

Employment Investigations

By David P. Warren, Esq.

California workers are aware that employment investigations periodically occur in the work environment around them. For many employees, the workplace investigation is a mysterious, ominous, and “hush hush” process about which they know very little. In fact, behind the confidential curtain there is a great deal to be known about legal mandates for investigation in many different situations, as well as what an investigation must consist of if it is to withstand legal scrutiny.

The Obligation to Conduct Investigations

The obligation to conduct investigations in the workplace stems from numerous sources, including statutes governing discrimination and harassment in the workplace and statutory provisions mandating safe working conditions.

In the context of harassment and discrimination claims based upon age, race, sex, national origin, religious creed, color, ancestry, physical disability, mental disability, medical condition, marital status, or sexual orientation investigations have a statutory mandate. The Fair Employment and Housing Act (FEHA) mandates affirmative employer obligations to prevent harassment and discrimination in the work environment. The FEHA makes it unlawful for an employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring. The statutory scheme imposes strict liability standards for harassment by supervisors and makes an employer liable for harassment by co-workers where the employer (or its agents or supervisors) know, or should have known, of the conduct and failed to take “immediate and appropriate corrective action.” The FEHA also mandates prompt, immediate and thorough investigation if an employer has any information to put it on notice of a possible violation and requires appropriate remedial action with respect to any harassment or discrimination found to exist. Further, FEHA provisions prohibit retaliation against any employee who opposes any practice forbidden by FEHA. There are numerous other statutes that are industry oriented that prohibit

retaliatory conduct. There are likewise both state and federal laws and regulations concerning safe working conditions that impose investigatory obligations in the event an employer is on notice of facts suggesting safety issues.

In the work environment, an employee who comes forward with a complaint of harassment, discrimination, or retaliation often does so with apprehension (or paralyzing fear), not only about the conduct underlying the complaint, but about the process they are likely to ignite by virtue of the complaint. Likewise, an employee accused of misconduct is extremely apprehensive about the investigatory process and the likely impact of any finding upon his or her career. An employer should undertake a thorough investigation prior to terminating an employee for misconduct for its own protection, so as to assure it is making a proper well-founded decision and so as to avoid a demoralizing effect of perceived arbitrary action in the workplace.

The Legal Evolution of the Investigation Requirements.

In 1998 the California Supreme Court decided *Cotran v. Rollins Hudig Hall International, Inc.*¹ This was the first time the Supreme Court addressed the employer’s obligations with respect to investigations. It adopted what it called “middle position” between the positions of plaintiff, who sought a requirement that the employer prove the misconduct actually occurred, and defendant, who wants protection from liability for having acted in subjective good faith, even if incorrect. Foundationally, *Cotran* arose in the context of an employee misconduct investigation. The plaintiff was accused of sexual harassment by two female employees. After investigation the claims of the two female employees were upheld and the plaintiff was terminated. It was only later learned that they in fact had both had affairs with the plaintiff and the harassment allegations were not true. *Cotran* sued for violation of the implied promise not to terminate without good cause.

In setting the standard, the Supreme Court concluded that a jury is to assess “through the lens of an objective standard” whether the termination was a result of “fair and honest reasons, regulated by good faith on the part of the employer which are not trivial, arbitrary, or capricious, unrelated to business needs or goals, or pretextual.” The Court held that there must be, “A reasoned 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.” The Supreme Court concluded the Decision by stating, “All of the elements of the governing standard are triable to the jury.” The Court was careful to point out that these determinations were to be made objectively based upon all facts presented and not simply out of an employer’s recital that they acted in good faith.

In Cotran the Court found that the investigation satisfied these standards because an extensive investigation occurred in which twenty-one employees had been interviewed (i.e. everyone who had been identified as potential witnesses and there was nothing else that anyone could point out could have been and was not).

Subsequently, in Silva v. Lucky Stores,² using the Cotran standard, the Court upheld another misconduct investigation. In so doing the Court specifically found that fifteen employees had interviewed over an investigation that spanned a full month, that no facts supporting any claim of pretext in the findings could be urged. It was emphasized that in these kinds of matters the investigator must be trained in how to properly conduct workplace investigations and methods of recording and memorializing witness interviews must be accurate, complete, and trustworthy. Relevant, open-ended, and non-leading questions must be utilized. Cotran and Silva thus give us a feel for what an investigation must be to withstand scrutiny.

