

The Benefits of Independent Workplace Investigations

by Angela Gupta

Upon learning of alleged unlawful behavior or violations of company policy or codes of conduct, employers are increasingly turning to independent outside counsel to initiate a prompt, thorough, and impartial investigation. This is a smart choice for several reasons. An independent investigation provides an employer with accurate and objective information to respond to the allegations and take appropriate steps, if necessary, to stop inappropriate behavior from continuing to occur. Equally important, an impartial inquiry allows an employer to effectively evaluate its legal situation and potentially limit liability under the circumstances.

For example, completing an independent investigation can be essential to an employer's ability to defend against the possibility of ensuing litigation involving unlawful harassment complaints. Under the *Faragher-Ellerth* defense, an employer may limit liability by showing it exercised "reasonable care" to prevent and promptly correct the alleged misconduct by: (1) adopting and training employees on a company policy prohibiting harassment; (2) *conducting a swift investigation upon learning of claims of harassment*; and (3) taking steps reasonably calculated to prevent the alleged harassment from reoccurring.¹

To conduct an airtight investigation, both the perceived and actual impartiality of the investigator is essential. Utilizing an outside attorney with no prior relationship to the company demonstrates the employer takes potential policy violations seriously and indicates a neutral investigator with no stake in the outcome of the investigation. Moreover, retaining independent investigative counsel (instead of the company's usual litigation counsel) provides additional advantages, including: (1) if the complaint ends up in litigation, the investigative attorney could be called as a fact witness and thereby be conflicted out of representing the employer in the litigation; and (2) if an employer decides to use the investigation in its defense, it will likely need to waive attorney-client privilege as to counsel who carried out the investigation.

In light of these considerations, choosing to retain independent outside counsel can be the surest way to ensure that the final report and investigative findings will have credibility with a factfinder in litigation, as well with various stakeholders within the company, including the complainant and other employees. In other words, obtaining an independent outside investigation can be one of the best investments an employer can make.

Associates in Dispute Resolution, LLC provides independent investigations by experienced attorneys who work exclusively in the neutral role. Our prompt, thorough, and objective fact-finding and credibility determinations enable employers to determine whether alleged behavior occurred and, if so, take necessary steps to stop future misconduct from occurring and protect against potential liability down the road.

¹ To invoke the *Faragher-Ellerth* defense, an employer must also show: (1) no tangible action was taken against the complaining employee; and (2) the complaining employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. See *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).



Angela Gupta brings over 29 years of legal experience to her work as a neutral with ADR Associates, where she conducts mediations, arbitrations, and independent investigations. Prior to joining ADR, Angela worked closely with federal judges in the District of Kansas to help resolve thousands of cases involving a wide range of federal and state laws. In practice, Angela represented individuals, corporations, and the government in employment, commercial, and bankruptcy litigation.

Editor's note: As reported in this link to the [Kansas City Star](#), Angela recently completed an independent investigation regarding the Code of Ethics for the City of Olathe.

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