

Employment Investigations - Land Mines and Lessons

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Workplace investigations and the way they are carried out are critical to liability issues and to the quality of the working environment. Workplace investigations and the way they are carried out have both legal and human implications. This article begins with a review of the governing law, then addresses human issues, and finally, the implications for litigation.

1. Development of the Law Governing Investigations

In many situations, investigations are mandatory. With respect to any action that may constitute discrimination, harassment, or retaliation, prompt and thorough investigation are mandated by *California Government Code Section 12940 et. seq.* (FEHA). What's more, there are standards for those investigations that are statutorily imposed. In California, investigations of any conduct which may constitute discrimination, harassment, or retaliation must be undertaken in a manner that is both "prompt and thorough" and appropriate remedial action must be taken with respect to any findings of violation. A review of those words alone puts one on notice of the degree of the obligation and why so many are deficient and do not protect the employer. In addition to the investigation mandate of FEHA, there are other sources for the obligation to investigate. They include OSHA, they include *Labor Code §6310* pertaining to working conditions, and they include claims of employee misconduct where the employer wishes to be protected from subsequent wrongful termination claims. It is in this latter context that these standards began to emerge when the California Supreme Court decided *Cotran v. Rollins Hudig Hall International, Inc.*,¹ in 1998.

In *Cotran*, the plaintiff had been accused of sexual harassment by two female employees. The employer conducted a thorough investigation and concluded that those allegations were true. In fact, those allegations were false. Both women later admitted that there had been no harassment but that they had

been consensually involved with the plaintiff. Ultimately, the California Supreme Court was thus faced with a situation in which the employer had thoroughly investigated and came to the good faith, but inaccurate, conclusion that harassment had occurred and terminated the plaintiff. This set of facts helped to initially define whether an employer had liability to the terminated plaintiff when his termination was based upon credible, but inaccurate accusations. Based upon these facts, the Supreme Court began to establish the standard that would govern investigation requirements. In setting the initial standard for investigations, the Supreme Court concluded that it is for a jury to assess "through the lens of an objective standard" whether the termination was the result of "fair and honest reasons regulated by good faith on the part of the employer which are not trivial, arbitrary, capricious, unrelated to business needs or goals, or pretextual." The Court further held that there must be "a reasonable conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." Given the statutory mandate of FEHA that claims must be promptly and thoroughly investigated, along with the language in *Cotran*, it is easy to see why the investigation must occur immediately upon notice to the employer that there is any reason to believe that there has been a violation and that the investigation must be legally "adequate." *Cotran's* progeny have further refined investigation requirements in addressing what an "adequate investigation" must include.

In *Silva v. Lucky Stores, Inc.*,² applying the *Cotran* standard the Court found that a misconduct investigation was adequate because fifteen (15) employees had been interviewed over a full month of investigation and no facts supporting any claim of pre-text were advanced. In the context of upholding the investigation in *Silva*, the Court emphasized that the investigator must be trained in how to properly conduct workplace investigations. The *Silva* Court

also held that methods of recording and memorializing witness interviews must be accurate, complete, and trustworthy.

In *Nazir v. United Airlines, Inc.*,³ the Court found an inadequate investigation could not protect an employer from liability. The Court in *Nazir* found that a failure to interview all potential witnesses, rendered the investigation inadequate and incomplete. Of great significance, the Court also held that failing to conduct a proper investigation was evidence of pretext in connection with the termination. The *Nazir* Court further held that when the investigation was conducted by, or under the control of, an employee that was involved or potentially “has an axe to grind” (or someone within the control of or who reports to the person with an axe to grind), the investigation is tainted before it begins. The *Nazir* Court also cited *Reeves v. Safeway*,⁴ where the process was tainted along the way and in which the “Cat’s Paw” Doctrine came into play rendering the outcome investigation ineffective and not credible. The “Cat’s Paw” doctrine involves one bad actor poisoning the well. The *Reeves* Court stated, “If the supervisor makes another the tool for carrying out discriminatory action, the original actor’s purpose will be imputed to the tool.”

