Chapter 2

Workplace Investigations

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§ 2:1 Introduction[1]

Investigations, whether internal or external, are typically utilized by employers as a means to explore and address potential workplace-related issues. Legal practitioners may be engaged to conduct workplace investigations when an employer learns of potential conduct that may violate its employment policies. For issues that may implicate workplace employment laws, conducting investigations may also

1. By way of reminder, practitioners are encouraged to review the rules and governing case laws in their governing jurisdiction. This chapter does not provide a jurisdiction-by-jurisdiction analysis and does not get into any applicable state procedural rules. This chapter's discussion focuses on the Federal Rules of Civil Procedure.

send the message that the employer takes the issues seriously and is willing to expend resources to review and address such concerns. Such a message often benefits employee morale, especially when the issues or concerns are publicly known. In addition to helping create a culture in which employees feel comfortable raising concerns, investigations may also serve the purpose of mitigating against reputational risk and legal liability. Investigations may also support an affirmative defense to Title VII hostile work environment claims[2] as well as for wrongful termination claims.[3]

Notwithstanding all of these benefits, investigations may also pose legal risks themselves if not conducted appropriately.

This chapter will discuss the practical aspects of the different stages of workplace investigations, and the considerations that may come into play when conducting such investigations.

§ 2:2 Complaint Intake

§ 2:2.1 Workplace Investigation Issues

Issues that often lead to workplace investigations include concerns related to discrimination (for example, race, disability, gender), harassment (for example, sexual, sex-based), hostile work environment, retaliation, bullying, or other violations of company policies (for example, social media policy). The concern does not necessarily need to be potentially legally cognizable or a policy violation to warrant an investigation. For example, a claim or concern that a work environment is "toxic" may not necessarily equate to a legally cognizable "hostile work environment" claim, but may likewise be the subject of an investigation.

Investigations can result from formal complaints and informal reports of potential policy violations that come to an employer's attention.

Once a management-level employee is made aware of a potential concern, that knowledge can be imputed to the company as a whole and an investigation may be required. This is because once a company

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2. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998). Note that not all states recognize such a defense. *See, e.g.*, Zakrzewska v. New Sch., 14 N.Y.3d 469 (2010) (finding that Faragher-Ellerth affirmative defense to workplace harassment claims is unavailable to New York City employers for similar claims brought under the New York City Human Rights Law).
3. Investigation as affirmative defense to liability for wrongful termination. *See, e.g.*, Walter v. BP Am., Inc., No. 12-cv-177, 2014 WL 1796676 (E.D. La. May 6, 2014), *aff'd*, 593 F. App'x (5th Cir. 2015).

is aware of certain problems such as harassment, it has a duty to take reasonable steps to eliminate it or could face civil liability under federal law.[4] For example, in *Domingues v. Barton Chevrolet Cadillac*,[5] the plaintiff informed two supervisory employees that a co-worker had touched the plaintiff's breast and made sexually inappropriate comments to her. The company's anti-harassment policy required the supervisory employees to take steps to have the employee's concern investigated and, if substantiated, to take appropriate remedial actions. The district court held that because the plaintiff "reported the sexual harassment to employees that had a duty to act, those employees' knowledge of the harassment c[ould] be imputed" to the company.[6] In *Erickson v. Daimler Trucks North America*,[7] the plaintiff told a supervisor that a co-worker confessed to her that he was in love with her. The supervisor did not report her disclosure to human resources but instead instructed the co-worker to keep his interactions with the plaintiff purely professional and checked in with him on a weekly basis to ensure he was complying.[8] The court rejected the company's argument that it had no obligation to commence an investigation until human resources received the complaint, instead finding that the company was on notice of the complaint as of the plaintiff's report to the supervisor.[9]

A company can suffer legal consequences if it does not investigate complaints that are raised. In *Wilmoth v. Arpin America Moving Systems, LLC*,[10] the plaintiff alleged a supervisor made several verbal and physical sexual advances toward her, that she complained to a different supervisor via email twice—once in January and again in March—and that the supervisor failed to respond. The court denied the employer's motion to dismiss, finding that the supervisor's inaction "amounted to deliberate indifference and/or an affirmative act" that may result in individual liability under New Jersey law.[11]

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4. Bailey v. Nexstar Broad., Inc., No. 19-cv-671 (VLB), 2020 WL 1083682, at *13 (D. Conn. Mar. 6, 2020) (citing Malik v. Carrier Corp., 202 F.3d 97, 107 (2d Cir. 2000).
5. Domingues v. Barton Chevrolet Cadillac, No. 18-cv-07772 (PMH), 2021 WL 637016, at *1–2, *7 (S.D.N.Y. Feb. 17, 2021).
6. *Id*.
7. Erickson v. Daimler Trucks N. Am., LLC, No. 10-cv-132 (ST), 2011 WL 4753534, at *2 (D. Or. July 20, 2011), *report and recommendation adopted*, No. 10-cv-132 (ST), 2011 WL 4753531 (D. Or. Oct. 6, 2011).
8. *Id*.
9. *Id*. at *12.
10. Wilmoth v. Arpin Am. Moving Sys., LLC, No. 19-cv-19187 (ES) (CLW), 2021 WL 3674344 (D.N.J. Aug. 19, 2021).
11. *Id*. at *11.

