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Why It Is Important To Have A Written Policy Regarding Investigating Employee Misconduct

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A young female employee walks into the office of the Director of Human Resources and states that her older, male supervisor recently made inappropriate sexual remark to her. What does the company do now? The employer should immediately develop a plan to investigate the claim and take appropriate action.

Why You Should Investigate Claims Of Employee Misconduct?

Investigating employee misconduct is crucial because it is important to gather all facts quickly so that the employer can respond in an appropriate fashion. Furthermore, a prompt investigation of a sexual harassment claim may help the employer to avoid liability. Courts, generally, look favorably on employers who take proactive steps to attempt to identify and resolve workplace problems, rather than ignoring problems and simply hoping they will go away.

How To Attempt To Avoid Liability?

The Ellerth/Faragher Defense

In two seminal decisions, the United States Supreme Court created a potential affirmative defense to a sexual harassment claim should an employer perform a prompt and thorough investigation. In what is commonly referred to as the Ellerth/Faragher Defense, the Supreme Court held that where an employee claims she was sexually harassed by her supervisor, the employer can avoid liability by showing the following two factors:

- "The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior;" and
- "The plaintiff employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

What Does This Mean For Employers?

All employers should have a written policy related to addressing employee misconduct and harassment. At a minimum, the policy should provide for reporting mechanisms so that employees know who they should contact in the company if they are harassed (*e.g.*, a specified human resources representative). Under the Ellerth/Faragher Defense, assuming an employer has such a policy, if an employee fails to report alleged harassment and take advantage of the self-reporting policy, the employer can assert this affirmative defense and avoid liability. Even if the employee reports the harassment, as stated in the above-discussed scenario, the employer's efforts to act promptly to quickly address the claim will be viewed favorably.

The Ellerth/Faragher Defense Is Only Applicable To Supervisors

Importantly, in June 2013, the Supreme Court ruled that the Ellerth/Faragher Defense only applies to harassment by a supervisor, *i.e.*, it does not apply to harassment among non-supervisory co-workers. If the alleged harasser is a non-supervisory co-worker, an employer is liable for harassment only if the complaining employee can prove that the employer was negligent in either discovering or failing to properly remedy the harassing conduct. In order to be considered a supervisor, an employee must have the power to take tangible employment actions against the injured party, such as hiring and firing. A co-worker does not fall within this definition. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). It is important to properly classify all involved parties at the outset of any investigation involving alleged employee misconduct.

In our next post, we will discuss selecting the appropriate person to conduct the investigation and the issue of confidentiality surrounding investigations of employee misconduct.