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Recent Trends in Workplace Investigations

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INVESTIGATIONS IN THE SPOTLIGHT

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Investigators in the Spotlight

- Celebrities/influencers
- Governors
- Other Elected Officials
- Athletes
- But maybe more...

California Public Records Act

Essick v. County of Sonoma (July 2022)

Investigative report of complaint against elected Sheriff is subject to disclosure under CPRA allowing newspaper to gain access to the full report. Sheriff is not protected by exceptions that apply to employees and/or police officers.

(Note: However, under *Waters v. City of Petaluma* investigative report was not subject to disclosure in litigation due to attorney/client privilege. Query what the result would have been if Sonoma County claimed privilege.)

California Legislature's Policy

Certain documents will be released in cases where the panel determines that facts related to sexual harassment claims have been substantiated against a member or a high-level legislative employee, and the house has imposed discipline or has determined that the allegations are well-founded based on the independent panel's findings.

The documents to be released will be the claim filed and the letter provided to the subject of the investigation, which will include a summary of the panel's factual findings. All documents will redact the personally identifying information of the accuser and witnesses, for privacy reasons.

Investigations in the Public Eye – Impacts on Investigations

Impacts on reports – what is written that may become public

Anonymity – will it hold?

Detail – at a certain level of detail, anonymity is a fiction

Take Away:

At a certain level – assume will become public and:

- ✓ Consider shorter executive summary type reports
- ✓ Consider aggregating information to maintain confidentiality
- ✓ This is about the impact before putting something in a report

Investigations in the Public Eye – Claims of Defamation

Defamation lawsuits are increasingly used against employer's enforcing their rules and as silencing tactics to keep targets and witnesses from speaking out.

Under U.S. law there are first amendment and public policy exemptions protecting institutions and individuals from liability for defamation.

On Oct. 1, 2021, a federal appeals court ruled in favor of **Pamela Lopez**, a lobbyist who was sued for defamation after speaking out about being sexually assaulted by former California lawmaker Matt Dababneh. The appellate court found that Lopez was protected by Fair Reporting privilege, which says individuals can't be sued for defamation if they are simply reporting on what was already said in specific contexts, such as reports to a legislative committee.

Investigations in the Public Eye – Public’s Misconceptions

Publicity about investigations can lead to misconceptions:

- An investigation should uncover and take account of something that occurred outside of work (sexual/social relationships, social media searches, prior criminal acts, etc.) AKA: “Why aren’t you doing oppositional research?”
- An allegations shouldn’t be substantiated unless it is “proved” beyond a reasonable doubt.
- The meaning of due process
- Shouldn’t the investigator consider the parties’ overall “character”?

RECENT TRENDS IN INVESTIGATING WORKPLACE BULLYING COMPLAINTS

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Employee-Led Movements

#MeToo Movement
#BlackLivesMatter
#StopAsianHate



What are the nature of the complaints?

Complaints about a particular person
Complaints about the work environment

Approaching Complainant Interviews

- Be directive with complainants
 - What were the most serious incidents?
 - What were the most recent incidents?
 - Other examples similar to these?
 - Who was involved?
 - Who else was there?
 - Have you discussed this with anyone else?

Climate Surveys

- Anonymous
- Typical approach
- Follow-up interviews
- Compiling responses

COMPLAINTS WITH CROSS-COMPLAINTS

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Cross-Complaints

Complainant brings a complaint against the Respondent

The Respondent complains about the Complainant

Interview Logistics

- Entails two separate interviews
- Interview each as the complainant
- Confirm scope
- Interview each as the respondent

Organizing the Report

Two separate reports?

One report?

DEI BACKLASH

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DEI Training Done Well

Elements of effective DEI training

- Conducted by a qualified and trusted trainer
- Respects diverse viewpoints
- Builds a supportive and engaging culture
- Creates psychological safety
- Part of a comprehensive, ongoing approach, not a single event

DEI Training “Gone Wrong”

- Weaponizing language
 - Whiteness
 - White privilege
 - Patriarchy
 - White supremacy
- Shaming and blaming
- Hierarchies of oppression
- Is the problem the trainer, or the trainee?

Concerns/Misgivings About DEI...

- It is “woke-ism”
- It is in line with Critical Race Theory
- It over-emphasizes our differences
- It can be a divisive topic
- It makes some employees feel bad about their race/identity
- It is a version of “thought police”
- It forces people to choose one identity over another

Legislative Responses

Executive Order 13950:

Signed by former President Trump on September 22, 2020, “to combat offensive and anti-American race and sex stereotyping and scapegoating” curtailed DEI training for federal agencies and contractors.

- Revoked by Executive Order 14035, signed by President Biden on January 20, 2021

Since January 2021, ten states have passed bills that restrict discussions about race and gender in schools.

