Workplace Investigation Notes: To Keep or Not to Keep? Recent Case Provides Guidance to Retailers

Insights
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Conducting investigations of internal complaints of discrimination and harassment is one of the most important jobs for retail employers to undertake. More than simply helping your business avoid liability, these investigations are critical for ferreting out the types of misbehaviors that undermine employee morale and motivate good employees to look for other jobs. But once the investigation is over and the appropriate actions taken, a decision must be made about whether to retain your investigative materials. A recent decision out of a federal court in Idaho has made the practice of destroying notes dangerous. Retailers should take note of this decision before adopting a specific policy or practice.

Setting the Stage: The Typical Investigation

While no two workplace investigations are identical, most involve interviewing witnesses and taking notes. Often, the results are set out in a final report explaining the investigator's findings. While it is uncommon that internal complaints ultimately become lawsuits, this report will almost always become evidence if a claim is filed

Most employers keep the report and underlying evidence such as witness statements, emails, text messages, etc. But there are two schools of thought regarding the investigator's notes. Some investigators simply include all their notes in the file. Others advocate destroying all notes once an investigative report has been completed. The reasoning for this practice is that notes are hastily written, may contain irrelevant information, be written in hard-to-understand shorthand, and are generally more susceptible to misinterpretation than the final focused report. While the proponents of destroying investigative notes have solid reasons, a recent case has put the practice under scrutiny.

Destruction of Investigative Notes Comes Under Fire…14 Months Later

In the October 7 decision, a university employer in Idaho investigated complaints of alleged gender bias in its law school. It was a far-reaching investigation designed to assess the climate, culture, and work environment for gender bias. The investigator interviewed 32 witnesses over a month.

The investigator prepared a comprehensive report that substantiated the existence of conduct "considered discrimination, retaliation, gender or sex discrimination." The report suggested

referring the matter to the university's department of civil rights.

One week after the report was distributed, the Human Resources department shredded the investigator's notes. This was done pursuant to a written policy governing the handling of climate, culture, and work environment investigative notes.

A year and two months after the report was issued, a former employee sued the university for gender discrimination. During discovery, the university turned over the investigative report. The plaintiff filed a motion seeking sanctions against the university for destroying the notes of witness interviews taken during the investigation – although there is no reference to the plaintiff being one of the original complaining parties. She had simply been interviewed as a witness in the investigation.

Court Concludes Spoliation Occurred for 2 Main Reasons

Destruction of evidence is known as "spoliation." For a party to be found guilty of spoliation, the party must have reasonably anticipated litigation being forthcoming for which the evidence would be relevant at the time the evidence is destroyed. In the Idaho case, there is no information in the opinion to lead us to think that any litigation was being explicitly threatened at the time the notes were destroyed. Nevertheless, the court concluded that the university should have anticipated litigation at the time it destroyed the notes for two reasons: language in the report itself, and the fact the university consulted with counsel following the issuance of the report.

Should Have Anticipated Litigation

On the first point, the court held the university should have anticipated litigation at the time the investigation was being conducted. That's because the report found conduct that "could rise to the level of what is considered discrimination, retaliation, gender, or sex discrimination," a concern that gender bias was negatively affecting female faculty and staff, and that "a number of participants identified potential race bias." In other words, the fact the investigation uncovered potential legal violations was enough that the university should have presumed litigation was likely, at least in the eyes of the court.

Consulted with Counsel

On the second point, the court noted that the university's privilege log showed communications with counsel during the time the notes were destroyed. There was no identification of the nature of the communications other than they were "relevant to this case." Communicating with counsel was thus evidence that the university did in fact reasonably anticipate litigation.

Court Drops Hammer on Employer – Despite What We All Know About Investigations

As sanction for the spoliation, the court agreed to issue an adverse inference instruction to the jury when the case heads to trial. This jury instruction will tell the jury about the existence of evidence,

that the employer destroyed the evidence, and that the evidence would have supported the plaintiff's case had it been available.

The court's logic is difficult to align with what employers know to be true about internal complaints.

- First, the mere fact that an investigation reveals inappropriate conduct, even harassment or discrimination, does not make litigation more or less likely to result. Cases are also often filed even though an internal investigation revealed no evidence of wrongdoing.
- The employer's investigation and, if misconduct is uncovered, the resulting corrective actions, are designed to prevent
- Most employers rely on the advice of counsel when responding to investigative findings. Not for fear of litigation, but because counsel can advise on the best course of action to remedy problems. There is no one right way to respond to every situation. Investigations often don't have solid conclusions about what happened because of insufficient evidence to decide the truth. Counsel's guidance is critical to properly responding to uncertain results. And even if lawyers are giving advice with one eye on preventing litigation, that does not mean that an employer must believe that litigation is on the horizon every time it seeks a lawyer's guidance.

Lessons to Be Learned

The obvious lesson from the decision is that an investigator's notes should be maintained with the investigation materials to avoid any allegation of spoliation should litigation occur. But there are other less obvious lessons as well.

- First, investigative reports should focus on describing the underlying conduct, not making conclusions about whether laws were violated. An investigative report stating that an employee created a "hostile environment" can undermine valid defenses in a later lawsuit.
- Second, an investigative report should not suggest the corrective action. Rather, the appropriate responsible employees should choose any resulting actions after they have considered the evidence uncovered during the investigation. It may be that the group includes the investigator, but if a report makes a recommendation of a course of action, and the employer decides on a different path, and something goes wrong, the report's recommendation will be used as evidence the employer's response was legally insufficient.
- Further, now that destroying notes is considered imprudent (by at least this court), the reasons supporting destroying notes should inform how notes are taken. For example, notes taken in barely legible handwriting will give off the impression that the investigation was sloppy. Personal shorthand will impede the ability of others to use them. Sparse notes that leave out context can be misconstrued. The best practice is to take notes with the thought in mind that an impartial third party – not just the investigator – will one day read the notes. Investigators should consider typing notes as they are made or having handwritten notes typed up. It is also easier to go over notes on a computer following an interview and correct any mistakes that were made. While

notes do not need to be a verbatim recording of the interview, recording more information is generally better than less.

- But even if your notes aren't perfect to look at, consider the fact that investigative notes that contain unhelpful content, hard-to-interpret verbiage, and ambiguous statements are less damaging than having the full notes unavailable. For example, in the Idaho decision discussed above, the court noted the investigative report did not identify which employees provided specific evidence or made which statements. This is not uncommon because knowing which employee said what can result in retaliation. Leaving the source of the information ambiguous avoids this problem. But the court thought being able to identify who said what was an important point. In litigation that often occurs years after an investigation, employees are unlikely to recall what they said. If the investigator did not take statements from the employees, and the notes are the only record, they will be invaluable in refreshing witnesses' recollections. They may also be needed to refute a witness's claim of reporting information that was not revealed at the time.

Again, most investigations are not followed by litigation. But because some are, it is important to remember that what you write down may well be read by someone trying to discredit your investigation – even years later.

Conclusion

We will continue to monitor the latest developments related to workplace law for retailers, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact the author of this Insight, your Fisher Phillips attorney, or any attorney in our Retail Industry Team.

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