

The Importance of Workplace Investigations in the #MeToo Era

By Daphne Pierre Bishop, Esq.

There is nothing new about California employers' obligation to investigate complaints of sexual harassment. California's civil rights law, the Fair Employment & Housing Act, prohibits sexual harassment and requires employers to take "all reasonable steps" to prevent and correct harassment. Those reasonable steps include promptly investigating complaints of sexual harassment.

What is new is the close scrutiny on how employers fulfill their obligation to investigate sexual harassment complaints. As the many #MeToo stories have gone viral and were dissected in the media and the courts, a common theme has emerged: The complaining party accuses their employer of ignoring the complaint or conducting a "sham" investigation that results in no repercussions to the alleged harasser. For instance, in a highly publicized blog post, former Uber employee Susan Fowler alleged that when she and co-workers complained to human resources alleging they

were sexually harassed, discriminated against due to their gender, HR covered up for managers by falsely claiming they were unable to substantiate their complaints and by flatly ignoring incidents of gender bias.

• What should an investigation of a sexual harassment complaint look like?

California regulations require harassment complaints to be investigated in a manner that is impartial, prompt and thorough. Furthermore, investigators should be knowledgeable and trained about standard investigatory practices, the law shaping investigations, how to determine the scope of an investigation, effective interviewing techniques, weighing witness credibility, analyzing evidence and report writing. The practices taken and resulting documentation may end up in court documents, so ensuring they are in compliance can greatly limit exposure. Although trained internal investigators (such as human resources professionals) can perform investigations, it is some-



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Daphne Pierre Bishop, Esq.
Carothers DiSante & Freudenberger LLP

times prudent to retain external investigators (licensed attorneys or private investigators), to avoid the appearance of bias by internal investigators— especially in high stakes matters where upper management has been accused of harassment. A judge or jury may conclude your HR department was impartial as they were acting on behalf of the company.

• Why engage in this potentially costly undertaking of conducting an internal investigation of alleged sexual harassment?

The #MeToo movement has made it abundantly clear that the costs of sweeping sexual harassment complaints under the rug are higher than the costs of conducting an appropriate investigation. In the aftermath of Fowler's blog post, Uber retained a law firm to investigate sexual harassment claims; however, the damage had already been done to Uber. The company continues to deal with the fallout in the form of litigation, changes in leadership and reputational harm. Although conducting an investigation does not completely insulate employers, it is a way for employers to learn what actually happened and to determine what action it should take (if any) to correct and prevent future harassment from occurring, in a manner that is within the employer's control, as opposed to the media or in litigation.

A timely and effective investigation also provides employers with an affirmative defense if an employee files a sexual harassment lawsuit. While an investigation is not always a complete defense or insurance against costly claims, it can potentially significantly reduce the amount of damages that a complaining employee may be awarded. Even if a jury ultimately finds that sexual harassment occurred, a jury would be less likely to award punitive damages if the employer can prove that it did the right thing by immediately conducting an investigation by

a neutral party and correcting sexual harassment. A prompt, thorough, and impartial investigation makes a case less lucrative and therefore less attractive for plaintiffs attorneys.

• **What other potential issues arise if a company fails to properly investigate claims of sexual harassment?**

Failure to properly investigate claims of sexual harassment also exposes employers to expensive classwide liability and burdensome governmental oversight. If an employee can establish that their employer has a practice of mishandling sexual harassment complaints, they may seek to represent all employees by using the class action procedure to force a company to make global changes to how it handles sexual harassment complaints. For instance, the EEOC filed a lawsuit against a California-based company on behalf of employees who claimed they were routinely subjected to sexual harassment and a hostile work environment by managers and co-workers. The employees claimed that the company's onsite human resources staff and management failed to properly address their repeated complaints about sexual harassment. The company agreed to pay a \$3.5 million class settlement, and to a three-year consent decree that requires the company to hire a third-party monitor, create an internal equal employment opportunity consultant and internal compliance

officer, conduct sexual harassment training with civility and bystander training for all employees, revise its anti-harassment policies, retain records relating to future sexual harassment complaints, and conduct audits and reporting of such information. This company could have avoided this costly and burdensome oversight if it could show that it had implemented effective procedures for investigating and responding to employee complaints of sexual harassment.

• **What are the additional benefits of conducting prompt, impartial and thorough investigations of sexual harassment complaints?**

Another benefit of conducting a prompt, impartial and thorough investigation of sexual harassment complaints is the preservation of evidence. Civil lawsuits arising from alleged sexual harassment are often filed years after the alleged incidents on which they are based took place. Employees in California have at least one year to file a claim for sexual harassment with the state agency charged with investigating harassment complaints and another year after the agency closes their case to file a lawsuit, and up to two years to file claims for wrongful termination, assault, and battery. This lapse of time makes it difficult for employers to defend claims of sexual harassment: memories fade, witnesses leave the company's employment and cannot

be located or refuse to willingly participate in litigation, and evidence (such as emails and text messages) disappear, among other issues. However, when a prompt and thorough investigation is conducted, evidence related to the alleged harassment is preserved because information is still fresh in the minds of witnesses and they are available to interview. This is especially helpful where the investigation was conducted by an attorney-investigator experienced in litigation, as they know what evidence is important to obtain and preserve in case of future litigation.

Lastly, performing a prompt, thorough, and impartial investigation is critical to protecting the rights of employees who are accused of wrongdoing. Employers must be fair to all employees, including the accused harasser, when investigating complaints of sexual harassment. This means the responding party must be given the opportunity to respond to the allegations made against him or her, and the investigator should analyze relevant evidence offered by the responding party in his or her defense. A rush to judgment and failure to consider the responding party's side of the story may lead employers making rash decisions to punish the alleged offending party. Employers should beware those decisions may potentially expose employers to liability initiated

by employees who have been accused of wrongdoing. A trend to watch out for is responding parties fighting back against disciplinary decisions resulting from investigations. For instance, the University of California system is currently embroiled in litigation brought by students who allege they were deprived of due process when disciplined for violating the university's anti-harassment policies. Another example is a recent lawsuit against one of the largest toymakers, in which a former employee claims the company conducted a sham sexual harassment investigation against him as a pretext for terminating his employment on account of his age.

Employers should not view workplace investigations as a bad thing. When done right, workplace investigations are a great tool for employers to foster a safe and inclusive workplace, correct problems in the workplace before they escalate, and minimize the costs associated with sexual harassment claims. They can also position employers in the best light, as they prove complaints were taken seriously and investigated, which ultimately can reduce liability.

Daphne Pierre Bishop, Esq. is Senior Counsel and Chair of the Internal Investigations Practice Group at Carothers DiSante & Freudenberger LLP. Bishop has

represented companies with California workforces for nearly two decades. Her experience advising and defending small to Fortune 500 companies in all industries against the gamut of employment-related claims offers her a unique advantage in assisting companies prevent, investigate and resolve employee and institutional misconduct. Bishop's practice focuses on providing internal investigation services as a neutral third-party investigator or a strategic advisor. She can be reached at dbishop@cdfsflaborlaw.com or 213-612-6300.



Daphne Pierre Bishop

Senior Counsel & Chair of Internal
Investigations Practice Group
Carothers DiSante & Freudenberger LLP
dbishop@cdfsflaborlaw.com
T: (213) 486-8605
www.CDFLaborLaw.com
707 Wilshire Boulevard, Suite 5150
Los Angeles, CA 90017