



ABA BUSINESS LAW SECTION

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Business Law Today

Volume 18, Number 1 September/October 2008

Properly Investigating Complaints of Harassment

How to Limit a Company's Exposure

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It is well known by employers that every company should maintain and distribute an anti-harassment policy that contains a clearly articulated complaint procedure for employees to complain of harassment and discrimination. However, employers often overlook the importance of promptly investigating complaints of harassment and taking quick and appropriate corrective action. All too often, what begins as simple workplace humor turns into an expensive harassment (or, even worse, a retaliation) claim when the employer does not conduct an effective investigation. Since an employer's prompt and effective response to complaints can limit or entirely eliminate its liability in a discrimination, harassment, or retaliation lawsuit, it is imperative that employers implement an effective mechanism to investigate and resolve workplace complaints.

The Importance of Training

It is absolutely critical that all managers and supervisors are regularly trained to identify conduct that constitutes harassment, discrimination, and retaliation and how to respond to issues they observe in the workplace or that are otherwise reported to them. Without the appropriate training of managers and supervisors, an employee's complaint will never make it to management or those agents responsible for investigating complaints. This failure could expose the employer to significant liability if a lawsuit ensues since courts inevitably look to see what, if anything, the employer did to remedy the situation. The better trained the company's managers and supervisors are to identify personnel problems in the workplace, the more quickly and effectively the employer can take prompt and appropriate action to resolve the workplace conflict.

Once a Problem Is Reported

The next issue for an employer is what to do once harassment, discrimination, and/or retaliation is reported or observed. While managers and supervisors should be trained to identify these events, they should not try to investigate the complaints themselves unless they are designated by the employer to conduct the investigation. Instead, they should report the complaint to the appropriate individual at the company charged with investigating complaints of workplace harassment and discrimination (e.g., human resource director, personnel manager, etc.). The investigator should have a clean background (no conviction record or history of harassment), a working knowledge of the company's policies and equal employment opportunity obligations, and generally be competent to remain impartial, objective, and fair during the investigation. If possible, it is also advisable in sexual harassment investigations that the investigator be the same gender as the victim. These attributes will help ensure that the investigation is conducted in a consistent and competent fashion.

Once a complaint has been reported, the employer should ask the employee who makes the complaint for a full narrative of the facts underlying the complaint. In this regard, it is helpful for the company to provide a written harassment complaint form to the employee to identify (1) the date of the incident, (2) the approximate time of the incident, (3) the place of the incident, (4) the company employees involved, (5) any witnesses to the incident, (6) the precise nature of discrimination, and (7) any additional comments. The complaining employee should sign and date the form. If a form is not available, then, at a minimum, the employer agent designated to investigate the incident should gather and memorialize in writing this information from the complaining employee, keeping in mind that anything written down can and will be used against the company in litigation.

A Word of Caution

Before an investigation actually begins, a word of caution is advised. No privilege attaches to an investigation unless it is conducted by or through legal counsel. And, even if conducted through legal counsel, the attorney-client privilege is narrowly drawn in many states and may not apply to factual information supplied to legal counsel. Therefore, great care is required to be sure that the investigation does not produce admissions against interest and a road map to easy victory for a

plaintiff's attorney. In order to minimize such risks, the investigator should limit questions to requests for factual information only, writing only verified factual details while steering away from recording mental impressions, conclusions, or speculation, particularly ones having the effect of suggesting fault or liability on behalf of the company or its agents.

Interviewing the Alleged Victim

When interviewing the alleged victim, there are a number of appropriate questions to ask in addition to the standard "who, what, when, where, and how" of the alleged harassment. Here are some examples of additional interview questions to ask the employee: How did you react? What response did you make when the incident occurred or afterwards? How did the harassment affect you? How has the harassment affected your job? Are there any persons with relevant information? Did the person who harassed you harass anyone else? Do you know whether anyone else complained about harassment by that person? Can you continue to work in your worksite? Are there any notes, physical evidence, or other documentation regarding the incident? How would you like to see this situation resolved? Do you know of any other relevant information?

After the interview, it is important to specifically tell the employee that he or she will not be retaliated against for providing truthful information. Because a victim of harassment should not have to work in a less desirable location as a result of raising a complaint, it is safest to withdraw the alleged harasser's access to the victim. Moreover, if the alleged harasser is a supervisor or coworker with whom he or she frequently works, it would be advisable to send the alleged harasser home until the company has time to conduct and finalize its investigation. Finally, it is important to ask the alleged victim to immediately communicate any further instances of alleged harassment to the investigator.

