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Best Practices for Investigating Internal Employee Complaints of Unlawful Harassment

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Edith Employee, a warehouse worker at ABC Company, just walked into the reception area of the Human Resources Department. Edith takes a seat. She is quite agitated, helplessly wringing her hands, and on the verge of tears. The next five minutes feel like an eternity, During which time, Edith steeps in a dangerous mix of nervous energy and rage.

Finally, someone can *see* Edith and she is told to head back to *see* ABC's HR Specialist. Edith nervously walks down the hallway. As Edith steps carefully into the HR Specialist's office, the HR Specialist sees that Edith is visibly shaking. But Edith has mustered up the courage to come this far. She can't stop now.

The words don't come easy. But Edith finally manages, "I….I….I….have a complaint. My direct supervisor, Sam…he, um, just told me that if I don't sleep with him, I will be fired!"

Edith has just made a very serious complaint against Sam, one that will require a formal investigation. Like most employees who complain about unlawful harassment, Edith expects that her employer will not only address her complaint, but also put a stop to Sam's behavior. Therefore, from this point forward, the action that HR Specialist and ABC take could be the difference between an internal complaint and very expensive litigation. Below are some steps to take help avoid the latter.

***Pre-Investigation**: Get Serious and Get Organized….Quickly.*

Whenever an employee complains about behavior that may constitute unlawful harassment – e.g., discrimination, sexual harassment, retaliation – the employer needs to take that complaint seriously. This is true regardless of the nature of the complaint.

Edith has raised a complaint of quid pro quo sexual harassment against Sam. Quid pro quo sexual harassment occurs where a supervisor either demands sexual favors from an employee in return for a job benefit or threatens an employee with an adverse employment action (for example: getting fired) if the employee rejects the supervisor's sexual advance or request for sexual favors.

Quid pro quo harassment is about as serious as it gets. But, if instead of report quid pro quo harassment, Edith had complained that Sam stands too close to her, calls her "dear" and "honey," and often comments on her dress, ABC needs to take those complaints just as seriously. The reason is that once Edith complains to Human Resources, then the law deems ABC on notice of Edith's complaint. If Edith's allegations against Sam are true, ABC does nothing to curtail Sam's behavior, and Sam continues to harass Edith, then ABC has effectively condoned Sam's behavior and allowed

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the unlawful harassment to continue. If the harassment becomes pervasive enough, Edith may have a tenable legal claim against ABC. So, an employer like ABC must take all complaints seriously.

Edith's complaint concerning a violation of ABC's anti-harassment policy – whatever that complaint may be – should be committed to writing. Either Edith can write out the complaint herself, or the Human Resources Specialist can jot it down for her. If the latter, then the Human Resources Specialist should have Edith review the complaint, revise it, and sign it at the bottom.

The next step is to act quickly and perform damage control. Once Edith has registered a formal complaint, ABC should separate Edith and Sam – or at least limit their interaction with one another in the workplace. At this point, it is not necessary to explain to Sam why the company has separated the two employees. Rather, the focus should be on separating Sam and Edith. If necessary, ABC should remove Sam from the workplace altogether pending an investigation, by placing him on a leave of absence with pay.

Once ABC has separated Edith and Sam, it is time to call the lawyers to fill them in on what has transpired. (Note: if ABC has in-house counsel, this step precedes separating Sam and Edith). Not every internal complaint of harassment triggers a call to outside legal counsel. However, in situations where the employer is inexperienced with internal unlawful harassment complaints, or if the complaint alleges very severe behavior (e.g., quid pro quo sexual harassment), then it makes sense to involve an outside attorney.

Once outside counsel is brought up to speed, it is time to pick an investigator. First ABC must decide whether to select someone internally or use a third-party, such as its outside counsel. There are many benefits to an outside investigator. First, the investigator is neutral and has no skin in the outcome of the investigation. Second, as noted above, the outside investigator may be more experienced investigating these claims. Third, Edith (and other interviewees) may be more at ease sharing with a non-coworker, rather than someone from Human Resources. It is also possible that Edith will perceive an in-house investigator as either judgmental or placing the interests of ABC ahead of Edith's.

On the flip side, ABC must consider that if it uses outside counsel to investigate, there is the risk that the investigator may become a fact-witness if Edith decides to pursue litigation against ABC based on Sam's conduct. Also, if ABC opts to use an outside investigator, it must be careful not to run afoul of the Fair Credit Reporting Act (FCRA). Among other things, FCRA places confidentiality restrictions on the investigation and any subsequent investigative report. Therefore, the company and outside investigator must ensure that details of the investigation are only shared on a need-to-know basis. And if ABC disciplines Sam after the investigation, it must inform Sam of the "nature and substance" of the report, upon which ABC based the adverse action.

