



The fox and the henhouse

Litigating claims of an employer’s failure to investigate

BY LISA P. MAK

This past February a former Uber employee, Susan Fowler, published a powerful blog post about the sexual harassment and gender discrimination she had experienced while working at that company. In her post, Fowler described how each time she reported harassment and discrimination, the human resources department did nothing to fix the problem, and management took retaliatory actions against her. Fowler’s piece went

viral, creating public outrage against Uber and prompting the company to launch an internal investigation (after Fowler had already left Uber for another job).

Fowler’s story highlights an important aspect of potential liability for a company in employment cases – the failure to properly investigate claims of discrimination, harassment, and retaliation. Developing the “failure to investigate” piece is often a powerful tool in litigating these cases.

The FEHA investigation mandate

The Fair Employment & Housing Act (“FEHA”) mandates employers to conduct investigations and take corrective action in certain situations. That statute makes it an unlawful employment practice for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (Cal. Gov. Code § 12940(k).) The FEHA also states that harassment of an employee based on his or her protected characteristic



(such as race, gender, disability, age, and other classifications) is unlawful if the company, or its agents or supervisors, knows or should have known of the harassment but “fails to take immediate and appropriate corrective action.” (Cal. Gov. Code § 12940(j)(1).

California case law has reiterated FEHA’s requirement for employers to promptly investigate discrimination claims as a way to prevent discrimination in the workplace. See, e.g., *Northrop Grumman Corp. v. Workers’ Comp. Appeals Bd.* (1997). 103 Cal.App.4th 1021, 1035-36 (2002) (“[p]rompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment”); *Washington v. California City Correction Center*, 871 F.Supp.2d 1010, 1027 (E.D. Cal. 2012).

Standards for adequate investigations

In *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, the California Supreme Court began establishing the standards for adequate workplace investigations. In *Cotran*, the plaintiff was accused of sexual harassment by two female employees. After an investigation, the employer concluded it was more likely than not that the plaintiff had committed the sexual harassment, and fired him. However, it was later revealed that the plaintiff and the two female employees had been involved in consensual relationships, and that the women had other motives for their actions. Plaintiff had not mentioned the consensual relationships during the company’s investigation because he felt frightened and ambushed.

Plaintiff sued the employer for breach of an implied contract to not terminate his employment except for good cause. At trial, a jury found that the plaintiff had not engaged in the behavior on which the company based the termination decision, and awarded the plaintiff for his lost compensation. On appeal, the

parties argued over whether, for claims of breach of implied employment contracts, the jury’s role was to decide if the plaintiff’s alleged misconduct had actually occurred, or just if the employer had reasonable grounds for believing the misconduct had occurred and had acted fairly based on that belief.

The California Supreme Court concluded that it was the jury’s role to assess, “through the lens of an objective standard,” the reasonableness of the employer’s decision to terminate the employee for just cause, under the circumstances known to the employer at the time the decision was made. The employer’s decision must be based on “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.” The *Cotran* Court further held that the employer’s decision should be “supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.” Although the Court declined to detail all the requirements of an adequate investigation, it noted that investigative fairness required listening to both sides and giving the parties a fair opportunity to present their position and address prejudicial statements.

Cases following *Cotran*

Cases following *Cotran* have refined the requirements for an “adequate investigation” in the employment context. In *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, the plaintiff was terminated after an investigation into allegations that he had sexually harassed female employees. The appellate court affirmed summary judgment in favor of Lucky Stores, determining that under the *Cotran* standards, there was no triable issue that the employer had conducted an appropriate investigation or that the employer had reasonably found good cause to terminate the plaintiff’s employment.

The *Silva* Court determined that Lucky Stores had presented substantial evidence to support its assertion that it had made the termination decision in good faith. Such evidence included: Lucky had a written policy specifying how to investigate sexual harassment allegations.

The plaintiff was given prompt notice of the charges made against him. There was a designated person – a human resources representative uninvolved with the situation – who was responsible for investigating sexual harassment complaints. This HR rep had been trained by in-house counsel on how to conduct investigations.

- The HR rep interviewed 15 store employees, including the plaintiff and the women who had accused him. He used “relevant, open-ended, nonleading questions” that attempted to elicit facts as opposed to opinions.
- The HR rep recorded information on witness interview forms and/or obtained written statements from each employee interviewed. The HR rep also re-interviewed several witnesses to follow up on information and clarify certain issues.
- The HR rep talked to the plaintiff multiple times during the investigation to clarify issues and gave him an opportunity to present his position and to respond to statements made by other witnesses during the investigation.
- The investigation was conducted promptly and confidentially.
- The HR rep summarized his investigative findings in a written report.

Based on these factors, the court concluded that Lucky’s investigation, while not perfect, met the *Cotran* standards for a fair and appropriate investigation, and showed that the decision to terminate the plaintiff’s employment was a reasoned conclusion supported by substantial evidence.

