

# WORKPLACE INVESTIGATIONS: RETHINKING THE TRADITIONAL PARADIGM AND ADVOCATING THE USE OF THIRD PARTY INVESTIGATORS

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When there is an allegation of misconduct in the workplace, such as under the employer's harassment or non-discrimination policy, the responsible organization typically responds with a frenetic activity to investigate and remedy any found wrongdoing. Unfortunately, however, the response that employers take may be premised upon either fear of liability and the potential costs associated with damage awards and defense costs, or because the typical response is one of rote activity, pounded into policy application to ensure that the employer checks off the necessary boxes to adequately defend the case in ensuing litigation. The

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quest for the truth is often lost to focus on other areas.

This article takes the position that the most effective investigations are those that are conducted by outside third parties. The purpose of this article is to bring to light many of the shortcomings of the traditional processes by which workplace misconduct investigations are conducted and identifies the benefits of utilizing third parties to conduct investigations. In addition, guidance is provided for the selection of a qualified and effective third party investigator.

## **THE TRADITIONAL PARADIGM**

A workplace investigation is typically conducted under a variety of scenarios. First, the human resources department conducts the investigation, reports its findings to management, disciplinary decisions are made, and, in the event of litigation, the human resources professional is deposed and serves as a witness for the defense. The pitfalls and errors in the investigation process are found when counsel becomes involved to defend the

employer. Counsel finds that despite the best of intentions, critical errors were made in the investigation. The interviewer is not clear on the facts, cannot explain the order of witnesses interviewed, cannot explain why notes were not taken during some of the interviews, or worse yet, fails to interview key witnesses. The organization then reacts and implements the second scenario.

In the second scenario, counsel is used (either inside or outside) to conduct the investigation itself. This is done to "ensure" that the investigation is done correctly and that it is done with the thought of litigation in mind. If litigation results, counsel feels as though the case can be safely defended and there is little concern about the quality of the investigation. At times, this scenario is similar to using to a sledgehammer to crack open a walnut. It is extremely costly and timely. It is often done solely with litigation and mitigation of damages in mind. Somewhere along the way, the desire to find the truth and improve the workplace has been forgotten.

A third scenario, somewhere in the middle, is when an internal professional is supervised by counsel to conduct the investigation. Counsel works closely as the internal professional conducts interviews, reviews documents, draws conclusions and makes recommendations. Counsel believes that this approach can maximize the use of the attorney-client privilege and believes that it will be better able to prevent problems in the investigation. Essentially, adopters of this approach believe that if something bad is found, the attorney-client privilege can be invoked like a magical defense shield in a Star Wars movie. If nothing bad is found, the investigation is put forth as a major element of the defense, the Star Wars defense shield being unnecessary. In addition, the very information that counsel relies upon is filtered through an inexperienced investigator. Important information can be overlooked.

The problems with all of these approaches are many. First, they presume that an internal professional and/or the attorney are actually qualified to do an investigation. The very fact that an individual is either a human resources professional or an attorney does not, in and of itself, mean he or she knows how to do an investigation. Organizations often erroneously believe they do. The human resources professional that juggles a variety of duties ranging from benefits administration to employee relations to training, is unlikely to be considered an expert in workplace investigations. Often, when these professionals are asked to conduct an investigation, they typically have little experience or specific training. Moreover, they are entwined in the political landscape of the organization. Attorneys

who conduct investigations have their own set of limitations. The inside counsel is typically a corporate attorney who knows employment law only peripherally. The outside counsel typically knows little about workplace dynamics and is focused necessarily on defense. Even when the attorney investigator is an expert their focus remains on defense and strategy.

The most significant problem with these approaches is that they do little to support finding the truth. Because of focus of each of these parties—the attorney being focused on defense and the human resources professional caught in the internal politics of the situation—the ability to find the truth in an investigation is seriously compromised. This can result in additional damaging facts being brought out in discovery that could have been found during the investigation. Worse yet, the faulty investigation seriously compromises the defense. A modest investment in an outside investigator suddenly looks like a small price to pay when compared to a multiple six-figure defense.

