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Pacific Northwest Labor & Employment Law Departments

Bellevue, Washington
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400

Portland, Oregon
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000

Seattle, Washington
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000

Our Presenters

Russ Perisho is a partner and member of the Seattle Labor & Employment Law group. He has advised and represented employers in labor and employment matters since 1978. He counsels a wide range of employers including hospitals, manufacturers, biotech companies, and software developers. Russ' current trial practice focuses on discrimination and wrongful discharge cases. He has handled a wide array of employment litigation, including age discrimination, disability discrimination, breach of contract claims following layoff, whistleblowing claims and alleged wrongful discharge. Russ is a graduate of the University of Illinois and Harvard Law School.

Kristina Moris, a principal with The Washington Firm, is a human resources generalist and a highly skilled consultant. Kristina combines an MBA in Human Resources from Cornell University with extensive professional experience to provide services to clients, such as Expedia, Virginia Mason, Adobe, Swedish Hospital, Chrysler Corporation, AT&T Wireless, Sellen, Turner Construction, Popcap Games, Snohomish County PUD and multiple law firms.

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Taking Workplace Investigations Seriously

By Russ Perisho and Marti Downey

A. Allegations of Harassment: The Importance of Investigations

If you glance at a newspaper or turn on a television, the message to employers is clear: Judges and juries will not tolerate inadequate investigations into claims of sexual, racial and other forms of harassment. Deficient investigations can render employers liable to both victims of unlawful harassment and to those alleged harassers who were terminated without sufficient evidence. Once liability is assessed, the damages can be extraordinary. For example:

- In California, a state court affirmed a jury award of ***$1.9 million*** to an employee who was subjected to daily sexual harassment despite numerous reports to his manager. The court found the award justified in light of the fact that the employer failed to take immediate and appropriate corrective action to stop the harassment. *Hope v. California Youth Authority*, 134 Cal. App. 4th 577 (2005).

- In New York, a jury awarded an employee ***$15 million*** in punitive damages after finding her supervisor and employer liable for sexual harassment. The employee had filed an internal complaint with her employer, but--concerned with publicity--the company determined that her complaint was unfounded (unfortunately for the company, coworkers corroborated her complaints). *Nestler v. Chartwells Dining Services*, No. 02-CV-1115, 2005 WL 2333458 (N.D.N.Y. Sept. 23, 2005).

- In Texas, a state court judge entered a judgment of ***$10.6 million*** against an employer after a jury found the employer liable for sexual harassment. The employee said she complained multiple times to managers and yet the company took no action to stop the harassment. *Zeltwanger v. Webber*, No. 95-9106 (Tex. Dist. Ct. Dec. 1999).

The good news, however, is that under both federal and state law, a prompt and thorough investigation, followed by corrective action designed to remedy and prevent harassment, can often shield employers from liability for the harassing conduct of their employees and supervisors. In *Burlington Industries, Inc. v. Ellerth*[1] and *Faragher v. City of Boca Raton*,[2] the U.S. Supreme Court made it clear that an employer is subject to vicarious liability for unlawful harassment by its supervisors. The court also set forth

[1] 524 U.S. 742 (1998).
[2] 524 U.S. 775 (1998).

a two-part affirmative defense to employer liability in certain instances of workplace harassment. To take advantage of this defense, an employer must prove:

- It exercised reasonable care to prevent and correct the workplace harassment; and
- The employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer (or to otherwise avoid the harm).

Similarly, in order to impose vicarious liability for supervisor or coworker harassment, Washington courts require a plaintiff to prove that his or her employer "failed to take reasonably prompt and adequate corrective action."[3]

Thus, to avoid liability for the creation of a hostile work environment based on sexual harassment by its employees, it is imperative that an employer (1) establish, publicize and enforce a clear and comprehensive anti-harassment policy (including effective complaint procedures),[4] (2) create and utilize a mechanism for a prompt, thorough and impartial investigation into the harassment, and (3) undertake remedial measures as necessary to ensure that further harassment does not occur. Faulty investigations expose employers to vicarious liability for workplace harassment.