Most recently, in *Mendoza v. Western Medical Center Santa Ana*,⁵ the Court determined the investigative process was tainted in a number of ways, rendering the investigation inadequate. The Court again held that the inadequate investigation was, in and of itself, evidence of pretext. In *Mendoza*, there were a number of shortcomings in the investigation. One male employee reported sexual harassment against another. The employer interviewed the employees together and conducted interviews in a quasi-public manner (holding these discussions where they could be seen by numerous others). The investigation was conducted by someone who is not a trained human resources investigator, nor trained to be thorough in investigations. The Court gave short shrift to the investigation’s conclusion that both the complainant and the alleged harasser were implicit in

unprofessional behavior and firing them both. The *Mendoza* Court concluded that the employer seemed more interested in getting rid of a problem than getting to the truth.

Mendoza cited *Nazir* for the proposition that an inadequate investigation is evidence of pretext. *Mendoza* also held that the lack of a vigorous investigation by defendants is evidence suggesting that defendants “did not value the discovery of the truth so much as a way to clean up the mess that was uncovered” when Mendoza made his complaint. Also of note, the employer argued that there was a concession by the plaintiff’s expert that additional facts would not necessarily have been discovered had the alleged flaws in the investigation been addressed. The Court noted, however, in that context that the question for the jury was defendants’ subjective motivation in deciding to fire Mendoza, not whether defendants had all the available material before them, thus dismissing that line of argument.

So, having authority that takes us through the present year and directs how investigations should be undertaken, what are the lessons? The lessons and the land mines are as follows:

i) Who Should Conduct the Investigation?

It should be no one who is any fashion involved in the issues at hand including supervisors in the chain of command. As there are potential allegations of inappropriate training that has led to the alleged discrimination, harassment, or retaliation, having the investigation conducted by someone in the chain of command is having the investigation conducted by someone who is likely going to be a target of any challenge. Independence and objectivity matter.

The investigation can’t be tainted anywhere. That means that there can’t be any express or implied pressures from the organization. When anyone in the chain of command makes a preference known as to how an investigation comes out, the investigation is tainted. If anyone in the chain of command expresses that they

want this “done and over with,” the investigation may well be tainted because the investigation has to be real and aimed at getting to the truth. It has to be thorough and compete. Anything that puts pressure on the investigator to do otherwise, potentially taints the investigation and will likely be an issue in the event of subsequent litigation.

ii) The Investigator Must Be Well Trained.

Don’t just use a manager who theoretically took a sexual harassment or discrimination in employment training class in person or online. Investigations should be undertaken by people who are well versed in what constitutes violations of law and what constitutes prompt and thorough investigation. The investigator must know how to conduct investigations in a manner that well documents evidence, and who can determine the nature and extent of the proper investigation to undertake. The more independent the investigator the better. Credibility is added when the investigation is undertaken by a third party rather than an employee of the company. Bringing in an investigator to conduct the investigation provides an additional layer of credibility as well as expertise. It adds strength to the ultimate conclusion and thus additional protection for the employer.

iii) Who Should Be Your Outside Investigator?

The obvious temptation here is to use your company legal counsel. Best choice - resist this temptation. Using your attorney to perform this unbiased and hopefully “neutral” investigatory role leads to a myriad of problems. Let’s begin with the fact that you’re going to great lengths to assure that the investigation is not tainted and the investigator is not biased. Starting by hiring somebody whose job it is to represent the company and whose loyalty is to the company, creates neutrality concerns at the outset. Organizational lawyers protect the company - that is their purpose. If placed in an investigatory role, that priority does not change. The mere fact

that the company’s lawyers are doing the investigation presents its own complications at the outset.

What’s more, by using the company legal counsel or attorney, multiple roles have been created for the company attorney. Consider that with respect to any claim for discrimination, harassment, or retaliation, the obligation to investigate is statutorily imposed. That means that if there is a dispute concerning whether or not there was discrimination, harassment, or retaliation, that investigation is discoverable. The case law is clear that to rely upon an investigation to substantiate the fact that the organization satisfied its statutory obligation to engage in a prompt and thorough investigation, that investigation has to be produced. If it is not produced, it cannot be used. Wellpoint Health Networks, Inc. v. Superior Court⁶ and many other California courts have repeatedly reached this same conclusion, *i.e.*, that a litigant must elect between claiming a privilege during discovery and not introducing such evidence at trial versus waiving the privilege for discovery and trial purposes. See *e.g.*, Fremont Indemnity Co. v. Superior Court⁷; James Talcott, Inc. v. Short⁸.