Similarly, in *Hall v. City of Dearborn*,[12] the plaintiff alleged she was subject to a hostile work environment of a sexual nature based on her supervisor's actions, and that she complained to the employer three times—on November 8 about an inappropriate comment, on November 16 about an inappropriate gesture, and on January 29 about another inappropriate comment—but the harassment continued.[13] After she reported yet another incident of harassment, the plaintiff alleges human resources told her "'they were not going to take these incidents seriously' and to 'not come back again with anything regarding [her supervisor] because it could be construed as [the plaintiff] starting to harass him.'"[14] The court denied the employer's motion for summary judgment, holding that a reasonable jury could find that the employer failed to "exercise[ ] reasonable care to prevent and correct promptly any sexually harassing behavior."[15] And in *Ray v. Salem Township Hospital*,[16] the plaintiff alleged she was subject to verbal and physical sexual harassment by her supervisor over the course of several months but that when she contact human resources, she was told that she should speak with her supervisor "to resolve the issue," and when she reached out a second time, was informed that the human resources representative was "busy."[17] The court denied the employer's motion for summary judgment, holding that a reasonable jury could find the employer knew the plaintiff was being sexually harassed and was "negligent in investigating and remedying" the inappropriate behavior, particularly where the employee with "the supervisory power necessary to take action to remedy [such] behavior . . . declined to act on Plaintiff's allegations."[18] Legal consequences for the employer can arise from not investigating even if the complainant requests no investigation take place because a court or jury may find that response unreasonable under the circumstances. In *Brunson v. Bayer Corp.*,[19] the plaintiff told two supervisors that a co-worker made unwelcome comments and gestures of a sexual nature toward her but said she wanted to handle it herself. The supervisors complied for approximately two months.[20] Once the supervisors

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12. Hall v. City of Dearborn, No. 20-cv-10198 (LJM), 2021 WL 4864219 (E.D. Mich. Oct. 19, 2021).
13. *Id*. at *1–2.
14. *Id*. at *3.
15. *Id*. at *8.
16. Ray v. Salem Twp. Hosp., No. 19-cv-01048 (GCS), 2021 WL 4439655 (S.D. Ill. Sept. 28, 2021).
17. *Id*. at *1.
18. *Id*. at *6.
19. Brunson v. Bayer Corp., 237 F. Supp. 2d 192 (D. Conn. 2002).
20. *Id*. at 197.

reported the complaint, the company conducted an investigation and ultimately terminated the individual who had made the comments.[21] The plaintiff subsequently sued the company alleging sex and race discrimination under Title VII.[22] The court denied the employer's motion for summary judgment finding that reasonable jurors could conclude the supervisors had a duty under the company policies to report the sexual harassment to management, that the supervisors would find the descriptions of such conduct potentially indicative of problematic sexual behavior as well as demonstrate a pattern of harassment possibly affecting others, and that a lack of response was negligent.[23]

§ 2:2.2 *Investigation Attributes: Promptness and Thoroughness*

While an investigation may serve to mitigate an employer's liability, the opposite effect can occur if the investigation is not conducted properly. Liability can arise both from the failure to conduct an investigation as well as from a poorly conducted investigation. In examining investigations, courts often consider how promptly they were initiated, as well as how thoroughly they were conducted. As discussed below, promptness and thoroughness should be considered on a case-by-case basis.

[A] Promptness

Regarding promptness, some courts have found that investigations that begin within a few days of the complaint are "prompt." In *Sutherland v. Wal-Mart Stores, Inc.*,[24] an investigation into sexual harassment allegations was sufficiently prompt where the employer began the investigation the day the company received the employee's complaint.[25] In contrast, courts have found that initiating an investigation months after first receiving the complaint may not be sufficiently prompt.[26]

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21. *Id*. at 197–198.
22. *Id*. at 201.
23. *Id*. at 204–205.
24. Sutherland v. Wal-Mart Stores, Inc., 632 F.3d 990, 994 (7th Cir. 2011).
25. *See* Newton v. Ohio Dep't of Rehab. & Corr.-Toledo Corr. Inst., 496 F. App'x 558, 565 (6th Cir. 2012) (same); *see also* Forsythe v. Wayfair, LLC, No. 20-cv-10002 (RGS), 2021 WL 102649, at *5 (D. Mass. Jan. 12, 2021) (investigation sufficiently prompt where it began approximately one week after supervisor received complaint); Andrus v. Corning, Inc., No. 14-cv-6667 (FPG), 2016 WL 5372467, at *6–7 (W.D.N.Y. Sept. 26, 2016) (same).
26. *See* Ellison v. Clarksville Montgomery Cnty. Sch. Sys., No. 17-cv-00729, 2019 WL 280982, at *12 (M.D. Tenn. Jan. 22, 2019) (employer's

Failure to promptly initiate an investigation may result in detrimental court rulings on dispositive motions for employers. For example, in *Sotoj v. Nashville Aquarium, Inc.*,[27] the district court denied the employer's motion for summary judgment because the employer failed to present evidence that its response to the plaintiff's complaint was prompt. Instead, the record demonstrated that no one was interviewed in connection with the employer's investigation until approximately one month after the plaintiff lodged her complaint, which was insufficient to establish that the employer "promptly responded to [the plaintiff's] complaint in a manner reasonably calculated to end the alleged harassment."

