Employment Issues: An Employer's Obligation to Investigate

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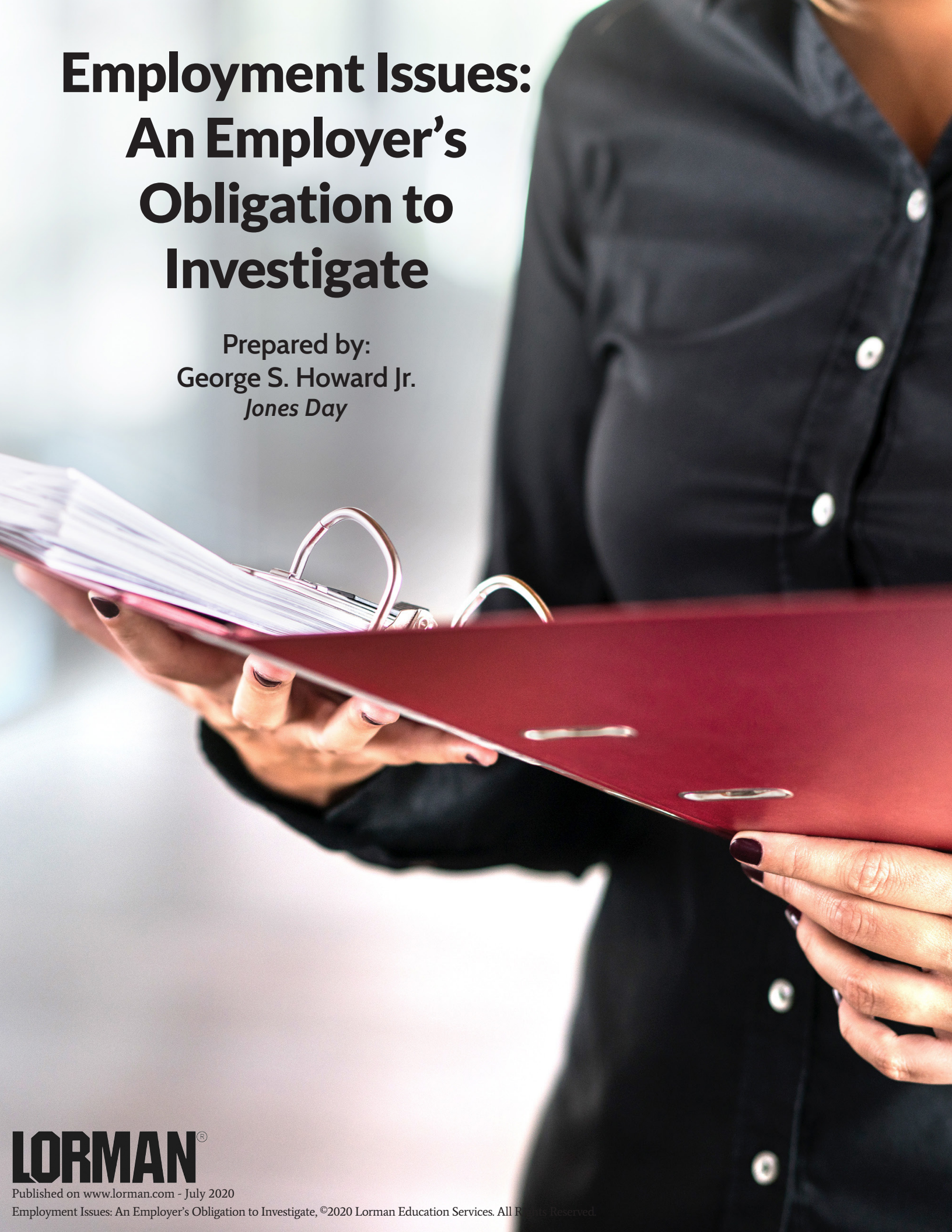

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An Employer's Obligation to Investigate

When an employer learns of allegations of misconduct, it should take prompt corrective action that is reasonably calculated to end the misconduct. If an employer is to avoid liability for "hostile environment" sexual harassment, it is obligated to take prompt and effective remedial action whenever it knows or should know of such conduct. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). Some state laws go farther: California imposes on employers a duty to "take all reasonable steps necessary to prevent discrimination and harassment from occurring." California Government Code section 12940(k).

