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BUSINESS LAW NEWS

Who Is Looking Out For Student-Athletes When Schools Purchase Disability Insurance For Them: A Case Study
Page 7

What's in a Game?
Page 17

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The Dos and Don'ts of Workplace Investigations for Sports Industry Employers

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In this day and age, it is imperative that employers in the sports industry understand how to conduct adequate investigations of workplace-related incidents. Conducting these investigations is required by law, and may decrease the value of lawsuits or prevent them altogether. Below is a list of dos and don'ts for you to keep in mind when conducting workplace investigations:

Dos:

Act Promptly

How soon an investigation must start depends on the circumstances, but the best practice is to conduct a prompt investigation.[1] Courts have become more stringent about the timing surrounding workplace investigations. One court held that an employer's response was prompt where it began its investigation on the day the complaint was made and three days after learning of the alleged harassment.[2] Another court held the opposite where the employer did not investigate until one month after the victim submitted her complaint, due to a slow bureaucratic complaint process.[3] Courts also make clear that employers must not wait to investigate until it determines whether the complaint is valid.[4] To be safe, employers should initiate investigations as soon as reasonably practicable following receipt of a workplace-related complaint.

Strategically Choose Your Investigator

One of the most, if not the most, important decisions is to select an appropriate investigator. Regardless of whether the investigator is an in-house employee (e.g., human resources, in-house counsel) or a third party (e.g., outside counsel), the individual should have zero conflicts of interest with or bias towards the complainant or the accused.[5] It is also imperative that the investigator is not under the supervision of the alleged harasser. Choose someone who understands how to investigate, knows the law, can effectively communicate, and, if necessary, can confidently testify about the investigation.[6]

Conduct Thorough Interviews

Create a written list of witnesses to interview and begin the interviews promptly. Begin with the complainant, and focus on limiting and clarifying the specific allegations being made. Then, go over the details of each alleged incident, asking what was said, who witnessed what, under what circumstances did this occur, what the accused said, what the complainant said, what the witnesses said, and whether any documents were exchanged. Proceed with interviewing the accused and all identified witnesses to see if the details are corroborated. It may also be necessary to interview other known victims of the alleged harasser;[7] otherwise, liability may result under causes of action for "Failure to Investigate" and "Failure to Take Prompt Remedial Action."[8] For each person interviewed, the investigator should determine whether: (1) their testimony is believable on its face and makes sense, (2) their demeanor indicates they are lying, (3) a motive for

lying exists, (4) other witnesses' testimony or physical evidence corroborates their testimony, and (5) their testimony indicates that the accused has a history of similar behavior. The investigator must not instruct any witness not to talk to opposing counsel.[9]

Document Everything

Documentation is critical. The investigator should take notes during and after interviews. If notes need to be cleaned up, the investigator should do so promptly. There should be notes made that explain the context or reasons for other notes. Also, if an individual on the original witness interview list will not be interviewed, document why. Keep all notes, and any written statements, in an investigation file labelled "Confidential," and save physical and electronic copies. Once an investigation is complete, follow up with the complainant and accused to explain the results of the investigation and what corrective actions, if any, are being taken. Document these interactions. Finally, expect that all notes will be projected on a large screen and become the subject of future litigation.[10]

Reach an Unbiased Determination and Prepare the Report

The investigator acts in the capacity of a fact finder, not as part of the employer's HR, management, or legal teams. He or she must reach a neutral, unbiased conclusion upon completion of the investigation. Any and all conclusions and reasoning should be contained in a final written report. The report should be carefully and thoughtfully prepared, and treated as discoverable evidence. Use objective, clear, and non-judgmental language when writing the report. Do not simply say a witness "was clearly lying." Instead, say "the witness's allegations were not substantiated by any other witness and are inconsistent with the written documents; the witness made several statements that I determined were not true or accurate." Finally, if appropriate, include a summary of any and all recommended actions or actions taken by the employer as a result of the investigation.

Don'ts:

Disclose Privileged Information

Employers often obtain advice and direction from counsel before, during, and after investigations. Sometimes, the same attorneys who serve as the investigators are also retained as defense counsel in litigation. This leads to questions and confusion about the applicability and scope of the attorney-client privilege and work product doctrine. The following is a summary of applicable California case law to clear up this confusion.

