Post-Investigation Recommendations

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Post-Investigation Recommendations

12.1 Issues to consider after investigation has been concluded

In rendering recommendations following an investigation, a number of issues must be considered and answered. These issues include the following:

- Were any of the company's policies, guidelines, or practices violated?
- Were any laws probably violated? Is the company required to report its findings to a governmental agency?
- Was the violation(s) serious?
- Have there been similar violations in the past; how have they been handled by the company?
- What is the employee's "track record" regarding past company policy violations?
- Are there any mitigating circumstances?
- Are any policy changes required?
- Is any discipline required?
- Who should have input regarding the post-investigation recommendations?

12.2 Ensure that appropriate action is taken

If it is determined that misconduct has occurred, an employer may take the following disciplinary actions (or others) depending on the severity of the wrongdoing:

- No action.
- Counseling/training.
- Warning.
- Transfer.
- Demotion.
- Compensation action (such as the loss of a bonus).
- Suspension.
- Termination.

How to deal with the alleged wrongdoer raises as many, if not more, legal and strategic issues than does the complained of conduct itself.

The employer is often placed in a difficult position regardless of the outcome of the investigation. Rarely will the accused confess to the allegations. Thus, the company will be forced to take some action, or decide not to take action, based on the investigator's findings. If

action is taken against the accused it may result in a lawsuit against the company by the accused. If the company takes only weak or no action it may result in a lawsuit against the company by the accuser. Consequently, selecting appropriate action that is supported by the investigator's record is critical.

Historically, courts have demanded that employers take swift action to remedy the unlawful conduct. In Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992), the court found that the employer was liable for harassment, despite its extensive efforts to resolve the plaintiff's complaints, because the penalty imposed on the offender was not sufficiently severe to stop the conduct. Under this analysis, employers may sometimes find themselves liable unless they punish the alleged wrongdoer to the maximum possible degree, i.e., termination. This situation is fraught with peril because these claims generally do not involve misconduct that is admitted. This may translate to lawsuits against the employer for wrongful termination, as occurred in the Cotran case. In Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001), the Ninth Circuit stated that the employer must take action that is reasonably calculated to end the harassment. However, the employer may consider also its legitimate interest in resolving the dispute without undue disruption in the workplace.

Even where the employer concludes improper behavior occurred, it is not always necessary to terminate the offending employee. If the employer takes sufficient action to prevent discrimination or harassment from recurring, it need not always terminate an offender. Barnett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984); Tuttman v. WBBM-TV, 209 F.3d 1044 (7th Cir. 2000). Counseling or sensitivity training may be an appropriate disciplinary response in some cases. Swenson, supra ("the employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace"). But inadequate discipline, or a failure to investigate thoroughly, can lead to liability. Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) (employer told complaining employee to report any further harassment, but took no disciplinary action; liability imposed for failing to prevent further harassment).

It is also important to review company policies and procedures before moving forward with discipline or termination. For example, with regard to employee discipline other than discharge:

- Does the company have a formal discipline procedure? What is HR's involvement?
- Are disciplinary proceedings documented in the employee's personnel file?
- Who has authority to adversely affect an employees
- Are disciplinary actions implemented uniformly depending upon the gravity of the problem?

With regard to discharges:

- Is the reason for the termination clear?
- Are there sufficient facts and documentation to support the termination decision?
- Is the termination consistent with the way other similarly situated employees have been treated?

- Has the employee been given adequate notice of the work rules and the consequences of violating company policies?
- Has an adequate investigation been conducted?
- Has the employee been given a meaningful opportunity to explain, rebut statements, and influence the employer's decision?
- Has the employer considered the employee's prior work record?
- Does the decision to terminate the employee comply with company's policies and practices on performance and corrective discipline?
- Is the company's stated reason for the termination consistent with prior discussions and documentation of the problem; e.g., prior warnings and performance reviews?
- Did criticism of the employee's conduct or performance start after the employee raised concerns about an alleged unlawful condition at work?
- Is the employee in a protected class or involved in a protected activity?
- Has the employee been given an opportunity to appeal the termination decision to higher management authority?
- Has the company completed the required termination paperwork; e.g., final paycheck in accordance with state law time requirements, change of status notice, COBRA notification, etc.
- What is the company's policy on termination (good cause, at-will, particular violations)?
- Who has authority to terminate an employee?
- Is the decision reviewed? Is HR involved?
- Does the process include evaluation for potential claims such as discrimination and retaliatory discharge?
- Are exit interviews conducted? Is HR involved?
- What are other employees/managers/customers told about the termination?
- Are steps taken to protect the employee's privacy?
- What reference information is given regarding former employees? Who is permitted to give references?
- Is there a dispute resolution procedure available for disgruntled employees?

13. Follow-Up to the Investigation

13.1 Response to the complaining employee

Generally, the company should disclose to the complainant the general conclusion reached from the investigation, and, if applicable, that "appropriate" disciplinary action will be taken. Care should be taken not to make statements that will increase the risk of liability, such as potentially defamatory statements or unnecessary revelations about issues raised by other witnesses.

