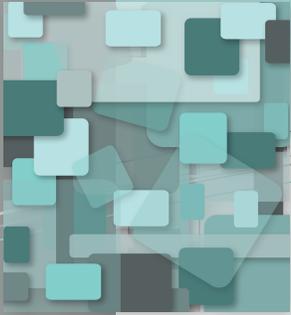


Investigating Discrimination Complaints

a Bashen Corporation White Paper



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Issue Presented:

Does an employer have a duty to investigate all employee complaints of discrimination?

Synopsis

Background

Title VII prohibits discrimination based on sex, and a string of seminal cases confirms that sexual harassment is a form of sex discrimination (*See Exhibit 1: Development of Sexual Harassment Law*). It is easier, and perhaps more precise, to categorize all discrimination and harassment claims under the all-inclusive heading of “DISCRIMINATION,” rather than parsing claims into discrimination or harassment and then handling each type differently. Harassment case law evolved from Title VII legislation. While the respective prima facie elements of proof are peculiar in each type of case, the need to investigate, or fact find, remains constant. Quite simply, for the purposes of prevention and correction, there is **no** difference between discrimination and harassment. An employer is **required** to prevent discrimination or harassment, and is obligated to correct any instances of discrimination or harassment once discovered.

It is impossible to determine if disparate treatment has occurred without a prompt and thorough investigation, inquiry, examination, exploration or any other name used to describe an effective fact finding process implemented by an employer. The threat to the employer increases dramatically in disparate impact cases where a facially neutral policy is having an adverse impact on a particular class of employees (e.g. systemic pay disparities between male and female employees). Such a case is typically insidious by nature, and a thorough investigation into apparent indicators is necessary to avert a potentially disastrous result.

EEOC Guidance

The EEOC’s Compliance Manual states in relevant part, “Because discrimination often is subtle, and there rarely is a ‘smoking gun,’ determining whether race played a role in the decisionmaking requires **examination** (emphasis added) of all surrounding facts and circumstances.” “Sources of information can include witness statements, including consideration of their credibility; documents; direct observation; statistical evidence such as EEO-1 data, among others.” (*Exhibit 2: Relevant Excerpt, EEOC Compliance*



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Manual Section 15: Race and Color Discrimination, 2. Conducting a Thorough Investigation)

The Compliance Manual provides guidance to employers, labor unions, employment agencies, agency investigators, and any other entity that might be involved in a complaint of discrimination. Notably, the Compliance Manual does not make distinctions, for example, between internal claims of discrimination or agency charges, nor does the Compliance Manual distinguish between discrimination and harassment. Knowledgeable employers understand that some type of an investigation is required when an employee complains of discrimination or harassment, assuming of course the employer is committed to preventing and correcting acts of discrimination.

An Employer's Anti-discrimination Policy

Most policies have a section regarding the employer's formal complaint process, which includes provisions for investigating complaints of discrimination or harassment. A good policy is integral to preventing and correcting discrimination. An employer that refuses, implicitly or explicitly, to

investigate discrimination complaints is, in effect, ignoring its own policy to prevent and correct discrimination. The employer's action, or inaction in this case, renders the policy meaningless. It is likely that the EEOC, FEPA and OFCCP would perceive this practice as untenable, and this custom could be catastrophic to a federal contractor. In addition, an employer that ignores or summarily dismisses an employee's internal discrimination complaint assumes the risk that the employee will file a charge with the EEOC, FEPA or OFCCP. An internal complaint, which the employer fully investigates, affords a splendid opportunity to resolve the problem in-house, and usually eliminates the risk of an agency investigation into the employer's employment policies and practices. It is impossible to predict the possible consequences that an agency might impose on an employer that has deliberately ignored its own anti-discrimination policy.

Elements of Proof and Pretext

In disparate treatment cases, an employee is required to prove a prima facie case of disparate treatment. The elements are:





The complainant is part of a protected group;
The complainant suffered an adverse employment action; and
The complainant was treated differently than similarly situated employees who are not part of the complainant's protected group.

It is *impossible* to know if there is a prima facie case of discrimination without an investigation. Once the prima facie case is proven, the employer must articulate legitimate reasons for the different treatment that resulted in an adverse employment action. It is *impossible* to know if the reasons are legitimate without an investigation. Once the employer rebuts the prima facie case with legitimate reasons, the complainant is given the opportunity to show that the employer's reasons are false or merely a pretext for discrimination.

A complainant can use the employer's failure to investigate -- or failure to investigate adequately -- as proof of pretext. *Duchon v. Cajon Co.*, 791 F. 2d 43 (6th Cir., 1986) ("little or no attempt was made to investigate or hear Duchon's side of the story...sufficient to defeat a motion for summary judgment."). Failing to investigate an internal complaint of discrimination can have

untoward results months or years later, and escalation always includes unwanted and exorbitant legal expenses.

Conclusion

Employers are required to prevent and correct discrimination in the work place, which is particularly crucial to a federal contractor. It is impossible to prevent or correct a problem without information about the problem. As such, most employers have anti-discrimination policies that include complaint procedures and investigations, which employers execute in different ways. The EEOC Compliance Manual clearly addresses the importance of thorough investigations into claims of discrimination **and** harassment. Private and federal sector employers, the EEOC, FEPA's, and Bashen Corporation investigated claims of discrimination **and** harassment long before the Supreme Court issued the *Faragher* and *Ellerth* opinions ("Opinions") in 1998, and nothing in the Opinions absolves an employer from investigating discrimination cases. Notably, the Opinions have a relatively narrow application to harassment cases involving supervisors. It is therefore implausible that an employer's duty to investigate



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applies only to supervisory harassment cases, which comprise a moderately small percentage of the types of discrimination claims filed annually. Informed employers have always considered investigations as a “Best Practice” to eliminate or mitigate risks.

After careful consideration of the available data, and based on our considerable experience, we conclude that fact finding investigations are critical to an employer’s ability to prevent and correct discrimination in the workplace, and that no distinction should be made between harassment claims and discrimination claims. An agency would probably view such a distinction as erroneous since harassment is a sub-category of discrimination, and any type of discrimination claim requires prompt attention. In exercising an abundance of caution, the employer should probably perceive every ignored case as a “ticking time bomb” and should act swiftly to disarm the threat.

About Bashen Corporation

Bashen Corporation (“Bashen”) provides employers with Equal Employment Opportunity (“EEO”) Compliance Administration services, which include: investigations, patented case/document management and tracking software, training, affirmative action plans, diversity strategies, alternative dispute resolution, risk management and EEO and HR consulting services. Hundreds of clients, including Fortune 500 companies, non-profits, federal agencies, educational institutions, and insurance carriers, benefit from Bashen’s experience. Bashen is a minority woman owned enterprise.



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