In addition to conducting an adequate investigation, employers must take prompt action to correct and prevent



discriminatory and harassing behavior. What constitutes appropriate remedial action will depend on the circumstances of each situation, but can include disciplining the wrongdoers, limiting contact between an alleged harasser and victim, mandating discrimination and harassment training, and implementing new compliance policies. Employers also cannot retaliate against employees who complain about discrimination, harassment, and retaliation. Cal. Gov. Code § 12940(h).

Using investigation standards in litigation

The FEHA's mandate for investigating, correcting, and preventing discrimination and harassment, combined with the standards for adequate investigation articulated in *Cotran* and *Silva*, can be a very effective tool for litigating employment cases. First, under the statutory language of the FEHA, a plaintiff can plead a separate cause of action for an employer's failure to prevent discrimination and harassment. This can be another basis for establishing an employer's liability if there is a finding of actual discrimination or harassment. (See CACI No. 2527.) This can be especially powerful when the employer did a cursory investigation into discrimination or harassment complaints, or did no investigation at all.

Second, gathering evidence to attack the adequacy of an employer's investigation can be useful in establishing factual issues to defeat summary judgment. Courts have compared employer investigations to the standards articulated in *Cotran* and *Silva* to determine whether an investigation was fair, appropriate, and reasonable under the circumstances. See, e.g., *Serri v. Santa Clara Univ.* (2014) 226 Cal.App.4th 830, 873). Similarly, you can use this comparative approach to establish a triable factual issue for claims of an employer's failure to prevent discrimination or harassment, and for claims involving a breach of an implied contract to not terminate except for good cause. In cases where the plaintiff is allegedly terminated

for misconduct after an investigation, you can use evidence of a shoddy or tainted investigation to establish that the "misconduct" was simply pretext for terminating the plaintiff based on his or her protected characteristic. Courts have held that an employer's failure to conduct a proper investigation can itself be evidence of a pretextual termination. (See, e.g., *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 277, 280; *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1344-45). Further, a "set-up" investigation into the plaintiff's alleged misconduct may arguably be considered an adverse employment action, if it materially affects the plaintiff's job performance or opportunities for advancement in his or her career, under the language of *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035.

Third, shining a spotlight at trial on the company's failure to adequately investigate the plaintiff's claims, or on the company's "set-up" investigation to unfairly terminate the plaintiff, can be very effective in turning a jury against the company. It allows you to focus on the employer's shortcomings, inability to be fair, and lack of credibility. Jurors may become upset that the employer swept legitimate complaints under the rug, or targeted the plaintiff unfairly, or failed to take remedial actions to create a better workplace. This can be an avenue to higher general and special damages, and also to possible punitive damages.

Building up the evidence

There are many ways you can build up the evidence on the "failure to investigate" part of your case. You should request a copy of the investigative file and all documents related to the investigation and its findings. This can be a treasure trove of evidence regarding the inadequacy of the investigation. You can use the factors established in *Cotran* and *Silva* as a checklist to see where the investigation was unfair or unreasonable. For example – Was the investigation conducted by someone who was truly neutral, or who

instead had a stake in a particular outcome? Were all critical witnesses interviewed and necessary documents reviewed? Was there sufficient documentation and support for the investigative findings? Was the plaintiff allowed to present his or her side of the story?

It is also worth noting that "[i]f a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy" in discovery. *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128. Thus, an employer who wants to rely on this defense will need to produce investigative documents, even if the investigation was undertaken by legal counsel. Otherwise, the employer will not be able to use evidence about the investigation at trial. You should also be wary of significant redactions in the investigative file, as this will hamper your ability to glean critical facts and analysis from the investigation.

The investigative file will also be a useful roadmap for conducting further discovery. You can depose the individuals who conducted the investigation and the witnesses they interviewed or failed to interview. You can examine documents to see if they support the investigative conclusions, and to formulate additional discovery questions. You can re-trace the investigative steps to uncover flaws or biases in the way the investigation was conducted. If witness interviews and documentary evidence are suspiciously missing from the file or have been inexplicably destroyed, you should highlight that at trial. See also CACI No. 203 and 205.

Another powerful approach is to point out how the handling of the investigation deviated from the employer's own stated policies on investigative and disciplinary procedures. You can also compare



the investigation at issue to how other investigations were handled by the company, to show that the company could have done things differently if it had wanted to. Hiring a human resources expert may also be useful to explain, for purposes of a summary judgment motion or for trial, how the company's investigation did not meet appropriate standards. Ultimately, you want to be able to focus on the deficiencies of the employer's investigation and how they did not give your client a fair chance.

Conclusion

Developing evidence on an employer's failure to investigate can be a

powerful tool for litigating contentious employment cases. If possible, you should incorporate this strategy into your cases to help defeat summary judgment, establish employer liability, and get the jury on your client's side at trial.

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