Unless the employer determines that the complaint was made maliciously or in bad faith, it should avoid any action against the complaining employee which might be viewed as

retaliatory. See Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (if charging party is found to have lied during internal investigation, the employer may pursue appropriate disciplinary measures and avoid a claim of unlawful retaliation).

The California Court of Appeals upheld the termination of a police officer who brought a retaliation claim after he had made repeated, meritless and frivolous claims of discrimination and harassment against the department and fellow officers. The Court of Appeals vacated a jury verdict in excess of $2 million on the officer's retaliation claim. It held that an employer in "appropriate circumstances" may lawfully terminate an employee for making false charges, "even where the subject matter of those charges is an allegation of sexual harassment." Joaquin v. City of Los Angeles 202 Cal. App. 4th 1207 (2012). Employers should be aware that the facts in Joaquin were egregious and the repeated claims of harassment made by the officer were clearly without any merit. An employer should not discipline an employee who makes a good faith claim of discrimination or harassment but simply cannot substantiate the claim.

If discipline or discharge is contemplated for independent reasons such as poor performance or misconduct, evaluate whether a causal link could be found between the employee's reports of possible impropriety and the adverse employment action.

13.2 Reporting to the subject or subjects of the investigation

For several reasons, including credibility and overall employee morale, the company should report back to the subject or subjects of the investigation regarding the investigation results. Usually, it is necessary only to tell the subjects of the investigation (i.e., the complaining party and "accused"), the general outcome of the investigation; it is often not necessary or even advisable to report specific findings or to discuss specific allegations and counter-allegations. It may also be advisable to report the outcome, in general terms, to employees who were interviewed as witnesses or who work in the department where the incident arose. When discussing the results of the investigation with coworkers or others who may have been witnesses, it is often advisable to focus on the *policy* that was involved (e.g., the policy against harassment, the policy regarding confidentiality of intellectual property, etc.), as opposed to the specific facts or allegations that were made. In general, there should be no reference to a specific disciplinary measures against a person found to have committed some form of misconduct. If the person is terminated, his or her absence from the workplace will be obvious.

13.3 Reporting to a government agency

Where an investigation results in a determination that laws have been violated, or that high-level managers have engaged in serious misconduct, reports to government agencies (and shareholders) may be required. For example, under Cal OSHA rules, a covered serious injury or fatality must be reported immediately, and records of safety inspections must be kept for Cal OSHA review. Failure to report to Cal OSHA a "serious concealed danger" is itself a violation of the California Corporate Criminal Liability Act of 1989. Cal. Penal Code § 387. For many reasons, including the possibility that self-reporting may be required, outside counsel should be consulted with respect to any allegation of possible criminal impropriety, securities or shareholder fraud, fraud in government procurement, or similar regulatory matters.

The company should assume that, regardless of the outcome of its investigation, the underlying incidents may be reported to a government agency. This is particularly true in cases of alleged fraud, waste, or abuse in connection with government contracts. Investigation of such intentional misconduct should be undertaken only after consultation with competent outside counsel.

13.4 Document Control

During an investigation, a variety of documentation, including relevant documents and investigation notes and memoranda, may be produced or collected. At the conclusion of the investigation, an investigation file should be assembled. The investigation file consists of every document the investigator reviewed, considered, generated or received during the course of the investigation.

13.4.1 Create an investigation file

Once the investigation has been completed, it is advisable to create a separate file for all the investigative materials. It should be noted, however, that this file can be evidence in a future criminal or civil legal action unless it is protected by the attorney-client privilege or the attorney work-product doctrine. If the employee initiates an administrative complaint or litigation, the investigation file may become discoverable.

Likewise, even absent litigation, the employee who is the subject of the investigation may be able to review the investigation file or parts of it. Under Cal. Lab. Code § 1198.5(a):

Every employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.

The California Labor Code provision contains exceptions from the employee's right to inspect. These exceptions include documents involving investigations of potentially criminal conduct and several other types of documents. The laws of several other states provide for similar "inspection" rights as to personnel files.

The employer should consult with legal counsel in the event it receives a request from an employee to see the investigation file.

13.4.2 Destruction of documents

Careful consideration should be given prior to destroying any notes or documents. Although, generally, drafts of memoranda can safely be destroyed if the final memoranda are retained, counsel should be consulted regarding possible spoliation of evidence issues prior to destroying any documents, including contemporaneous notes which later were used to compile a memorandum.

14. Discoverability of the Investigation

Where an employer relies on the investigator's report as a defense to a lawsuit (such as a harassment lawsuit), the report is discoverable, even if the investigator was an attorney. Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110 (1997). Many employers, however, wish to conduct the investigation on a "privileged" basis. If so, the employer should use an outside attorney and should consult with that attorney how best to preserve the attorney-client

privilege and attorney work product rules. One approach which has proven effective is to have a non-attorney conduct the investigation under supervision of an outside or in-house attorney. However, the attorney involved does not conduct the factual investigation, nor does he or she make factual findings. In those circumstances, the report and findings of the non-attorney investigator are discoverable, but the attorney "supervising" the matter may make recommendations and provide legal advice to the client without any waiver of the attorney-client privilege. Kaiser Foundation Hospitals v. Superior Court, 66 Cal. App. 4th 1217 (1998).