And that’s just the beginning of the problem. The real problem becomes at what point does the investigator no longer function as a neutral third party who’s investigating, and at what point is that person the organization’s lawyer again and giving legal advice. Communications from the company lawyer are not discoverable and protected by the attorney-client privilege. Communications from the investigator are part of the investigation and are discoverable, so the employer becomes embroiled in a fight about how much of the investigation communications can be accessed. There can be a fight to protect communications that the company wants to protect as it tries to draw lines concerning what is protected and what is not with the whole thing hopelessly convoluted.

The lesson is that the organization is best served

by an investigator who is separate and distinct from your own legal counsel so that the neutrality of the former role can be maintained. A trained, independent investigator or an employment attorney is recommended for conducting the investigation, just not the attorney relied upon for your legal advice in connection with the matter.

iv) Contents of the Investigation.

The investigator needs to thoroughly review the allegations, policies, emails, and any other pertinent documents. With those things in mind, the investigator typically sets about preparing questions to be used in conducting the interview. Questions focus on the issues presented, are the subject of substantial thought in advance of the investigation, and normally should be asked consistently at all interviews. This avoids the trap of having asked only certain witnesses key questions and thereby missing critical information.

If the answers to certain questions take the investigator in a new direction, the investigator should go there and explore the issues raised. In a number of cases, witnesses described additional conduct clearly violative of policy by another employer, and it is ignored as a subject of inquiry because that's not what the investigation is about. When it is later learned that this information was divulged to the investigator and nothing was done with it, the employer has a problem.

Investigations should also be conducted privately and with due respect for the employee who is the subject of the inquiry. Investigations, are in and of themselves, inherently nerve wracking events for employees. Not just the employee who is the known subject of the inquiry, the employees who are simply witnesses are often intimidated by the process. The investigator should be sensitive to the concerns that an investigation stirs up in all employees. The investigation must properly assimilate the information obtained and the investigator should make credibility assessments.

v) The Investigation Is Done, Now What?

While it is critical to conduct a prompt and thorough investigation, it's also critical to act upon it. The Fair Employment and Housing Act requires an employer to take appropriate remedial action. Appropriate remedial action is necessarily undefined because it has to fit all potential situations, but common sense plays a large role here. At the end of the investigation when the investigator has provided his or her report is the appropriate time to discuss the matter with legal counsel to determine the appropriate course of action. If there is some minor violation by a long term employee, the responsive "appropriate remedial action" will be different than if there is a substantial and ongoing course of harassing conduct that has been occurring or of the conduct is a singular occurrence but more severe. To aid in those decisions, the investigator's credibility assessments are important. The investigator should determine whether a witness's testimony is credible and, if not, why not. It is often helpful to have those assessments as a part of the process when it's time to make a decision about what action must be taken. The trained investigator can then defend those credibility decisions in testimony and those credibility findings can make a big difference in the result.

The *Mendoza* decision addresses the practicality that needs to underlie all investigations. The investigation has to be aimed at getting to the truth—not agenda driven. It must be prompt and thorough. As noted, an inadequate investigation can be the basis for a finding of pretext and can create the likelihood of a verdict in favor of an employee claiming harassment, discrimination, or retaliation.

The investigation must be performed by well-trained personnel. The investigatory process itself must be credible, thorough, and absent any factor that taints the process. When those requirements have been satisfied, the investigation stands a much stronger chance of withstanding scrutiny. It may cost a little more to do the investigation right, but consider the

alternative long term costs of not doing so when that investigation, and the employment decisions based thereupon, come apart. Many cases result in substantial verdicts and settlements based upon gross inadequacies found in investigations. To put it another way, conducting a legally adequate investigation is essential.

2. The Human Side

Other than a spouse or significant other, the employment relationship is perhaps the most significant relationship in an individual's life. Employees take pride in developing expertise in what they do, in knowing their job well, and in doing it right. We all derive self-worth and self-image from the knowledge we obtain and the work we perform. Employers, however, want the most qualified persons who behave professionally and get the most accomplished without distraction. This sets the stage for the calamity that arises when there is a claim of conduct that may constitute harassment or discrimination pervading the workplace. At the outset, the complaining party is nervous. This person has many second thoughts about whether they should even be advancing a complaint or whether they should just continue to live with the problem in silence. They fear that they may not be believed. They fear that reputation with their employer and co-workers is at stake. They fear the possibility of retaliation.

