CALIFORNIA DREAMIN’ (NIGHTMARIN’)

Bad Investigations: A Plaintiff’s Dream; Defendant’s Nightmare

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I. INTRODUCTION

As both sides of the table in employment litigation well know, investigations can make or break either side’s case. While a proper investigation may provide the employer with an affirmative defense under the Ellerth-Faragher doctrine, an investigation which is improperly performed not only may destroy that defense at trial, but may be utilized, in jurisdictions which require an investigation, to establish liability on the part of the employer. Worse, when investigations are misused or mishandled, dangerous affirmative claims may be asserted by creative plaintiffs’ attorneys based upon such disasters.

This paper explores the common attacks on investigations employed by plaintiffs’ counsel which may have a decisive effect upon the outcome of employment litigation.

II. ATTACKS ON INVESTIGATIONS

Common fruitful attacks on investigations fall into several major categories:

(A) Attacks on the timing of the investigation;

(B) Attacks on the qualifications of the investigator;

(C) Attacks on the conduct and thoroughness of the investigation;

(D) Attacks on documentation and recordkeeping with respect to investigations;

(E) Attacks on the treatment of plaintiff and the alleged “bad actor,” both during and after the investigation, including attacks on the employer’s failure to appreciate the ramifications of the complaint and to ensure that no such complaint occurs in the future.

A. Attacks On The Timing Of The Investigation

Obviously, investigations must be given priority; they must be done in a prompt, full and fair manner. The failure to immediately commence an investigation and to conclude it as quickly as possible, while also being thorough, is a common mistake. If delays are caused by the complaining party, the failure to document that such delays are caused by the complainant may make the delay difficult to justify. In addition, the failure to insulate the complainant from the “bad actor” during the investigation, remove the “bad actor” or important witnesses from personnel decisions about the
complaining party during the investigation, and, of course, to investigate at all, due to the complaining party’s request for confidentiality, or because of some asserted technical inadequacy in the form of the complaint (such as that it is not written or not written on a formal “complaint” form), are all fruitful areas of attack by plaintiffs’ counsel.

B. The Improper Investigator

A primary source of fodder for plaintiffs’ counsel in attacking investigations continues, remarkably, to be the complete inadequacy of the investigator. Inadequacy can take several forms. One of the most obvious is that the person is unqualified in terms of a lack of familiarity with the substantive law at issue and/or the proper training in how to conduct investigations. Incredibly, even some very large national and international companies continue to use in-house human resources personnel who have never been trained in how to properly conduct an investigation. This mistake alone can doom the investigation, upon proper questioning at the investigator’s deposition by plaintiff’s counsel.

In addition to the lack of qualifications or training, the use of an in-house person to investigate complaints where the alleged bad actor is a high-level person, in the chain of command of the person investigating him or her, and/or where there is any other relationship whatsoever between the in-house person and the accused, can be fatal. Similarly, the use of regular outside counsel to investigate (even without the further complication of using that same counsel to defend the subsequent litigation) in most cases is a serious mistake, and provides excellent fodder for plaintiffs’ counsel. Obviously, anyone who has a professional or personal relationship with any of the parties or witnesses to the investigation should not conduct the investigation.

In addition to questions about such relationships, questions about the investigator’s qualifications, potential bias, and lack of objectivity will be thoroughly explored in the deposition of the investigator by experienced plaintiff’s counsel. The following questions often elicit damaging
information about the investigator: (1) how many other employment investigations the investigator has performed, and what types; (2) how they were conducted and the results thereof; (3) what formal training in conducting investigations the investigator has received; (4) how many other investigations the investigator has done for this employer; (5) in how many investigations has the investigator found the allegations to be substantiated versus unsubstantiated; (6) how much the investigator was paid; (7) whether the investigator does other work for this employer; and (8) what percentage of the investigator’s income is derived from work for this employer.