### **THE CASE FOR THE OUTSIDE INVESTIGATOR**

Over time, the use of neutral third parties in investigations of employee misconduct has become more and more compelling. In recent history, there have been a variety of challenges to organizations premised upon their ability or willingness to be completely objective in their business operations. For example, the news portrays senior level leadership in organizations being accused of self-dealing and self-interest. The result of which has been the imposition of regulations to enforce objectivity and neutrality in the management of

the business. This ranges, for example, from the design of compensation committees on the board of directors to limits on accounting firms to also consult with their clients in other areas. As another example, employees question the neutrality and fairness of human resources professionals who conduct investigations and then impose discipline. School districts are continually faced with increasing challenges from parents and other stakeholders who question expenses and decisions surrounding the provision of education. The bottom line: society has grown increasingly more participatory. Stakeholders demand information, they want to make sure there are checks and balances and they continually seek to ensure that decisions are made based upon the collection of data and information in an objective manner.

This trend toward objectivity in the management of the business and society compels the organization and its attorneys to consider the use of third parties in investigations of workplace misconduct. Some of the more obvious reasons advocating the use of third parties include the following.

#### **Neutrality and Objectivity**

Plaintiff's counsel, internal cynics and other doubtful employees often question the neutrality and objectivity of the investigation. Human resources, typically viewed as being aligned with management, and management itself find themselves in an untenable position that they often ignore. They serve as the investigator, prosecutor and jury in the administration of justice in their organizations. When questioned about whether it is appropriate to serve in all three of these roles, respondents typically claim they can perform these tasks with

complete neutrality and are not biased in any way. Even if that were the case, how could it possibly be believed?

The outside investigator has no stake in the outcome and has no preconceived notions of guilt or innocence on the part of the parties. He or she can face the investigation with a clear head. The investigator is not tainted by knowledge of any past history of the accused or accuser, can look at the evidence with a fresh eye, and will most likely pick up on things that parties close to the matter will not see. Like the arbitrator or mediator that parties in litigation often rely upon for their neutrality and objectivity to resolve their disputes, the neutral outside investigator serves a similar role.

### **Perception of Fairness**

Employees who are part of an investigation often feel as though the investigator is tainted and pro-management. This occurs because the investigator is often a member of human resources, a member of management or an inside or outside attorney. The outside investigator, while retained by the organization or law firm, will be able to portray an element of fairness based on the issues of neutrality and objectivity. While cynical or doubtful employees may question the fairness of an investigator hired by management, the effective investigator will be able to portray a necessary element of fairness that management and its attorneys cannot. This may be an important element in the event the investigation is challenged by plaintiff's counsel or by the Equal Employment Opportunity Commission during the course of its investigation.

### **Ability to Retain the Attorney-Client Privilege When the Investigator is Retained Through Counsel**

In *Faragher v. City of Boca Raton*<sup>1</sup> and *Burlington Industries v. Ellerth*<sup>2</sup> the Supreme Court established what has become known as the *Faragher/ Ellerth* Defense. Utilizing this defense, employers may avoid certain liability for claims of hostile work environment harassment committed by supervisors and employees. Part of this defense includes promptly preventing and correcting harassing behavior. The investigation process falls squarely in this defense as the effective investigation helps to demonstrate the employer's prompt and remedial action. A faulty investigation can compromise the employer's ability to adequately defend itself. A well-done investigation can be the cornerstone of success.

The use of the attorney-client privilege, however, in defense of such cases is not always absolute. When defense counsel conducts the investigation and the adequacy of the investigation is used in the defense of the case, the attorney-client privilege may be lost. For example, several courts have found that where the defense counsel has also conducted the investigation and where the reasonableness of the investigation becomes an issue in the case, the privilege is lost.<sup>3</sup> The result is that defense counsel suddenly finds itself a witness to the litigation. The defense attorney can find himself deposed, his notes unprotected and the advice given to his client subject to disclosure.<sup>4</sup> Some firms have responded to such rulings by taking the position that workplace investigations are not privileged and have begun to utilize outside professionals exclusively.

