



National Investigation Counsel®

Serving law firms & in-house counsel



***Navigating Uncharted Waters...
An Investigator's Perspective***

WRITTEN BY: LINDA G. BURWELL

Published In:

**STATE BAR OF MICHIGAN LABOR AND EMPLOYMENT LAWNOTES
SUMMER 2020**

NAVIGATING UNCHARTERED WATERS ... AN INVESTIGATOR'S PERSPECTIVE

Linda G. Burwell
National Investigation Counsel, PLLC

As this article is being written in April 2020, many peoples' lives have been upended by the COVID-19 pandemic and related restrictions on various activities. Many companies are struggling to sustain some semblance of what they once were. Companies are more likely short staffed, staffed with individuals who have been shuffled to a new position and/or staffed with individuals who lack institutional knowledge. Some companies have even shifted their focus to a different product or service and have completely different priorities than they had months ago.

These changes can seriously challenge a company's ability to effectively handle employee concerns. For example, if an employee complains about events that occurred prior to the pandemic, witnesses may be in a different position, in a different department, on leave, no longer with the company or perhaps no longer living.

Rules are changing by the day and sometimes by the hour. Regardless of how fast they are changing and how uncertain things will be, the one thing certain is that there will be rules and there will be people trying to make sense of them.

Different concerns, unique to the pandemic situation, may be raised. For example:

- Failure to accommodate;
- Discrimination involving the jobs or duties required of some but not all employees;
- Discrimination by laying off or furloughing some but not all employees;
- Discrimination by bringing some but not all employees back to work, or by allowing some but not all employees to continue teleworking;
- Issues involving out-of-classification work in organized workplaces;
- Harassment based on national origin ("Chinese Virus");
- Invasion of privacy concerns based on COVID -19; and
- Issues involving compliance with the many rules and regulations promulgated to address COVID-19 and related whistleblower claims.

Companies will need to respond quickly to questions or requests that they haven't faced before. Changes in personnel, operating procedures, telecommuting rules, customer interactions and other areas impacted by the COVID-19 pandemic and the political and business responses to it, all make responding to employee claims a more challenging endeavor. Fair, reasonable and effective responses require level-headedness, discipline and creativity on the part of HR directors and others in management. When a complaint is presented, the important thing is to keep

one's eye on the ball – the objective to provide a prompt, thorough and impartial investigation – rather than get stuck on processes laid out in a written company policy that may not be feasible under the current circumstances.

Although preceding the COVID-19 pandemic, a recent Seventh Circuit case offers useful guidance on this point. The plaintiff in *Gamble v. Fiat Chrysler Automobiles*, No. 18 C 4520, 2020 WL 1445611 at *1 (N.D. Ill Mar. 25, 2020) an African American production supervisor, was terminated for violating Fiat Chrysler Automobiles' ("FCA's") Discrimination and Harassment Prevention Policy. Gamble challenged his termination, claiming that FCA's reasoning was a pretext for race discrimination and that FCA's human resources representative, Kelly Pollard, performed her investigation in a biased fashion, thus supporting the pretext. Gamble's claim that the HR investigator was biased was based upon her failure to get witness statements in violation of the company's policy and her failure to interview some individuals that Gamble requested be interviewed.

The court granted FCA's motion for summary judgment because it found that the investigator had conducted a reasonable investigation of the allegations brought against Gamble and honestly concluded that Gamble's conduct warranted his termination. The court found that because the investigator reached this honest belief after interviewing multiple individuals with relevant information, no reasonable jury could conclude that her decision to recommend Gamble's termination was pretextual. Even if the two individuals (identified by Gamble, but not interviewed) had some ulterior motive for making allegations against Gamble, because the investigator honestly believed the allegations, FCA's decision to terminate Gamble cannot be considered pretextual.

The *Gamble* case is in alignment with the Sixth Circuit on this issue. In *McLaughlin v. Fifth Third Bank, Inc.*, 772 F. App'x 300, 301 (6th Cir, 2019), the Sixth Circuit upheld summary judgment based on the strength of a bank's investigation where it found the bank had an honest belief supporting its decision even if the decision was not correct. Consistent with *Gamble*, the *McLaughlin* case teaches that an investigation need not be perfect and, indeed, its findings need not even be correct, so long as the investigation is reasonable under the circumstances and is conducted in good faith,

Take-aways:

1. Under the current COVID-19 conditions, there may be certain actions that an investigator might ordinarily undertake, or that are called for in an employer's investigation procedure guidelines, that are not feasible or even possible. The *Gamble* case supports the proposition that an investigation need not be perfect and need not adhere to the letter of every guideline to be fair and effective. Anything the investigator can do to show he or she protected the integrity of the process and did in fact complete a prompt impartial and thorough investigation under the existing circumstances will prove helpful. Such as:
 - Document the reason for the method of interview if different from normal, e.g., video or audio rather than in person;
 - Document any admonitions given;

- document any distractions that may have occurred during the interview;
 - document why certain individuals weren't interviewed;
 - document reasons for delays if any;
 - document abnormalities if any;
 - make credibility decisions; and
 - document support for the credibility decisions.
2. Because your HR or investigation department may be staffed differently, your handbook and complaint policies may not reflect the current reality of the organization. Even if it is not possible to change the written policies, it would be wise to identify a temporary contact person or number for people to contact if they have a concern. Perhaps this could be the individual who is the entity's COVID-19 Coordinator.
 3. Individuals (including your investigators) may continue to get sick or be furloughed. Having a mechanism (or person) in place who can quickly re-assign the investigation to another person within the company or who can at least contact the complaining party and witnesses to inform them of the delay will also be helpful. Also, putting a mechanism in place to make sure that investigations are proceeding on track and are completed could prove important.
 4. Document production may take longer as people working from home may not have the same technology or bandwidth. Some employees or other witnesses may be less responsive or harder to locate – especially if they have been furloughed. In-person interviews likely will need to be replaced by interviews using telephones, Zoom or similar technology, and investigators will need to become proficient with new tools.

Conclusion

Channels of communication will be disrupted. There will likely be an increase in the volume of calls and requests for information. The current disruptions to workplaces have the potential to generate even more than the usual number of complaints under circumstances that make them more challenging to deal with. Making it a first priority to let people know who they can reach out to and how they can reach out to them will help both employees and management. Having a solid and well communicated process to ensure those in charge of receiving calls for assistance are actually receiving those calls, will never be more important.

The customary process of an investigation may change; the order in which various steps are taken may change; the manner in which they are done and who is available to do them all may need to change in light of changed circumstances. But case law suggests that the courts will not second guess an employer's reasonable decisions made on the ground – even if they depart at times from “the book” – so long as the investigator is acting in good faith to conduct a prompt, impartial and thorough investigation and has an honest belief supporting its decision and document its process. With the objective kept in focus, successful investigations are certainly possible. ■

Linda G. Burwell is an investigation counsel and president at National Investigation Counsel, a niche firm serving law firms, in-house counsel and insurers, specializing primarily in workplace investigations. She can be reached at linda@nationalinvestigationcounsel.com or (248) 730-5583.