In *Wellpoint Health Networks, Inc. v. Superior Court*, an employee complained of discrimination and retaliation while still employed.[11] A law firm was hired to investigate the claims. The investigation included various interviews and even correspondence with the employee, which stated that the charges had been "taken seriously" but that his claims were unsupported by the investigation. Thereafter, the employment ended (ostensibly because of a layoff), and a suit was filed.[12] The investigation materials were sought in discovery, both from the employer and directly from the attorney (who was now defending the litigation). The employer and their counsel objected, and motions to compel were brought. The trial court ordered the communications produced, on the basis that the lawyer had been acting in a "non-attorney" capacity, and that therefore privilege did not apply.[13] The employer appealed. Although the appellate court overturned, it did not disagree with the basic premise of the trial court:

> The courts in [prior] cases recognized that even though an attorney is hired to conduct business affairs, he or she may be called on to give legal advice during the course of the representation, and documents related to those communications should be protected notwithstanding the original purpose of employing the attorney. The trial court should not have given McCombs carte blanche access to Lafayette's investigative file, but should have based its ruling on the subject matter of each document.[14]

Wellpoint was followed, and narrowed, by *Kaiser Foundation Hospitals v. Superior Court*.[15] There, "Kaiser performed a prelitigation in-house investigation through a nonlawyer human resources specialist and then produced its entire investigation file in discovery, only claiming attorney-client or work product protection of certain specified documents consisting of attorney-client communications."[16] The court held that

> where a defendant has produced its files and disclosed the substance of its internal investigation conducted by non-lawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action.[17]

Then came *City of Petaluma v. Superior Court (Waters)*.[18] *Waters* involved an employee who resigned from the City of Petaluma after filing an initial harassment and discrimination complaint with the EEOC.[19] The City Attorney retained outside counsel to investigate the employee's claims. The retention agreement between the City and outside counsel stated that outside counsel would "interview witnesses, collect and review pertinent information, and report to [the City] on that information." It also stated, "[a]s attorneys, we will use our employment law and investigation expertise to assist you in determining the issues to be investigated and conduct impartial fact-finding," and that the investigation would be subject to the attorney-client privilege.[20] The agreement specifically provided that outside counsel would not render legal advice.[21]

In the lawsuit that followed, the City sought to withhold the investigation based on the attorney-client privilege and the work-product doctrine. The superior court granted the employee's motion to compel, finding that the information sought was not privileged, because the retention agreement specifically stated that outside counsel would not provide legal advice. The court also concluded that any applicable privilege had been waived, because the City had put the investigation at issue by asserting an avoidable consequences defense.[22]

The court of appeal reversed, holding that an investigation report prepared by outside counsel need not contain legal advice to protect the report from having to be produced in litigation, so long as the lawyer provided "legal services … in anticipation of litigation."[23] In so holding, the appellate court disagreed with the superior court's finding that the investigation report was not privileged because the retention agreement stated that the attorney investigator would not provide legal advice.[24] The court found that in assessing whether a communication is privileged, the initial focus of the inquiry is on the dominant purpose of the relationship between the attorney and client, not the purpose served by the individual communication.[25] The court noted that the statute defining "client" for purposes of the attorney-client privilege and work product doctrine refers to a person who retains a lawyer for securing "legal service or advice."[26] Accordingly, the court held, "[t]he plain terms of the statute support the conclusion that an attorney-client relationship may exist when an attorney provides a legal service without also providing advice. The rendering of legal advice is not required for the privilege to apply."[27] Since the dominant purpose of outside counsel's relationship with the City was to provide "professional legal services" in "anticipation of litigation" that the City Attorney could then use as a basis to provide legal advice to the City, the City had established a claim of privilege and work product protection.[28]

Based on the foregoing, employers should keep a separate file containing communications and notes of counsel and label it "Privileged." These records should be kept separate from general personnel or other random desk files, and not mixed with the actual investigation file. Also, random employees should not be given access to them. Finally, the file should be kept out of the purview of key decision makers, to avoid an argument that their reliance on the information waives attorney-client or work product protections.