***The Investigation**: Be Thorough and Keep an Open Mind.*

Once the investigator is selected, he or she should meet with management to discuss generally the parameters of the investigation, which should be committed to writing as part of an engagement letter. Next, the investigator should read the complaint, review applicable documentation (e.g., ABC's anti-harassment policy, Edith and Sam's personnel files), and create a list of interviewees based on the substance of Edith's complaint.

The investigator can then outline questions for the interviewees. There is no set interview script. For Edith, the investigator may ask questions like:

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- What did Sam do?
- When did Sam do it? Was it a single event, or a series of threats?
- Where did Sam make the threat(s)?
- How did Edith respond to Sam?
- Were there any witnesses or did Edith discuss Sam's actions with anyone else?
- Is there anyone else who may have information relevant to Edith's complaint?
- Does Edith possess or know of any documents to support her complaint?
- Is Edith aware of ABC's anti-harassment policy and, if she delayed in reporting Sam's conduct, why?
- How has Sam's behavior affected Edith's job performance?
- What was Edith's relationship with Sam like before the harassment of which she complained began?
- Has Edith sought any professional treatment or counseling?
- How would Edith like ABC to discipline Sam if ABC finds that Sam violated ABC's anti-harassment policy?

For Sam, the investigator should prepare questions that are designed to give Sam a chance to address the specific allegations in the complaint. After all, Sam should have a reasonably opportunity to defend himself and to provide names of witnesses and documentation to support his defense.

The investigator may have to interview other witnesses and, during those interviews, should minimize any sharing of investigation details with them. Generally, a "who, what, when, where, how" approach will suffice.

The investigator should conduct each interview in a location in which the interviewee can feel most at ease. There should be no other persons or distractions in the interview room. (Although unionized employees may have the right to have a union representative present during the interview).

Before each interview begins, the investigator should make an introduction. The investigator should then explain the purpose and role of the investigator; namely, that ABC has hired the investigator to investigate an allegation of unlawful harassment in the workplace. During that explanation, the investigator should underscore that ABC takes such complaints very seriously. The investigator should further stress that both the interview and the investigation are confidential, and the interviewee should not discuss the interview with anyone else. The interviewee must also cooperate fully and refrain from interfering with the investigation. Obstruction and non-cooperation are grounds for discipline, up to and including termination of employment. The investigator should warn Sam that regardless of what may have happened in the past between him and Edith, ABC has a zero tolerance policy on retaliation – adverse employment action in response to a victim complaint or participation in a workplace investigation. Similarly, the investigator should reassure Edith and the remaining interviewees that no one may retaliate against them for complaining / participating in the investigation.

Throughout the entire investigation – from the initial due diligence to final interview – the investigator needs to keep an open mind and never pre-judge. During every interview, the investigator should be taking notes. But the investigator should also be listening carefully to the responses provided to the investigator's questions. The investigator can deviate a bit from the interview outline, as needed. And although snap-judgment is bad, the investigator's experience can help with interviewee credibility determinations. This is important because many unlawful harassment complaints devolve into "he-said / she-said" situations.

When each interview concludes, the investigator should have the interviewee review the investigator's notes to assure that they are accurate. Then the investigator should thank the interviewee for his/her time. Once the investigator

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completes the entire round of interviews and has looked at all related documents, the investigator should consider whether to re-interview anyone.

***Post-Investigation**: Report, Discipline, and Advise.*

Once the investigation concludes, the investigator must report findings back to ABC. There are two ways to do this: an oral report or a written report. The advantage to the oral report is that the investigator does not create a document that ABC may need to turn over to Edith in the event of litigation. Also, an oral report may be appropriate for a relatively short or minor investigation.

However, the written report has many added advantages. First, the investigator can summarize notes – which are likely discoverable anyway – into a cohesive document that also includes a summary of the allegations, the scope of the investigation, persons interviewed, documents reviewed, credibility determinations, other findings, and action steps for the company. Second, the written report may be an easier tool to communicate the investigator's findings. If nothing less, it is a document to which ABC may later refer should it need to do so. Plus, the written report enhances the legitimacy of the overall investigation.

The report, either written or oral, should not express legal conclusions. Rather, the investigator should conclude only whether Sam has violated ABC's anti-harassment policy and, if so, how he violated it. The report should also reference what form of discipline Edith desires for Sam. However, ultimately, it is up to ABC to determine how to discipline Sam.

If the investigator finds that Sam has violated the anti-harassment policy, ABC must discipline Sam in a way that is reasonably designed to eliminate the workplace harassment. That discipline can range from termination of employment all the way down to a verbal warning. Whatever ABC decides to do, it must communicate that to both Edith and Sam. Similarly, if the investigator concludes that there is insufficient evidence to establish that Sam violated ABC's anti-harassment policy, ABC should communicate that to both Sam and Edith.

Regardless of the outcome, the investigator and ABC's Human Resources Specialist should check in with Edith periodically to confirm that she no longer perceives herself as the victim of any unlawful workplace harassment. Each of these meetings should be documented. If Edith claims that Sam is at it again, then ABC should investigate.

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