In some circumstances, the employee will want to remain anonymous. In other cases, the employee may complain of harassment and then ask the employer not to investigate since it "is not a big deal." In these circumstances, the employer still has the legal obligation to investigate and, if appropriate, remedy the conflict. The company can inform the alleged victim that it will make every effort to keep the matter confidential, but that it cannot promise to do so, since it has the legal obligation to fully investigate the workplace dispute and the disclosure of events and names may be inevitable.

Interviewing the Alleged Harasser

Once all the facts have been gathered from the victim, it is certainly prudent to give the alleged harasser an opportunity to respond to the allegations. This can be done orally or in writing, but to the extent it is done orally, it is important to accurately and fairly document the reasons the alleged harasser gave for his or her actions. Inform the alleged harasser that a complaint has been brought against him or her and that the company is required by law to investigate all complaints whether or not they are valid.

Some important questions to ask the alleged harasser are as follows: What is your response to the allegations? If the harasser claims that the allegations are false, ask why might the complainant lie? Have any other complaints been made against you? Have you ever been disciplined before for harassment? Are there any persons who have relevant information? Are there any notes, physical evidence, or other documentation regarding the incident? Do you know of any other relevant information?

Interviewing Other Witnesses

To fulfill the employer's legal obligation to investigate harassment in the workplace, the employer must interview all other witnesses with potentially relevant information, such as those individuals identified in the harassment complaint form or other employees who have been identified during the investigation. Since some of the employees being interviewed may have no idea why they are being interviewed, it is advisable for the investigator to provide the witness with a brief introduction that includes the reason for the interview, as well as a disclosure that the employee will not be retaliated against for providing truthful information. Additionally, the interviewer should start the interview by stating that the company has a legal obligation to investigate the incident. It is also advisable for the interviewer to have a witness present not only to take notes, but to serve as a corroborating witness in the event the employee being interviewed later tries to challenge the content of the interview. This recommendation applies to whoever is being interviewed during an investigation.

Following are some important questions to ask third parties or witnesses: What did you see or hear? When did the incident occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace. What did the complainant tell you? Has the conduct occurred in the past? Do you know of any other relevant information? Are there any other persons who have relevant information?

After gathering all the relevant information, the interviewer should inform the employee that he or she should not behave any differently toward any of the parties involved (to the extent that names were disclosed or easily identifiable based on the questioning). Unless the employee is noticeably affected, instruct the employee to return to work and to follow up with the investigator if he or she observes or witnesses any further harassment or discrimination. Finally, to the extent possible, inform the employee to keep the content of the interview confidential and to not discuss it among coworkers. The investigator should caution all employees being interviewed that attempting to influence the investigation or disclosing confidential information by discussing it with others can be cause for disciplinary action.

After all interviews have been completed, carefully review the interview notes. If there are any inconsistencies, conduct follow-up interviews regarding those inconsistencies with any of the parties previously interviewed. It is important to tie up loose ends so that appropriate action can be taken to resolve the workplace dispute.

Taking Prompt, Remedial Action

Once all the interviews have been finalized and credibility issues are resolved, management should make a determination as to whether harassment, discrimination, or retaliation has occurred. That determination could be made by the investigator or by a management official who reviews the investigator's report. While a discussion of what constitutes a reasonable and appropriate action to take after a workplace complaint depends on the specific facts of each situation (and well beyond the scope of this article), it is important that any action taken against the alleged harasser be done only after a thorough investigation. In other words, a company wants to adequately corroborate the complaints (or defenses) and ensure that it is not acting in a retaliatory or rash fashion before imposing discipline upon an employee.

Similarly, the employer has an obligation to treat similar complaints of harassment in a similar fashion. What this means is that if an employee gets immediately terminated for making sexually explicit comments to female coworkers, an employee who later conducts himself in a similar fashion should likewise be immediately terminated. All too often, this rule is inadvertently violated which, by itself, can prove that the complaining employee is being treated differently than others. In litigation, a company will have to prove that it acted reasonably and fairly and such a goal is compromised if the actions taken by the company in similar situations are inconsistent.