Promise Confidentiality

Confidentiality should be examined from two perspectives: the investigator's and the employees'. Generally, the investigator (internal or external) cannot keep the complaint confidential. Employers should therefore only promise limited confidentiality—by saying, for example, "the information will be known only by those who 'need to know.'" The investigator should not promise complete confidentiality, because it may be necessary to disclose information obtained during the investigation to complete the investigation and/or take appropriate action.

Whether employers can tell employees not to talk about the investigation is a complex issue. Although managers should be told not to disclose information relating to the investigation, courts have held it is

inappropriate for employers to require employees to keep information secret, since employees have the right to openly discuss their work conditions.[29] Limited exceptions to this general rule exist. Employers should consult with counsel before attempting to require confidentiality.

Engage in Retaliatory Conduct

Before an investigation begins, employers often take immediate action to ease tensions in the workplace (e.g., leaves of absences for the complainant and/or accused, transferring the alleged harasser, etc.). Before doing so, employers should consult with counsel. The proximity in time between a protected action and an allegedly retaliatory employment decision is a factor courts will consider when determining the causal link element of retaliation claims.[30] Personnel decisions made on a whim following receipt of a complaint can therefore be a recipe for a lawsuit and construed as retaliatory.

Endnotes

1 Cal. Gov. Code § 2940(j)(1).

2 Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001).

3 Bradley v. Dep't of Corr. & Rehab., 158 Cal. App. 4th 1612 (2008).

4 Hope v. Cal. Youth Auth., 134 Cal. App. 4th 577 (2005).

5 Nazir v. United Airlines, 178 Cal. App. 4th 243, 325 (2009) (investigator so biased against the complainant that the court held the investigation "can itself be evidence of pretext").

6 Silva v. Lucky Stores, Inc., 65 Cal. App. 4th 256, 272 (1998) (investigator "had been trained by in-house counsel on how to conduct an investigation").

7 Heyne v. Caruso, 69 F.3d 1475, 1480-81 (9th Cir. 1995) (court determined that probative value of the testimony of other victims of the same harasser outweighed any alleged unfair prejudice and held that because of the "inherent difficulty of proving a state of mind" of the harasser, corroborative "me too" testimony of other victims made it more likely that the perpetrator viewed female workers as sexual objects).

8 Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995) (employer's investigation criticized because there was no effort to seek corroboration from co-workers and others); *Nazir*, 178 Cal. App. 4th at 280 (deeply-biased investigator's failure to interview several directly relevant witnesses to counter accusations that had been made against the complainants "evidences pretext").

9 Cal. Rules Prof'l. Conduct r. 5-310

10 *See* Kaiser Found. Hosps. v. Sup. Ct. (Smee), 66 Cal. App. 4th 1217, 1228 (1998) (any nonprivileged investigation documents must be produced where adequacy of investigation at issue).

11 Wellpoint Health Networks, Inc. v. Sup. Ct., 59 Cal. App. 4th 110 (1997).

12 *Id.* at 115-16.

13 *Id.* at 116-17.

14 *Id.* at 122.

15 *Kaiser*, 66 Cal. App. 4th at 1217.

16 *Id.* at 1227.

17 *Id.*

18 City of Petaluma v. Sup. Ct., 248 Cal. App. 4th 1023 (2016).

19 *Id.* at 1029.

20 *Id.*

21 *Id.*

22 *Id.* at 1030-31.

23 *Id.* at 1028.

24 *Id.* at 1033-34.

25 *Id.* at 1035.

26 *Id.* at 1032.

27 *Id.* at 1034.

28 *Id.* at 1034-36. The court also found that the City did not waive privilege by asserting an avoidable consequences defense because the investigation was conducted after Waters left her employment. *Id.* at 1036-37. The court did not address whether assertion of the avoidable consequences doctrine as an affirmative defense to a complaint brought by a current employee could result in a waiver of applicable privileges.

29 N.L.R.B. General Counsel Memorandum No. 15-04 (Mar. 18, 2015) ("[E]mployees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public.").

30 Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988); Morgan v. Regents of Univ. of Calif., 88 Cal. App. 4th 52, 69 (2000).

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