

**INTERNAL
INVESTIGATIONS**

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**STANDARDS FOR
INVESTIGATIONS**

- Recent case law indicates the courts are willing to apply the sexual harassment standard for employer liability when analyzing other forms of harassment and hostile work environments under Title VII.

- **Example:** Anthony Booker was the only black supervisor in Budget Rent-A-Car Systems' Nashville branch for 13 years. He rose through the management ranks before being named location manager, which required him to report to a general manager who was reputed to be abusive. He was prompted by other managers' reports about the manager's behavior to keep a diary in which he recounted incidents of mistreatment that continued over eight months. This included verbal abuse, berating, cursing, cancellation of his previously approved vacation, and the demotion to a job he held three years earlier.

• **Booker sued his employer under Title VII, alleging racial harassment and race discrimination. The federal district judge determined that the same standards should be followed in this racial harassment case as those set out by the Supreme Court in sexual harassment cases. Specifically, employers are vicariously liable (*subject to an affirmative defense*) whenever a supervisor has created a hostile work environment. (*Booker v. Budget Rent-a-Car Systems*)**

• **Courts often look to the thoroughness of an investigation when deciding the extent of an employer's liability.**

• **Example: The superficial investigation of an internal race discrimination claim led to a \$17 million judgment against a California aircraft manufacturer. The case involved a "glass ceiling" claim by Jeffrey Lane, a black physicist who had not been promoted after 10 years of employment.**

The HR representative who investigated the claim learned that a white employee, hired at the same time as the black physicist, had been promoted after five years. However, because he and Lane were paid the same, she concluded, there was no discrimination.

In finding for the employee, the court noted that a failure to promote could be discriminatory whether or not the employees were paid equally. The court chastised the HR rep for not investigating further to find out the statistics of promotion rates for blacks generally in the company.

The court stated the investigator did not look carefully enough into the company's practices.

GOALS OF THE INVESTIGATION

Determine whether the charge or allegation, in fact, occurred.

Set the stage for related employment decisions.

GOALS OF THE INVESTIGATION

Reduce damages and other related consequences to the complainant.

Protect others from potential discrimination in the workplace.

Set the stage for defense of potential litigation.

If investigations are not conducted carefully, negative consequences could result, such as:

•Failure to identify a meritorious claim.

•Failure to take prompt, corrective action.

•Failure to protect others from potential workplace harassment, discrimination or retaliation.

•Failure to identify false charges which could lead to employer liability for wrongful discipline of the alleged harasser.

•Failure to set up a successful defense of potential litigation.

Specific suggestions for investigating discrimination claims included:

Expanding the investigation to determine whether targeted disparate employees in positions similar to the complainant have experienced discrimination.

Finding out how many targeted disparate group were in higher-level positions than the complainant. This would allowed a determination as to whether the complainant was underpaid and under promoted because of his/her race and/or gender.

•Examining statistics of promotion rates for targeted disparate group in the organization.

•Acquiring a better understanding of how affirmative action statistics were kept before considering company-wide information irrelevant.

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STANDARDS FOR INVESTIGATIONS

• PRIVACY

- **When reviewing the legality of investigations, the law generally balances an employer's interest in a safe and efficient work force against the employees' rights to be free from unreasonable invasions of privacy.**



- **Employee privacy rights may be protected by statutes (such as medical confidentiality laws), constitutions, and common law.**



Example: In the common law, there are three types of privacy rights that are directly relevant to investigations:

I
Public disclosure of private facts
(*informational privacy*)

The right to privacy includes the right to keep certain *personal information* from public knowledge. Informational privacy prohibits employers from disclosing information that would be offensive to a reasonable person and not of legitimate concern to the public. For example, if an investigation publicizes information about an individual's private affairs, such as having AIDS or being HIV-positive, the individual may sue for an invasion of privacy.

II
Placing in a false light
(*false light privacy*)

If an investigating employer assigns *false attributes or associations* to the targeted employee, and these false attributes are broadcasted to a large number of people, there may be recovery for invasion of privacy. For example, wrongly labeling someone a racist or a homosexual may be enough to create liability for false light privacy, even if there is no injury to the employee's reputation.

III

**Intrusion into another's seclusion
(autonomy privacy)**

The right to privacy protects employees' *physical and psychological "space."* Basically, unless there is a legitimate business purpose, employees have a right to be left alone. Accordingly, any intrusion of an employees' physical environment or psychological liberty could be a common law invasion of privacy.

DEFAMATION

- **During an investigation, damaging and perhaps false information may be obtained. Anyone who divulges information gained in an investigation to others, including co-workers, office staff and personal friends, risks liability for defamation.**

Defamation typically means:

A false oral or written statement

Defamation typically means:

Communicated to a third party

Defamation typically means:

That injures the reputation of the individual by exposing the individual to hatred, contempt, or ridicule, or by causing the employee to be shunned or avoided; and

Defamation typically means:

That is unprivileged.

Qualified Privilege

- **An employer has a qualified privilege to divulge even defamatory information to persons who have a demonstrated “need to know” the information, such as the person in charge of the investigation or of the disciplinary policies or the organization.**

Qualified Privilege

- **However, the privilege does not apply to defamatory information that is disclosed in bad faith or that lacks credibility.**

Checklist for Conducting an Internal Investigation

- **Learn all the facts!**
- **Identify the Principals!**

- **Complainant or Harassee**
- **The Accused or Harasser**
- **Witnesses**
 - **Identified by the Complainant**
 - **Identified by the Accused**
- **The Supervisor or Manager**

Checklist for Conducting an Internal Investigation

- **Interview all principals**
 - **Make a list of sub-candidates identified by principals**
 - **Target individuals for an interview that may offer direct testimony (eye-witness accounts)**
 - **Avoid individuals with second-hand information from a third party**

Checklist for Conducting an Internal Investigation

- **Avoid 'office sweeping' interviews!**

Checklist for Conducting an Internal Investigation

- **Listen to everything!**
 - **Avoid interrupting the interviewee**
 - **Try to maintain eye contact with interviewee as much as possible**

- **Avoid nodding and making emotional facial expressions**
 - **Resist the 'mmhmm' and 'humph'**

Checklist for Conducting an Internal Investigation

- **Ask questions!**
 - Write down questions beforehand
 - Repeat the question in a different way later in the interview
 - Look for inconsistency

Checklist for Conducting an Internal Investigation

- **Ask questions!**
 - Avoid 'fill in the blank' responses
 - Don't settle for the 'You know?...'
 - **Don't let the interviewee turn YOU into the interviewee!**
 - Be careful of the "answer the question with a question" responses

**UNITED STATES
SUPREME
COURT'S
DECISION(S)**

**Burlington Industries, Inc vs
Ellerth...**

- Under Title VII, an employer may be subject to vicarious liability for a supervisor's harassing conduct even when no tangible employment action is taken against the employee.

**Faragher vs City of Boca
Raton...**

- "No tangible action may still hold agencies liable for workplace harassment."

Coates vs Sundor Brands, Inc...

- The subordinate had led management to believe that the harassment had stopped.

Harris vs Forklift Systems,
Inc...

- Environment was one that a reasonable person would find hostile, and was in fact perceived to be hostile by the employee.

Questions and Answers?