The party who is the subject of complaint obviously has his or her own substantial concerns and worries. If he or she is not believed, how will all of this play out and how will their career be impacted. At the same time, the employer and its managing representatives still have their day-to-day large list of things that must be promptly accomplished and don't want the diversion from the demands of the schedule. An employer's representatives are often trained to go through the motions as quickly as possible and oftentimes without compliance with the standards referenced in Section 1. Neither the complainant nor the party complained against is put at ease if they sense the employer's lack of desire to get to the truth. There is only one course of conduct that benefits all

parties and that is a prompt, thorough, and good faith investigation.

On the human level, a professional investigation is how the employer convinces employees that they are treated with respect and fairly. If the completed investigation finds harassment or discrimination then so be it. The employer must take appropriate remedial action.

One related issue is that the manager who runs a department or unit of the company is accountable for everything he or she is not getting done. If the company does not convey to them that it is an important part of their job to conduct these investigations correctly, even if it takes time away from other things, that will show up in the quality of the investigation. The priority such matters are given is passed down from the top and through the ranks. For employers, management should make clear that any such claims warrant prompt and thorough investigation so as to protect all of those involved (including the company). That investigation should be put in the hands of only those who are properly and thoroughly trained and should be conducted in accordance with the standards set forth in Section 1 above. An even playing field in connection with any investigation protects everyone. Investigations performed by attorneys or investigators must have no agenda other than to get to the underlying facts in connection with the allegations in issue.

The investigation is a much more reasonable cost of doing business than the alternative— which is often significant liability for inadequate investigation. The cost is also measured in employees who live in fear that they “might be next” if such investigations are perceived as less than fair in the day-to-day work environment.

3. The Impact of Inadequate Investigation on Later Litigation

Investigations have the best chance of withstanding scrutiny if they are timely, thorough, and untainted. It is surprising how vulnerable many investigations truly are. Over the years, countless challenges to

investigations have resulted in glowing deficiencies based upon the fact that:

- The investigation is tainted at the outset or during its process;
- The investigation is not undertaken timely—when the employer had notice;
- The investigation is incomplete;
- The investigation fails to discover critical evidence;
- The investigation discovers and then ignores critical evidence;
- The investigation is performed inconsistently;
- The investigation is performed by those unqualified to conduct it;
- The investigation is performed by someone with an agenda or who works for someone with an agenda; and
- The investigation is, for one of many other reasons, not neutral but it is clearly result oriented and agenda driven.

What is the significance of all this in litigation? Well if the investigation is legally inadequate for any of the reasons set forth above, summary judgment motions fail and there are significant issues for trial.

What's more, an inadequate investigation in and of itself, can be evidence of pretext and the jury can be so instructed in reaching a verdict concerning alleged harassment, discrimination, and/or retaliation.

Employer investigations and the law that governs them has been an evolving process and that evolution is ongoing. Following the rules is like following a proven recipe. You do it right and the meal is enjoyable and adds to your reputation as a good cook. You stray too far and you get indigestion and acid reflux that continues throughout the dispute that follows.

David P. Warren, Esq., is an experienced trial attorney, advocate and negotiator, bringing thirty-seven years of experience and dedication to his Arbitration and Investigation practice. Over the past 30 years Mr. Warren has been involved in working on innumerable employee/employer issues, advising on employee matters, reviewing investigations, speaking on investigations and, in a large number of cases, successfully attacking inadequate investigations.

1. Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal.4th 93
2. Silva v. Lucky Stores, Inc. (1998) 65 Cal.App.4th 256
3. Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243
4. Reeves v. Safeway (2004) 121 Cal.App.4th 95
5. Mendoza v. Western Medical Center Santa Ana (2014) 222 Cal.App.4th 334
6. Wellpoint Health Networks, Inc. v. Superior Court (McCombs) (1997) 59 Cal.App.4th 110, 130
7. Fremont Indemnity Co. v. Superior Court (1982) 137 Cal.App.3d 554, 559-560
8. James Talcott, Inc. v. Short (1979) 100 Cal.App.3d 504, 510