never be disseminated beyond those persons with a direct need to know.

There may be many situations in which it cannot be determined whether sexual harassment has occurred or not because there is no information available except for the complainant's accusations and the harasser's denial. In this type of case the complainant should be assured that although no finding could be made, the employer intends to enforce its sexual harassment policy and protect employees from harassment as well as from retaliation for participating in any investigation and that any future harassment should be reported promptly. It is very important in these situations to check back with the complainant on a periodic basis to make sure that no retaliation occurs and that no other instances of harassment have occurred. The alleged harasser should be advised that although no determination could be made as to the truth of the claim, all employees are expected to comply with the company's policy against harassment and retaliation. Further, the employer should remind the alleged harasser that retaliation will not be tolerated.

The employer should also consider a transfer or reassignment of work to prevent future contact between the complainant and the alleged harasser. This is a touchy subject and can best be handled by offering both the complainant and the alleged harasser an opportunity to make a voluntary move. Employers should be careful, however, about involuntarily moving a complainant when that move would result in less favorable terms and conditions of employment. Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.

If at the conclusion of the investigation it is determined that harassment has occurred, the employer must take "prompt remedial action". This will include some type of disciplinary action against the alleged harasser and advising the complainant of the action taken. Remedial action is generally considered to be adequate if it is "reasonably calculated to prevent further harassment." It is not sufficient to simply end the current harassment. It is also necessary to discipline the harasser.

The remedial action taken need not be the most severe sanction available. Most courts are satisfied as long as the action is reasonably calculated to prevent further harassment. Discipline may range from an oral warning to termination of employment. Several factors to be considered in determining the appropriate discipline are: the severity of the conduct; discipline imposed for previous cases of sexual harassment; discipline imposed for violations of other company policies; and the harasser's disciplinary and employment history.

Generally, a written reprimand is preferable since it creates a record of the employer’s action and can be seen as a more concrete evidence of the employers desire to deter the conduct. For incidents of sexual harassment that warrant stronger discipline than a mere warning, short of discharge, a suspension or demotion may be an appropriate remedy. Particularly, demoting a supervisor from a supervisory position

to an hourly position may be appropriate. Denying a salary increase, bonus or otherwise imposing a monetary penalty may also serve as appropriate disciplinary measures.

The employer is, of course, obliged to respond to any repeat conduct; and whether the employer's next response is reasonable may very well depend on whether the employer progressively stiffens its discipline or vainly hopes that no response, or the same responses as before, will be effective. Repeat conduct may show the unreasonableness of prior responses. On the other hand, an employer is not liable, although a perpetrator persists, so long as each response was reasonable. An employer is not required to terminate a perpetrator except where termination is the only response that would be reasonably calculated to end the harassment.

An internal investigation should protect the reputation of both complainant and the alleged harasser. The allegations and information obtained should be discussed only with the involved parties; each person interviewed should be admonished not to discuss the matter with others; and should be informed of the risk of defamation if the incident is discussed outside the investigation. However, emphasizing the need for confidentiality should not result in intimidating the complainant or the supporting witnesses. A qualified privilege usually 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. However, statements not made for good cause but made maliciously or recklessly abuse the privilege and will result in the loss of the privilege.

In the wake of the recent media coverage of sexual harassment, an employer must realize that it cannot stick its head in the sand with respect to harassment complaints. Employers should strive to ensure that employees understand its policies and procedures, as well as its commitment to preventing and correcting inappropriate conduct in the workplace.

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[1] Title VII of the Civil Rights Act of 1964, as amended (race, color, religion, sex, and national origin discrimination); (2) the Americans with Disabilities Act, as amended (disability discrimination) (4) the Age Discrimination in Employment Act (age discrimination).

[2] 118 S.Ct. 2257, 2267 (1998).

[3] 118 S.Ct. 2275 (1998).

[4] *Ellerth,* 118 S.Ct. at 2268.

[5] *Id*. at 2270.

[6] *Ogden v. Wax Works, Inc*., 214 F.3d 999, 1010 (8th Cir. 2000).

[7] *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009).