- In 2022 alone, state legislatures introduced 111 new bills across 33 states

Litigation re “Reverse Discrimination”

Duvall v. Novant Health, Inc., Civil Action No. 3:19-cv-00624 (W.D.N.C. October 26, 2021)

- \$10 million verdict awarded by jury that found plaintiff’s race (white) and sex (male) were motivating factors when the employer terminated his employment and replaced him with two women, one black and one white, as part of the company’s D & I initiative to increase diversity in its senior leaderships.

DiBenedetto v. AT&T Services, No. 21-cv-04527 (N.D. Ga., Nov. 2, 2021).

- A former AT&T assistant vice president claimed the company engaged in illegal workplace discrimination when it fired him, an older, white male, following after the CEO announced a commitment to diversifying the company’s leadership.

Weaver v. Ohio Farmers Insurance Co., No. 22CA0004-M, 2022 WL 3147815 (Ohio Ct. App., August 8, 2022).

- Company’s DEI policy declared a need to increase the number of women and minorities in leadership roles, and the company tracked its progress on its DEI goals by measuring “headcount.”
- Weaver, a white man, was let go during a company-wide RIF. He sued alleging that the company’s DEI policy was evidence that his layoff was reverse discrimination.
- Court of Appeal disagreed, finding that the company’s DEI goals were not, in and of themselves, evidence of discrimination, and that Ohio Farmers Insurance selected Weaver for layoff for legitimate business reasons.

And ...

Let's not forget the COVID-19 pandemic!

- Physical, social and economic impact led to significant mental health strains
- Increased stress and anxiety
- Increased isolation
- Less physical proximity was supposed to decrease frictions, but may have had the opposite effect
- Did workers forget how to play in the sandbox together?

The Impact on Investigations

DEI training can trigger EEO claims:

- The training was “racist” or “sexist” – one group was emphasized over another
- The trainer treated the complainant in a hostile manner
- The complainant was “targeted” by the trainer or other participants
- The complainant felt accused of being racist/sexist/homophobic
- The complainant’s protected group was marginalized
- The training is evidence of hostility towards white employees (“reverse discrimination”)
- The training infringed on complainant’s right to free speech or forced a political message on complainant

The Impact on Investigation Participants

- “Stale” claims are more common
- Everyone is more emotional
- Cross-complaints are more common
- Investigator’s implicit biases can be triggered
- Investigator burnout
 - Listening to the witnesses’ stories can take its toll
 - Apathy can develop as a result
 - Self-care is important

BACKLASH RE: EMPLOYER-INITIATED INVESTIGATIONS

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Pushback from Critics

- An attorney must be a zealous advocate for their client therefore an attorney performing an investigation cannot be neutral.
- Attorneys performing investigations have conflicts of interests.
- An investigation under the attorney client privilege cannot be neutral because the organization is trying to have it “both way” – they will waive the privilege only if it benefits them.

Misconceptions that Underlie These Concepts

- Attorneys are always and only advocates
- Employers always want one outcome – the one that supports “management”
- Employees file internal complaints vs the *employer*
- An investigator will always “side” with the employer (whatever that means)
- Employers want investigations under the attorney/client privilege for nefarious reasons, so they can hide the truth

Must attorneys be “zealous advocates?” If so, what does that mean?

- Attorneys can be advisors, negotiators and fact-finders. (See the Model Rules of Professional Conduct) – each role has distinct ethical requirements.
- Limited scope representation allows attorneys to be in the role of an impartial fact-finder.

What conflicts of interest may exist?

- Conflicts can arise from:
 - Previous representation by self or law partners and the nature of that representation
 - Being in different roles for the same institution (e.g.: advocate vs. investigator)
- Previous knowledge of or interaction with principal parties or issues

Misconception: Investigators are not accountable

- Independent attorney investigators operate under ethical rules.
- A biased or incomplete investigation could be harmful to the client, leading to potential liability of the client and the investigator and to reputational harm.
- If a case goes to litigation the investigation may be subject to scrutiny.
- An investigator could be sued for malpractice.

Thus, investigators are (or can be) held accountable by the client, the courts and the public.

Purpose of the Attorney-Client Privilege in Investigations

- Uncover all the facts without fear of exposure of private information (such as medical information or sensitive personal information.)
- Encourages complainants and witnesses to speak up and provide full information without fear of a loss of privacy or control of their narrative.
- Better allows for a positive post-investigative work environment that is free from retaliation.

The employer has duties to all its employees – the complainant, respondent and witnesses – to fairness and to protect confidential and private information.

See Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role, Harris & Oppenheimer, California Labor & Employment Law Review, September 2022.

Any Questions?



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Vida Thomas is Managing Partner and Co-Owner of Oppenheimer Investigations Group. An AV-rated attorney, Vida has practiced employment law for over 25 years, and spent much of that time advising employers on all aspects of employment law and human resources management. Over the years she also developed a substantial workplace investigations practice.



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Thank You