When the outside investigator is retained through counsel, the ability to preserve the attorney-client privilege is maximized, subject obviously to the *Ellerth/Faragher* issues identified above. Counsel may choose to protect the investigation or to use the results of its investigation in the *Ellerth/Faragher* defense. An investigator who is not retained through counsel, but rather retained by non-attorneys from the employer is merely another witness in the case as it goes to litigation and can be deposed as such. While this may still be a better option than to use a less experienced in-house staff member, retaining the outside investigator through counsel maximizes the ability of the employer and its counsel to strategize its defense and utilize the privilege where permissible in light of law in its own jurisdiction. Defense conflicts are avoided and flexibility is maximized.

### **Professionalism and Experience**

An individual who specializes in investigations will likely have significantly more expertise than either an in-house staff member or an outside attorney. In-house staff members are often pulled between the need to conduct the investigation and the many other responsibilities they have. As a result, the investigation gets sandwiched in among many duties, compromising timeliness and thoroughness.

An investigator who is also an attorney fully understands the nature of litigation and can, therefore, conduct a better investigation. He or she will understand the role of evidence, discovery and the other issues related to litigation. Beyond being an attorney, however, it is important for the investigator of workplace misconduct to understand the workplace. This is easier said than done. There are

many private investigators that conduct investigations. Ensuring their knowledge of the workplace is critical. Does he know how policies are applied in the workplace? Does he have an understanding of what can really happen in the workplace despite a policy? Does she understand the political elements which exist in the workplace and how these can impact the investigation? An effective investigator will be able to use his or her knowledge of the workplace to draw out the facts of the case.

### **Statement of Seriousness**

The very act of bringing in an outsider to conduct an investigation demonstrates and underscores the serious nature of the issue at hand and communicates to those involved that the organization is taking the matter seriously. Whereas participants in the investigation may be likely to brush aside questions from insiders, when an outside investigator poses those same questions, a more serious tone emerges.

Inside investigators often struggle with scheduling issues when trying to fit the investigation into the day-to-day operations. Investigations are disruptive, take employees away from their work, and cause attention in the workplace to turn away from the work activities. Senior level or influential stakeholders in the organization who doubt the seriousness of the complaint can put in place roadblocks—roadblocks that internal investigators may be hesitant to challenge for political reasons. Employees will be unavailable or unwilling to participate in the investigation and they may be hesitant to disclose information based upon signals from these influential stakeholders. The presence of an outside investigator and the serious tone established by such a presence

makes everyone aware of the importance of the investigation and they will be more likely to be willing to free up their schedule to participate.

### **Avoidance of Internal Political Problems**

Considering the disruptive nature of investigations in the workplace, it is important to minimize the political backlash or upheaval that occurs as a result. Separate and apart from the issue of retaliation, the very fact that the investigation is conducted by someone in-house places that person, all of the witnesses, the accused and the accuser in awkward positions. Turf issues suddenly emerge as the findings of the investigation result in a change in the administration of policy. Findings that show a lack of diligence on the part of a manager are second-guessed by that manager when they are uncovered by an insider perceived as biased. Long after the investigation is over, the accused (assuming no adverse findings) often wonders if the human resources manager who investigated the complaint adversely influenced such things as bonuses or raises.

If corporate performance is based partially on the ability of parties to work amicably together toward the achievement of organizational objectives, the use of an internal investigator can seriously undermine that goal. Organizations spend an inordinate amount of time, energy and money promoting workplace cohesiveness and encouraging employees to work together as teams and to break down barriers to effective performance. Placing an internal staff member in the position of investigating a co-worker can have the effect of neutralizing or reversing the positive effects of these investments.

