Protecting HR During Internal Investigations

How to Protect HR During Internal Investigations & What Happens When You Don't

A discussion of court cases *LARGELY* stating that internal HR/HC (human capital) investigators, who investigate harassment & discrimination, aren't protected by Title VII's opposition & participation clauses. How HR/HC can protect itself & the employer from protracted litigation & potential liability. I say "largely" because there are some grey areas, which we'll discuss.

Presentation Format & "Warning"

- Please don't Hesitate to Ask Questions At Any Time.
- Caution: Judges change their minds & decisions may vary from place-to-place. However, as you'll see per the next slide, the decisions are uniformly consistent on this topic & over many jurisdictions, regardless of political leanings.
- At this point in time, federal judges disagree with the EEOC on this topic. Moreover & paradoxically, many management side attorneys like me agree with the EEOC on this topic!

Some of the Cases (All Federal)

- Townsend (Grey-Allen) v. Benjamin Enterprises (2012); U.S. Court of Appeals 2nd Circuit (NY, CT & VT)
- Hatmaker v. Memorial Medical Center (2010); U.S. Court of Appeals 7th Circuit (IL, WI & IN)
- EEOC v. Total System Services Inc. (2000); U.S. Court of Appeals 11th Circuit (AL, FL & GA)
- Vaconcelos v. Meese/U.S. D.O.J. (1990); U.S. Court of Appeals 9th Circuit (AK, AZ, CA, HI, ID, MT, NV, OR & WA)
- 5th & 6th Circuits largely concur (LA, MS & TX; KY, MI, OH & TN) - they haven't directly addressed the HR issue, but suggest that those who participate or oppose illegal conduct (even without an EEOC charge being filed) are protected, investigators aren't. Abbott v. Crown Motor, 2003, 6th Cir. (TX, KY, MI, OH, TN).
- Caution: Public sector contracting guidelines could result in contradictory outcomes. They're pretty liberal in holding contractors accountable.

Title VII of 1964/1991 42 USC 2000e3a

(Just a Part of It, But With Big Implications-AKA 704(a))

- Absent direct evidence, in order to establish a case of retaliation, party must show (1) they participated or opposed Title VII harassment or discrimination.
- This is the 1st step in establishing the threshold 4 requirements for a case of retaliation (AKA the "prima facie case").
- The 3 remaining steps are (2) employer aware of this opposition/participation; (3) employer took adverse action against plaintiff; & (4) causal connection between the protected activity & retaliatory action (motive to retaliate).
- All 4 must be met. Then burden shifts 2 more times.

Here's The Typical Fact Pattern in *VERY GENERAL* Terms

- An employee complains to the employer about harassment/discrimination.
- Someone on employer's behalf investigates (e.g., HR/ HC or a 3rd party).
- Employer fires or disciplines the investigator because investigator supports accuser, employer doesn't like the process, etc.
- Courts hold that if the investigation isn't pursuant to an official EEOC charge, this isn't retaliatory action against the investigator. This is what Congress intended & the law states.

Krugel's Opinions

- I disagree with the courts; they screwed HR.
- In Townsend (2012), concurring Judge Lohier: "Congress should . . . clarify Title VII if it desires to prohibit private employers from retaliating against employees merely because they participate in internal investigations . . . prior to any involvement by the EEOC."
- Here's the heart of the matter according to the courts: It's not up to them to change Title VII. It's up to Congress. Either Congress or the courts should change this to support HR/HC in investigations. It's a matter of integrity, transparency & good business sense.
- In this age of transparency, who wants to work for a company that treats employees & investigations in such a shoddy manner?
- "Fruit of the poison tree." Often judges cite this or similar clichés. That's what these cases represent to HR/HC.

In the Meantime What Should HR Do?

- Is the integrity of all Title VII investigations at stake here? Not exactly. These decisions relate only to retaliatory action for conducting an internal investigation, & prior to an EEOC charge being filed (also it's federal law only, not state).
- Companies should seek to insulate & protect investigators from retaliatory actions for conducting a good faith investigation. How this is done is key (see next slide).
  - But, these court decisions seem to pit HR/HC against their own employers. The logic is twisted.

How Should HR Do It?

- Policies/procedures – Craft policies & procedures to protect the integrity of investigations (e.g., internal review process; give investigators "power," investigate by committee, or use a 3rd party company.
- Lobby Congress via SHRM, etc.
- Keep it internal: Warn the company & involve legal counsel. Is a bogus investigation or retaliation really worth the cost of litigation?

Questions That Have Yet to Be Answered by the Courts

- U.S. Supremes (Farragher & Ellerth) provide defense for prompt & remedial internal actions ("get-out-of-jail card"). Don't these circuit court opinions lead to bogus investigations in order to maintain the defense? I think they could.
- What if a company fires the investigator in anticipation of an EEOC charge, or because the investigator may testify on the accuser's behalf at the EEOC?
- What if a company fires the investigator after an EEOC charge is filed because the company believes that the investigator contributed to the accuser's motivation to file an EEOC charge?
- In the context of our discussion, isn't the investigator or HR/HC person really = to the accuser?

Contact Krugel for the Cases

- If you'd like copies of any of the cases (PDF), feel free to contact me at cak1@charlesakrugel.com.