The employer's investigation under the law of most states need not be perfect nor must it even reach the correct factual result. *See Cotran v. Rollins Hudig Hall, supra*. (employer absolved liability where it reached a conclusion in good faith after a reasonably thorough investigation; even though conclusion turned out to be incorrect). A very recent decision from California upheld the dismissal of an employee where the employer's investigation included interviews with 10 persons over a two-month period, including persons identified by the complaining party (who believed those persons would support his position). The court, upholding the termination, and relying on the *Cotran* decision, held that employers, in California at least, need not conduct a perfect or even an optimal investigation. "Three Factual determinations are relevant to the question of employer liability: (i) did the employer act in good faith in making the decision to terminate; (ii) did the decision follow an investigation that was appropriate under the circumstances; and (iii) did the employer have reasonable grounds for believing the employee had engaged in misconduct." *Jameson v. Pacific Gas and Electric Co.*, 16 Cal. App. 5th 901 (2017). Other cases hold that the employer is not required to "conduct a full blown, due process trial type proceeding in response to complaints of sexual harassment." Nor must the employer interview every conceivable witness. *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007); *Walton v. Johnson & Johnson Services*, 347 F.3d 1272 (11th Cir. 2003). As the Eleventh Circuit has stated, the employer must only "arrive at a reasonably fair estimate of [the] truth." *Baldwin, supra*.

In some recent cases, investigations have weighed in favor of an employer summary judgment, especially where the investigation was professionally conducted. *See*, e.g. *Grant v. Trustees of Indiana University*, 870 F.3d 562 (7th Cir. 2017); *Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431 (8th Cir. 2016).

On the other hand, a superficial, clearly defective investigation can be used by a plaintiff to support a discrimination or harassment claim, or even an award of punitive damages. See, for example, *May v. Chrysler Group, LLC*, 2012 W.L. 3608588 (7th Cir. August 23, 2012) (punitive

damage award of $3.5 million reinstated on appeal; Chrysler did not "promptly and adequately" respond to harassment, which included alleged death threats; Chrysler's "response was shockingly thin as measured against the gravity of [the] harassment"; the harassment supposedly continued for two years even though Chrysler was "investigating" that entire time; the jury heard evidence that part of the investigation was an effort to prove that the employee/plaintiff fabricated some of the death threats in order to support his claim).

Additionally, attorneys for either a putative victim or an alleged perpetrator will attack an investigation for its supposed lack of thoroughness, or the alleged bias of the investigator or of other persons who provided information to the investigator or were involved in the decision making process. *See* discussion of "Cat's Paw Theory" at Section 11, below.

Upon completion of the investigation, the employer must reach a conclusion and take the appropriate remedial measures necessary to correct the situation and prevent the actions from recurring. "Appropriate corrective action," when such action is deemed required, necessitates some form of disciplinary measures which contribute to the elimination of the problem that is the subject of the complaint. *Intlekofer v. Turnage*, 973 F.2d 773, 778 (19th Cir. 1992). The appropriateness of the remedial action will depend on the severity and persistence of the harassment and the effectiveness of any remedial steps. Additionally, the specific remedies applied by the employer "must focus not only on changing the harasser's behavior, but also on persuading potential harassers to refrain from unlawful conduct." *Id*. Where remedial measures are taken that do not end the objectionable conduct or prevent further harassment, an employer must take further measures to progressively discipline the employee(s) until the harassment has stopped. *Id*.

The employer should also make follow-up inquiries to ensure that the harassment has not resumed and that the victim has not suffered retaliation. In the *May* case, *supra.*, the punitive damage award was upheld in part because [the] harassment continued for years, the threats were extremely serious, and there was scant evidence of an increased effort [to investigate] or stop the threats] over time." The court noted "Chrysler did not increase its (meager) efforts over a long stretch of time in the face of remarkably awful harassment, and that was reckless."

Can an Investigation Be a Defense to a Lawsuit?

In a harassment case where no tangible job action has been taken against the victim, the employer may avoid any liability, or at least limit the damages, by proving:

- The employer exercised reasonable care to prevent and correct promptly any harassment; and

- The plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise to avoid harm.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

This defense, available in harassment cases, is often called the "*Faragher*" defense. In some states, a similar defense exists but it can only limit the recoverable damages by

denying plaintiff damages he or she could have avoided by using the preventive or corrective measures; *State Department of Health Services v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003). In order to invoke this defense, the employer must show that it in fact had an effective policy to prevent and/or remedy any harassment that occurred. It would also have to show that the employee unreasonably failed to use those preventive or corrective measures. This may require proof of previous claims or investigations, previous action taken against inappropriate behavior, dissemination of the policy training of supervisors or employees, and similar proof. This defense is *not* available where harassment by a supervisor is accompanied by a tangible employment action (such as termination, demotion, failure to promote, etc.). In practice, facts that may permit the *Faragher* defense are not uncommon. Therefore, employers should promptly investigate all harassment claims, document thoroughly the investigation and keep records of the investigation and its outcome. Whether this defense is available in discrimination or other types of lawsuits is an open question. However, the employer's prompt, effective response to possible workplace misconduct will usually be useful in any subsequent litigation.