In addition to the promptness with which an investigation was initiated, courts may also consider whether the investigation was completed in a prompt manner. To that end, courts have found that investigations completed within two weeks are sufficiently prompt. In *Barroso v. Lidestri Foods, Inc.*,[28] for example, the employer's response was found to be prompt where it conducted an investigation and took remedial action against the accused within just eleven days (and only seven business days) of receiving the complaint. Similarly, in *Andrus*,[29] the employer's response was deemed sufficiently prompt where it conducted an investigation and terminated the accused's employment within approximately two weeks of the complainant lodging her complaint.

While the goal is to conduct an investigation as quickly as possible, courts recognize that what is a "reasonable" time often depends on the specific facts and circumstances related to the matter being investigated. For example, a lengthier investigation may be needed depending on the number and type of issues involved, how many interviews may need to be conducted to thoroughly investigate the concern, the witnesses' availability, and to what extent document review may be conducted. In fact, a lengthier investigation may be needed in order to ensure its thoroughness. In *Trahan v. LaSalle Hospital Service District No. 1*,[30] for example, the court found that

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response was unreasonable where employer waited "nearly a month after the plaintiff's initial complaint before beginning an investigation"); *see also* E.E.O.C. v. Mgmt. Hosp. of Racine, Inc., 666 F.3d 422, 435–36 (7th Cir. 2012) (investigation not sufficiently prompt where it was initiated one to two months after complainants reported the harassment to management).

27. Sotoj v. Nashville Aquarium, Inc., No. 14-cv-00754, 2016 WL 3568591, at *9 (M.D. Tenn. July 1, 2016).
28. Barroso v. Lidestri Foods, Inc., 937 F. Supp. 2d 620, 637 (D.N.J. 2013).
29. Andrus v. Corning, Inc., 2016 WL 5372467, at *7.
30. Trahan v. LaSalle Hosp. Serv. Dist. No. 1, No. 11-cv-1507, 2014 WL 1217850, at *9 (W.D. La. Mar. 24, 2014).

a one-month investigation was reasonably prompt in light of the fact that the investigator was out of town on business when the complaint was lodged, that several interviewees worked nights or other irregular hours, and that the complainant worked on a part-time basis only for a handful of days each month. Similarly, in *Cochran v. Harrison Finance Co.*,[31] a three-month investigation into alleged harassment by the company's president was found to be reasonable in light of the president's "position in the company, the number of branches (and employees) under his supervision, and the very serious nature of the charges."

The promptness of initiating an investigation may also impact an employer's litigation risk if it is determined the investigation itself took a longer amount of time to complete. For example, in *Sears-Barnett v. Syracuse Community Health Center, Inc.*, the employer conducted a seven-week long investigation when the plaintiff reported a colleague for sexual harassment.[32] The plaintiff alleged the employer took too long to discipline the colleague.[33] The court noted that while "seven weeks is not an insubstantial period of time to conduct what seems to be a straightforward investigation," the investigation was promptly initiated in the first instance. The court ultimately held that the length of the investigation was not enough to overcome summary judgment as "the law simply cannot require sending [the employer] to trial because they did not immediately discipline a supervisory employee upon the first allegation of sexual harassment levied at her . . . ."[34]

[B] Thoroughness

Courts will further consider whether an investigation was thorough enough to address the concerns raised and support the actions taken. Brief and cursory investigations that do not fully review the concerns raised have been found to be insufficient. For example, in *E.E.O.C. v. Boh Brothers Construction Co.*,[35] the Fifth Circuit upheld a jury verdict finding the employer liable for a supervisor's misconduct where investigators conducted only "a belated and cursory twenty-minute investigation." Similarly, in *Vandegrift v. City*

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31. Cochran v. Harrison Fin. Co., No. 13-cv-00061 (CB-M), 2014 WL 1017889, at *6 n.3 (S.D. Ala. Mar. 17, 2014).
32. Sears-Barnett v. Syracuse Cmty. Health Ctr., Inc., 531 F. Supp. 3d 522, 537–538 (N.D.N.Y. 2021).
33. *Id*.
34. *Id*.
35. E.E.O.C. v. Boh Bros. Constr. Co., 731 F.3d 444, 465 (5th Cir. 2013).