B. Attorney-Client Privilege and Attorney Work Product

Understandably, employers often prefer to avoid widespread disclosure of non-public corporate information, including information revealed in sensitive internal investigations. One avenue for achieving this objective is to ensure that written and oral communications gathered in the investigation are covered by the attorney-client privilege and/or the attorney work product doctrine.

1. Attorney-Client Privilege

Generally speaking, the attorney-client privilege protects confidential communications between a client and his or her attorney made for the purpose of securing legal advice or assistance.[5] The U.S. Supreme Court has given broad protection to confidential communications made between corporate counsel and corporate employees (not just those at the top of the corporate ladder) who supply relevant information during an internal legal investigation.[6] In applying the privilege to communications with lower-level employees, the court was persuaded by a number of factors including:

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[3] *Robel v. Roundup Corp.*, 148 Wn.2d 35, 47 (2002). *See also Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 165-67 (2000) (adopting *Faragher/Ellerth* affirmative defense).

[4] Anti-harassment policies are discussed in greater detail in Section H below.

[5] The attorney-client privilege is a common law privilege now codified in RCW 5.60.060(2).

[6] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

- The communications were made to corporate counsel acting as such;
- The communications were made during interviews conducted at the direction of corporate counsel;
- The information at issue was not available from high-ranking employees;
- The communications concerned matters within the scope of the employees' duties; and
- The employees were aware that they were being questioned so the corporation could obtain legal advice.

To ensure employee communications made during internal investigations are covered by the attorney-client privilege, an employer would be well advised to model its investigation on the factors set forth in *Upjohn*. It is important to remember that while the privilege protects written and oral communications between attorney and client, it does not necessarily protect the underlying facts (i.e. a pre-existing, otherwise discoverable document does not automatically become privileged because it is handed to counsel during a confidential communication). In the corporate context, the privilege is held by the corporation (employer) and may be waived by the corporation's disclosure to third parties.

2. Attorney Work Product

In order to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and a strategy with an eye toward litigation "free from unnecessary intrusion" by his adversaries, the U.S. Supreme Court created the work product doctrine.[7] The work product doctrine protects from discovery:

> Documents and tangible things prepared in anticipation of trial or litigation by or for another party or that party's representative unless the party seeking discovery can show a substantial need for the materials and that it is unable, without undue hardship, to obtain substantially equivalent materials elsewhere.

Because this doctrine only protects materials created in anticipation of litigation, it is crucial that corporate counsel, and/or those acting at counsel's direction during an investigation, record the *legal* nature (as opposed to corporate counsel's duty to give general business advice, etc.) of their participation. Documents created in the course of the investigation must be clearly designated in a manner consistent with the legal objective. Greater protection is afforded to work product containing an attorney's

[7] *Hickman v. Taylor*, 329 U.S. 495 (1947). Now codified in Fed. R. Civ. P. 26(b)(3) and CR 26(b)(4).

opinions, conclusions, and mental impressions ("opinion work product"). Such material enjoys nearly absolute protection and is discoverable only in extraordinary circumstances. Waiver of the work product protection occurs upon any disclosure to a third party where the disclosure would be inconsistent with the purpose of the doctrine to keep a party's theories and strategy secret from its adversary.

C. Recording an Interview: Washington Law

While it may be tempting to record an employee interview during an internal investigation, one should approach the issue with caution. It is important to remember that Washington law prohibits the recording of a conversation between two or more individuals "without first obtaining the consent of all the participants in the communication."[8] Therefore, before recording an interview, the interviewer must obtain consent from the interviewee. Best practices would include placing the recorder in plain view and obtaining the consent of all parties on the record. Even if consent is obtained, there are several practical concerns that counsel against recording an employee interview. First and foremost, the prospect of recording a conversation usually makes the interviewee nervous and can lead to withheld or inaccurate information. Additionally, the contents of a recording, including the interview's tone and method, could be used to discredit information obtained in the interview.

