



National Investigation Counsel®

Serving law firms, in-house counsel & insurers.



***Dealing with Anonymous Complaints –
An Investigator's Perspective***

WRITTEN BY: LINDA G. BURWELL

Published In:

**STATE BAR OF MICHIGAN LABOR AND EMPLOYMENT LAWNOTES
SPRING 2021**

DEALING WITH ANONYMOUS COMPLAINTS— AN INVESTIGATOR'S PERSPECTIVE

Linda G. Burwell
National Investigation Counsel, PLLC

Imagine representing a company whose president calls you because she received the following note:

This note is being sent to you out of respect for the Company whose name doesn't deserve to be dragged through the mud because of 'one bad apple'. Frank is intimidating and bullying people trying to get them to quit.

The note is unsigned and the president has no idea who wrote it or who sent it. The president has called asking for your advice on how to handle the issue. What do you tell her? Does she need to investigate? If so, to whom should she talk?

Anonymous complaints can come in many different forms and from many different sources. They can be a singular note slid under the president's office door as in the above hypothetical. They can be a note or email from multiple individuals. They can be many different individuals complaining to different people through different sources, one after another. They can be from attorneys on behalf of certain unnamed individuals (current and/or former employees). They can be calls to a hot-line or anonymous correspondence to board members. There have been instances where managers and directors created a separate email address with a fictitious name in order to communicate their collective complaints.

Anonymous complaints are becoming more prevalent in #MeToo situations. For example, one anonymous individual may complain on behalf of another unnamed individual. Or a supervisor may complain on behalf of an identified "victim," but that "victim" doesn't want to be named.

Does the Company Need to Investigate?

Coming back to our hypothetical, the first issue to resolve when getting this type of note is whether the company should investigate the concern. After all, the note doesn't disclose much about the issue except for the name of the alleged wrongdoer and the general nature of the alleged wrongful acts.

Even with so few facts, there could be several reasons to investigate. For example:

- There may be a legal duty, such as Title VII, or other law (just because an individual doesn't use the correct language, doesn't mean it isn't covered);
- There may be a company policy that prohibits the behavior (this might include the handbook, written stand-alone policies, mission statement, core values, bylaws, etc.);
- There may be an organizational reason. For example, the anonymous complaint is consistent with previously noted concerns about a specific department, specific person, high turnover, etc. (A good executive has an awareness of the state of her organization: does this concern seem like something that should be explored to get to the bottom of it?); or

- It just might be the right thing to do – this could be an opportunity to gather facts to see what, if anything, is broken, check the pulse of employee morale or simply show employees that the company takes concerns seriously.

An employer does not need to know who submitted the concern in order to investigate that concern (or at least develop some background information to decide whether it should be treated as a complaint). This is true even if the company's handbook or complaint policy requires a signed complaint. While companies are encouraged to have a clear complaint policy and procedure and are well within their rights to require employees to follow their policy (even one that requires a signed written complaint), it can be a mistake to apply this too literally and fail to investigate because the individual did not follow the procedure for filing a complaint, by, for example, submitting an unsigned written complaint or missing the filing deadlines. Concerns raised about events beyond the statute of limitations often occur in the #MeToo context. Some have been many years (even decades) past the deadline. One might be inclined to dismiss such a claim automatically and question why the concern was raised so much later, why the complainant wasn't the individual who came forward and/or why the complaint wasn't signed. Be careful of that response. Although the lapse of time or other failure to follow the company's policies most likely will prevent an individual from bringing a claim against the company under the law or the company's policy, the company may be deemed to be "on notice" of the issue for the next complainant. Gathering additional facts could help determine the extent of the conduct and the number of individuals involved or if there are others impacted by the conduct, and whether a hostile environment or toxic culture may persist, and could assist the company not only to defend future lawsuits, but, more importantly, fix existing issues.

To Whom Should the Company Talk?

Another issue to resolve is how the company should locate and reach out to the anonymous complainant(s)? To whom should the company talk? The company should be careful not to focus all of its attention on learning *who* filed the complaint. It is often much more important to learn more about the alleged conduct than to "out" the complainant. It would also be a mistake to dismiss outright a concern simply because the company assumes it knows who brought the concern and believes that individual to be a disgruntled employee with documented performance issues (or disgruntled applicant or former employee). The company might very well be mistaken about the identity of the complainant. Even if the complainant is a disgruntled employee who is on the verge of being terminated for performance issues, the concerns raised by that employee could nonetheless be legitimate and, left unchecked, could cause unwanted turnover of high performing employees.

Similarly, leaders may focus too much energy on how the complainant obtained certain information, or on the complainant's own performance issues, rather than on the concerns brought forward by the complainant. One example of a company's misguided focus on the complainant and the complainant's actions rather than on the alleged conduct, is *Perez v. Progenics Pharmaceuticals, Inc.*, No. 1:2010-cv-08278, S.D. NY (2016) where the complainant sent a letter to the company's general counsel accusing the company of committing fraud by issuing a false press release regarding clinical trials of a drug. The company fired the complainant the next day and spent its efforts to determine how the complainant had improperly accessed files to

find the information to lodge the complaint, rather than whether there was indeed a misstatement in its public statements. The claimant was ultimately awarded \$1.6 million dollars for his wrongful termination.

Applying these considerations when determining whom to interview in the context of our hypothetical, the company could be well served by narrowing down the issues or the department where Frank or the alleged victims work but the company may wish to peel the layers back slowly. It could be a mistake to send a general email identifying Frank or asking everyone if they have a problem with Frank. EEOC Guidelines offer some instruction. According to the EEOC, an effective harassment complaint system balances privacy and process to ensure the alleged harasser is not judged prematurely. *Promising Practices for Preventing Harassment*, <https://www1.eeoc.gov/eeoc/publications/promising-practices.cfm?renderforprint=1>. Thus, the company should balance being able to gather information with the need to protect the claimant's and respondent's privacy. Again, look to people who are likely to be aware of the kinds of actions complained of, either as potential victims or co-workers. Instead of asking about Frank, it may prove helpful to ask the employee about the department and whether there are any concerns about people leaving the department and whether they have any knowledge of why people have left or are leaving. Use your investigative skills to read the witnesses carefully. Look for common threads in witnesses' accounts, or inconsistencies. You can get a good sense of Frank's management style without naming Frank.

Before reaching out to individuals, determine what is the best way for you to gather all the information. Company records are a good source of information. In our hypothetical, an organizational chart should show who is in Frank's department and who works with him. Other records may show whether resignations in Frank's department are unusually frequent or unexplained. They may show what his direct reports' performance reviews look like. Do some people seem to fall out of favor? Are there issues with the way he communicates in writing with others?

There are also certain things for the company to consider before beginning to interview witnesses in older "MeToo" situations where the alleged acts occurred years ago or where the witnesses are no longer around. For example: how should the employer locate the individuals with knowledge and/or determine whom to interview? Who is the best person to make the introductions? Will you need multiple people to make the introductions? What if there are individuals who aren't capable of providing information? All of these different situations will challenge your skills and ingenuity, and each will require a unique and tailored approach, but there is almost always a reasonable path to available information.

Conclusion

The anonymous complaint imposes some unique demands and challenges to an organization and to the person tasked with the investigation. Your counsel to the company should be focused on the core objective of helping your client learn whether there is a legitimate allegation of bad behavior that should be investigated, and assist your client to balance the interests of the various participants, and the company, in seeking to learn the facts and be in a position to take appropriate action, if warranted. And, of course, as in most cases, it is important for the company and its investigator to document why it did, or did not do something, or why it deviated from its normal practice. ■