In some circumstances, the investigation may be inconclusive. For example, there are no corroborating witnesses to the harassment (e.g., "he said/she said" situation). If this occurs, it is completely acceptable to inform the parties that a thorough investigation was conducted and was inconclusive. However, the investigator should inform the complaining employee to immediately report any further instances of harassment, discrimination, or retaliation, and that the company will conduct another investigation.

Document the Investigation

It is certainly advisable to document the investigation process, such as when the complaint came to the employer's attention, who was interviewed, what was disclosed, when and where the interviews took place, as well as who was present, what remedial action was taken, and why it was taken. This step is important because the employer may be required to demonstrate when and how it investigated the employee's complaint at a later time, perhaps during an Equal Employment Opportunity Commission investigation or at trial.

However, the company has to decide how detailed and specific it wants to document the investigation. Keeping in mind that all nonprivileged documents memorializing the investigation will be produced later in discovery if litigation results, there certainly can be drawbacks to taking very detailed and copious notes, especially if there are inconsistencies in those notes. On the other hand, well-drafted notes regarding the company's investigation of the alleged harassment, as well as a description of the reasons it took the employment action, can protect the company from future litigation.

There are a number of simple steps that a company can take to ensure that the documentation related to an investigation is appropriate. First, the person drafting the notes should review them for accuracy and make sure there are no inconsistencies.

Second, the notes should be taken contemporaneously with, or soon after, each interview so as to be reliable. Investigation notes drafted long after the relevant events, or worse, only after a discrimination lawsuit is filed, are less reliable than those taken at the time of the employee's first complaint.

Third, the notes should clearly identify when they were drafted and who drafted them, as well as whether anyone else was present. This step is important since the company will want to ensure the identity of who conducted the investigation and whether anyone else can corroborate the contents of the notes if the investigator is no longer employed by the company or available.

Fourth, if the notes are in handwriting, make sure they are legible; if not, it is prudent to have the interviewer transcribe them into a computer version.

Fifth, at the conclusion of each interview (or as soon as possible thereafter), the investigator should review with the witness the points contained in the notes to confirm their accuracy and, if possible, get the witness to sign and date the notes indicating their accuracy.

Sixth, given the importance of a proper investigation, it is always advisable to consult an employment attorney to make sure that any documentation created by the company related to its investigation is drafted correctly and can affirmatively be used to defend the company in a subsequent lawsuit.

One final issue of key importance in documenting an investigation is where and how long to maintain investigation notes. Under new federal e-discovery rules, draconian penalties can result if a company permits the destruction or deletion of relevant documents, such as investigation notes, after the company has notice of a potential claim. To avoid such a possibility, it is generally advisable to keep any documents related to an investigation for a minimum of two years following the relevant employee's termination and/or separation from the company. If the company reasonably anticipates litigation, either by receipt of a formal charge or by a verbal threat by an employee, all potentially relevant documentation relating to either the events or the employee should be preserved, even if the company maintains a document destruction policy. When in doubt, the safest practice is for the company to preserve the relevant documentation, including any investigation notes.

And given the confidential nature of the investigation notes, it is generally recommended to keep all written records of a harassment investigation in a confidential file separate from the employee's personnel file. However, keep in mind that some states, such as Illinois, require employers to keep certain documentation relating to an employee's discipline, probation, or termination in their personnel file. Therefore, in certain circumstances, it will be important to maintain the documentation memorializing the results of the investigation or any disciplinary action taken against an employee in the disciplined employee's personnel file.

Conclusion

Incorporating the foregoing steps into your investigations of workplace disputes will go a long way to minimizing or eliminating any potential liability of the company from employment discrimination or harassment claims. In addition, it will foster a work environment that demonstrates to the workforce that not only will harassment, discrimination, and retaliation not be tolerated, but also will quickly and effectively be investigated and resolved if it does occur.

Additional Resources

For more reading on a similar topic, you can retrieve the following articles on the *Business Law Today* Web site at www.abanet.org/buslaw/blt.

All issues since 1995 may be accessed under the "Past Issues" heading at the bottom of the Web page.

[Conducting Investigations of Wrongful Workplace Conduct: Issues and Guidelines](#)

By Roy A. Ginsburg
Business Law Today
May/June 2008
Volume 17, Number 5--page 39

[Checking Out Claims of Harassment: How to Investigate by the Book](#)

By Anne Buckleitner
Business Law Today
January/February 2002
Volume 11, Number 3--page 14

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