The subject of retaliation is almost routinely discussed from the perspective of the need to protect the complainant and witnesses. It is not at all uncommon, however, for the internal investigator to become the subject of retaliation, ostracism or viewed differently by others based upon his or her findings. When such findings are unpopular, typically the messenger is the one who is personally associated with those findings. This will often be the case when the findings are in disagreement with the philosophical views of an important organizational stakeholder or when the accused is important to the organization. This author believes that in most instances, internal professionals place themselves in a political quandary every time they do an investigation. Undoubtedly, someone will be displeased with the findings and outcome for a variety of inappropriate reasons and the investigator will be blamed.

### **Ability to Get the Organization Back on Track**

Following an investigation, the organization must quickly return to productivity. The organization needs to make corrections to the internal problems uncovered and move on. When the internal management is viewed as the party to correct the findings and move the organization forward, rather than being the leader of a witch-hunt, the organization is more likely to get back on track more quickly.

### **EEOC Guidance**

The Equal Employment Opportunity Commission weighed in on the subject of workplace investigations by issuing its *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*.<sup>5</sup> Specifically, “The employer

should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.”<sup>6</sup>

Successful plaintiff’s counsel will challenge the expertise of the investigator, particularly where that investigator lacks a significant amount of expertise and experience. This may be the case even where the investigator’s efforts are closely monitored by defense counsel.

### **The FACT Act and its Effect on Workplace Investigations**

Those involved in investigating employee misconduct had been stymied by the Federal Trade Commission’s (FTC) interpretation of the requirements of the Fair Credit Reporting Act (FCRA) since the dreaded “Vail Letter” of 1999. Until the Vail Letter, the law applied generally to applicants for employment who were subjected to detailed background investigations. The employer was required to obtain advance consent from the applicant and certain disclosures were required to be made on documents separate from the application for employment. In the event adverse action was taken based upon the results of the report, the employer was required, among other things, to provide a detailed copy of the report containing the adverse information to the individual. In addition, the employer was required to wait a

period of time before taking the adverse action.

In the Vail Letter, an attorney for the FTC interpreted the law to require employers who used third parties to investigate allegations of misconduct to comply with the requirements of the FCRA, deeming them “investigative consumer reports” under the law. What this meant for employers is that it now required them to seek consent from the accused to conduct an investigation and required providing that individual with a full, detailed report of the investigation prior to taking adverse action.

The FACT Act amended certain provisions of the FCRA and went into effect on March 31, 2004. Specifically, the law changes those requirements, now ensuring that employers can conduct a fair and impartial investigation without compromising confidentiality and the investigatory process.

Under the law, certain investigations of misconduct and alleged violations of employer written policies are now no longer considered investigative consumer reports. Section 603 of the Fair Credit Reporting Act (15 U.S.C.A. §1681a) was specifically amended to exclude certain communications (“reports”) for employee investigations. Where the report would otherwise be an investigative consumer report, it will not be considered an investigative consumer report subject to disclosure rules if the communication is made in connection with the investigation of suspected misconduct relating to employment or compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer. In addition, the report must not be made for the

purpose of investigating a consumer’s credit worthiness, credit standing, or credit capacity, and there are restrictions regarding disclosure of the report.

Once the employer determines it will take adverse action based in whole or in part on the report, the employer must disclose to the employee a summary containing the nature and substance of the communication upon which the adverse action is based. This means that with the use of outside investigators or attorneys, employers no longer have to obtain consent from the accused employee prior to conducting the investigation. In addition, employers are no longer required to provide a detailed report to the individual containing sensitive employee information and the names of interviewed parties. However, employers are required to provide the accused with a summary of the investigation but may omit these sensitive details. In addition, the employer no longer has to provide this summary prior to taking adverse action. Thus, if the results of the investigation warrant an employee termination, the employer may take that action and provide the summary report after.<sup>7</sup>

### **CONSIDERATIONS IN SELECTING AN INVESTIGATOR**

Having asserted the position that third party investigators are more appropriate for investigations of workplace misconduct, it is imperative that those responsible to selecting investigators consider the following:

- 1. Knowledge of the Industry:** An effective investigator will have knowledge of the industry in question to the extent that such knowledge is relevant to the case at hand. In addition, where the

substantive nature of the issue is highly specialized or technical in nature, it is important to qualify the investigator's knowledge of the specific area in question.