D. Removing Victims From the Workplace

In its efforts to take the "immediate and appropriate corrective action" mandated by both the *Faragher/Ellerth* affirmative defense and the EEOC,[9] an employer must be careful not to adversely affect the terms and conditions of the complaining party's employment. Both the EEOC and the Ninth Circuit Court of Appeals (which covers Washington) have openly condemned employment decisions that had a negative impact on the alleged victim's working conditions. In the words of the Ninth Circuit:

> We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser. We wholeheartedly agree with the EEOC that a victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment. *EEOC Compliance Manual* (CCH) § 615.4(a)(9)(iii), ¶ 3103, at 3213 (1988).[10]

E. Retaliation for Participating in Internal Investigations

Employers should proceed with caution when preparing to take adverse

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[8] RCW 9.73.030(1)(a).

[9] *See* 29 C.F.R. § 1604.11(d).

[10] *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991). *See also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).

employment action against employees who have participated in investigations involving allegations of unlawful employment practices under Title VII or the Washington Law Against Discrimination (WLAD). Discipline or discharge under these circumstances could constitute unlawful retaliation in violation of federal and/or state anti-discrimination laws. *See* 42 U.S.C. § 2000e-3(a) (making it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]"); RCW 49.60.210 (making it "an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by [the WLAD], or because he or she has filed a charge, testified, or assisted in any proceeding under [the WLAD]"); *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003) (holding "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge"); *Sorrentino v. Bohbot Entm't & Media, Inc*., 697 N.Y.S.2d 263, 264 (1999) (holding employee's participation in employer's internal investigation of sexual harassment claims by another employee was activity protected from retaliatory practices). *See also* *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002 at V.C.1(b) (6/18/99) ("Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.").

F. Weingarten Rights

As announced by the U.S. Supreme Court in *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975), an employee in a unionized workforce is entitled to union representation during investigatory interviews that the employee reasonably believes could result in disciplinary action. An employee does not, however, have a right to be represented by his private legal counsel who is neither a co-employee nor a union representative. *McLean Hospital*, 264 NLRB 459 (1982). Nor does an employee have a right to have a specific union representative present, as opposed to any union representative. *Roadway Express, Inc.*, 246 NLRB 1127 (1979).

Whether or not these *Weingarten* rights extend to employees in a non-unionized workforce has been the topic of much debate, with the National Labor Relations Board (NLRB) changing its position twice in the past decade alone. In 2000, the NLRB reversed a 12-year precedent when it decided to extend *Weingarten* rights to non-union employees, guaranteeing them the right to have a coworker present at investigatory interviews which the employee reasonably believed might result in disciplinary action. *Epilepsy Foundation*, 331 NLRB 676 (2000). In 2004, the NLRB retreated from this position and overruled *Epilepsy Foundation*, holding that non-unionized employees do *not* have the right to have a coworker present at investigatory interviews that might lead to discipline. *IBM Corp*., 341 NLRB 1288 (2004) (case arose out of internal

investigation into allegations of harassment). Basing its decision on the conditions of the continually evolving "contemporary workplace," the NLRB explained that, "[i]n recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations . . . . Our consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker."[11]

G. Additional Considerations for Public Sector Employers

The state may not deprive public employees who have a property right in continued employment of that right without due process of law. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Therefore, before disciplining the subject of an internal investigation, a public employer should provide:[12]

1. Oral or written notice of the charges against the employee;

2. An explanation of the employer's evidence against the employee; and

3. An opportunity for the employee to present his or her "side of the story."

H. The Importance of a Clear Anti-Harassment Policy

A clear and comprehensive written anti-harassment policy is not only necessary to successfully defend a sexual, racial or other unlawful harassment claim but also is, the single best tool for avoiding incidents of workplace sexual harassment in the first place. According to the EEOC:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.[13]

But what should such a policy look like? The EEOC has provided the following guidance regarding essential elements of an effective sexual harassment policy:

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[11] *Id*. At 1290
[12] *Loudermill*, 470 U.S. at 542-47
[13] 29 C.F.R. § 1604(f).

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[14]

[14] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors at V.C.1 (Guidance No. 915.002 issued 6/18/99), *available at* http://eeoc.gov/policy/docs/harassment.html (the EEOC goes on to discuss each of these requirements in greater detail).