By contrast, the recent case of Nazir v. United Airlines, Inc.³ identifies several ways in which an investigation will not withstand scrutiny. In Nazir, the Court found that the first failure of this investigation was that the person who was called upon to lead the investigation, at least inferentially,

had an axe to grind and was assisted by someone who “served him.” In other words, putting someone with a potential axe to grind in charge of the investigation and allowing his subordinates to carry it out taints the investigation from the outset. In fact, the Nazir Court described it by saying that such an investigation could “exploit a disciplinary process predisposed to confirm all charges.” In so holding, the Court cited Reeves v. Safeway Stores.⁴

In Reeves the Court denied summary judgment where there was an issue of whether the plaintiff’s supervisor bore animus towards the employee. The employer took the position that the supervisor wasn’t the decision maker with respect to the termination, hence, any such supervisory animus was irrelevant. The Court found to the contrary stating that the “cat’s paw” doctrine came into play. Specifically, if the process was tainted anywhere along the way by that supervisor’s negative presentation of the employee or action to be taken, then that discriminatory animus may well have an impact upon the ultimate decision.

In Nazir, not only did the Court find that the investigation was headed by someone with a potential axe to grind, they also found that the investigation was seriously flawed. In specific, there was a witness plaintiff had identified as having pertinent information who was never interviewed as a part of the investigation by the employer. What’s more, the reason the employer advanced for not interviewing that employee did not square with the fact that they had spoken to another similarly situated employee. The Court held that such failure to interview witnesses not only rendered the investigation inadequate and incomplete, but was evidence of pretext in the decision making process.

In reversing the trial court’s grant of Summary Judgment in Nazir, the Court of Appeals reiterated that Cotran required an appropriate investigation that was neither arbitrary nor pretextual and noted that the Supreme Court in Cotran had expressly held that those standards were triable to the jury.

Cotran and its progeny show us that an employment investigation must be prompt. An employer has a duty to prevent harassment and discrimination in the

workplace that the Courts have characterized as an affirmative and mandatory duty.⁵ The duty to investigate exists as soon as the employer is aware of facts that put the employer on notice that a potential issue exists. That duty exists even if the complaining party provides that information “in confidence,” or does not wish their matter pursued.

The investigation must be thorough— i.e. all identified witnesses must be interviewed, all reasonable avenues of inquiry pursued, and all pertinent documents reviewed. Further, appropriate conclusions must be reached and the findings must not be tainted, pretextual, or unsupported. If any discrimination or harassment is found, appropriate remedial action be taken. This presents issues that arise in a number of forms. By way of illustration, a sexual attack that results in a verbal warning and no further discipline is unlikely to be held as appropriate remediation. Likewise, somebody who just received his fifth written warning for the same conduct, without escalation in the discipline, has not been the subject of appropriate remedial action.

In representing primarily employees, at the outset of a case I want to see the investigative report so that I can make assessments as to whether an investigation was done as promptly as the operative facts would warrant, whether there were witnesses who were not interviewed (or from whom pertinent questions were not asked or pertinent information not obtained), whether critical documents were sought and reviewed and whether the actions taken during the investigation itself, as well as in response

to the findings, were appropriate remedial actions. An employee coming forward with a complaint, or providing information in connection with a complaint, cannot be subjected to any form of retaliatory action. The FEHA prohibits any retaliation against an employee for “opposing any practices forbidden by the Act.”

The standard emerging from *Cotran* and its progeny is that there must be a factual assessment resulting in “a reasoned conclusion supported by substantial evidence gathered through an adequate investigation including notice of misconduct and a chance for response by the employee,” and a determination of whether the action taken was a result of “fair and honest reasons regulated by good faith on the part of the employer that is not trivial, arbitrary, or capricious unrelated to business needs or goals or pretextual.” As made clear by both *Cotran* and *Nazir*, the trier of fact is to make these assessments through the lens of an “objective standard.” These standards have evolved from the need to balance the interests of the employer in regulating the work environment and the needs of the employee in maintaining his or her career in the face of often serious allegations (which may or may not be accurate). Because of the balancing of these competing interests, most cases are, by definition, fact intensive. The operative facts must be filtered in the context in which they arose and assessed through that “objective lens” to determine whether the investigation was prompt, fair, and thorough and whether appropriate remedial action was taken.

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 [76 Cal.Rptr.2d 382].
3. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243
4. *Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95
5. *Northrop Grumman Corp. v. Workers' Compensation Appeals Bd.* (2002) 103 Cal.App.4th 1021.