## 2. Knowledge of the "Workplace":

While there are many investigators, one that is an expert in workplace issues will most likely be best suited to investigations of workplace misconduct. This means that such an investigator understands organizational theory and basic theories of management. In addition, he should have an understanding regarding how organizations operate in real life as opposed to on paper. Lastly, he should have an understanding of organizational cultural dynamics.

## 3. An Understanding of the Legal Process:

The effectiveness of an investigation is typically correlated with one's knowledge of the legal process. One who knows the steps and nuances involved in litigation will most likely be able to plan and conduct the investigation most effectively. For example, one who is knowledgeable of the nuances of electronic discovery, even at a cursory level, will be better able to anticipate where necessary documentary evidence may be found. In addition, the investigator will most likely be a better witness in the impending litigation than someone who is not knowledgeable of the process. She typically has more experienced being deposed and interviewed as a witness.

## 4. Knowledge of the Subject Matter in Question:

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actual misconduct in question should influence the selection of the investigator. For example, misconduct surrounding accounting fraud should be investigated by someone knowledgeable in this area. Sexual harassment claims should be investigated by someone knowledgeable in this area.

## 5. Ensuring the Attorney-Client Privilege is Preserved:

The organization and counsel should give careful thought at the outset as to how the investigator is retained (by either the organization or outside counsel) and whether that person should be an attorney.

## 6. Compliance with the FACT Act:

The FACT Act, which became effective last year, opens the door to employers to use outside investigators. Employers should ensure that proper procedures are followed under the law particularly with respect to pre-existing policies and necessary disclosure.

## CONCLUSION

Workplace investigations provide an opportunity for employers to gain an understanding of what is occurring in the workplace, how effective managers and supervisors are, how well employees interact and, ultimately, can serve as an eye to the overall effectiveness of the organization. Employers and their defense counsel often unknowingly set the stage for investigations to be conducted in an unobjective manner. If the employer is lucky, the case may be defended in the event of litigation with minimal expense and defense costs. What is

missing, however, is the opportunity to objectively find the truth and to dig deeper into the actual workings of the organization. If the quest for the truth is the first and foremost item on the organization's mind, the ability to defend itself once the truth, whether good or bad, is known should be much easier. However, those organizations that seek to cut corners and avoid the truth may find that although they can be successful over the short term, eventually, they will find themselves staring at the truth far too late in litigation to be successful. The result will be at greater expense and a lost opportunity to increase overall organizational effectiveness.

## NOTES:

1. 524 U.S. 775 (1998).
2. 524 U.S. 742 (1998).
3. See, *McGrath v. Nassau County Health Care Corp.*, 204 F.R.D. 240 (E.D. N.Y. 2001) (requiring production of counsel's investigatory notes and legal advice). See also, *Pray v. New York City Ballet Co.*, 73 Fair Empl. Prac. Cas. (BNA) 1714, 71 Empl. Prac. Dec. (CCH) P 44795, 1997 WL 266980 (S.D. N.Y. 1997) (which allowed plaintiff to depose defense counsel when adequacy of investigation was made an issue in the case).
4. For a more detailed discussion of attorney-client privilege issues, see, e.g., George Panaro, Esq.'s column in this journal, *The HR Trouble Shooter: Should Lawyers Rather Than NonLawyers Be Used to Investigate Discrimination Complaints*, HR Advisor vol. 10 no. 2 (March/April 2004).
5. U.S. E.E.O.C., Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <http://eeoc.gov/policy/docs/harassment.html#VC1e> (last visited May 25, 2005).
6. U.S. E.E.O.C., Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <http://eeoc.gov/policy/docs/harassment.html#VC1e> (last visited May 25, 2005).
7. For a more detailed discussion on the impact of the FACT Act on workplace investigations, see Rod M. Fleigel and Ronald D. Arena, *The Impact of the FACT Act on Employee Misconduct Investigations and Implications for FCRA and Title VII Compliance*, 20:1 The Labor Lawyer 97 (Summer 2004).