Finally, enough cannot be said about the skills that are required for conducting a proper investigation, particularly the interviews of the complainant, the accused, and witnesses. Very accomplished employment counsel often fail to properly handle investigations, as they are accustomed to the adversarial process of conducting cross-examination and depositions in litigation. To the contrary, open-ended questions, conducted in a fair, impartial and thorough manner, without being intimidating or threatening to the complainant or any of the witnesses, are requisites to a proper interview. The failure to use proper interview techniques, indeed, risks critical information being missed or misinterpreted, as well as mistakes regarding the credibility of witnesses. Attacks in this area may be minimized by:

(1) Using opened-ended questions at first, saving more specific questions tailored to the witness’s prior responses;

(2) Pressing the witness for clear and definite responses; not being satisfied with vague or evasive responses;

(3) Pinning the witness down by asking global questions at the conclusion of each subject area;

(4) Determining the bases/sources of the witness’s information;

(5) Determining whether there are witnesses to the events recounted by that witness;

(6) Determining whether there are documents to support or rebut the witnesses account;
(7) Refraining from expressing any opinion to the witness or making factual statements to witnesses;

(8) Refraining from making representations to the witnesses about potential conclusions of the investigation or actions that may be taken as a result thereof;

(9) Establishing control firmly but politely, including informing witnesses they are required to cooperate with the investigation, while avoiding combative behavior; and

(10) Being understanding and building trust with reluctant complainants and witnesses and easing into difficult topics.

The investigator not only may be attacked for the questions asked (or not asked), and the form of the questions, but for the attitude he or she exhibits during the interviews, and in depositions. If the investigator appears in his or her deposition to be aggressive, combative, or argumentative, it is extremely likely that the investigator will similarly be believed (by the jury) to have acted in that manner while conducting the investigation. This unfavorable impression of the investigator alone may create a serious problem for the employer at trial. Indeed, the critical failure to appreciate that proper interviewing techniques require a different type of skill and attitude, more akin to mediation than to litigation, often results in the conduct of the investigator becoming the focus of plaintiff’s counsel, to the great detriment of the employer.

C. Conduct Of The Investigation

A common avenue of attack by plaintiffs’ counsel is that the investigator determines that he or she does not have enough information to fully investigate the complaint and/or to make a determination. This is particularly true with anonymous complaints. Anonymous complaint hotlines and other mechanisms have become more prevalent in recent years, yet the investigation of such complaints often is non-existent or shoddy, based upon the excuse that such a complaint could not properly be investigated. This is a dangerous position for an employer/investigator to take.
Moreover, the failure to explore everything that the complainant, as well as any other witness, says about any related acts, or to listen to the “bad actor” about any protected complaints he or she may have, and/or witnesses he or she may deem relevant, also can damage the investigation. Investigators often fail to interview every person named by the complainant or the “bad actor” as someone who might have knowledge, and to explore related topics that are raised during the investigation. Absent unusual circumstances, the investigator should always do so, not only to show fairness, but because the information from that person or about that related issue may be critical. Conversely, the lack of corroboration from a witness who is mentioned as someone who will corroborate what the complainant or another witness has said, or the lack of merit of a related issue raised, may assist the employer. If a person with knowledge is not interviewed, or a related line of inquiry not pursued, it is likely that the complainant’s attorney will later show successfully that critical information was not gathered or explored.

It is also important that the investigation be conducted in a manner which is consistent with other investigations conducted by the company, as well as with any written policies or instruction manuals for investigations. Reasonable confidentiality (although no absolute assurances of same) must be afforded. Indeed, the lack of confidentiality can skew an investigation to such an extent that it may invalidate it. For this reason, if possible, it often is advisable to interview the complainant first, and the alleged “bad actor” last. If the “bad actor” does not know until all other witnesses have been interviewed that there is a complaint pending, tainting the pool of witnesses and/or retaliation, which may skew or derail the investigation, may be avoided. In addition, this method gives the investigator an opportunity to get all relevant facts before confronting the “bad actor.” Of course, witnesses, including the complainant and the “bad actor,” always should be re-interviewed if additional information comes to light during the course of the investigation, as often occurs.
Extensive notes should be taken during the interview. It is advisable that, for critical witnesses, two persons be present in the interview. Although investigators may disagree about the use of tape recordings or statements, clearly, well-documented, thorough notes of what was said in each interview must be taken and maintained. Obviously, conclusions should not be made until all relevant documents and witnesses have been interviewed.

However, conclusions in virtually every case should be drawn, although as to the facts, not the law. Time and again, investigations are flawed because the investigator fails to make conclusions of fact. This failure often implicates the most difficult aspect of conducting an investigation: determining credibility. In a large number of investigations, the allegations are “he said, she said.” Nevertheless, credibility determinations normally must be made in this context; it is not an acceptable excuse that there were “no witnesses.” Despite this necessity, investigators often determine in this situation that no conclusions can be drawn, leaving open a wide area for attack.

There are many methods of determining credibility, including:

1. Determining the witness’s potential biases and interests (including whether the witness has a history with the company or any of the parties, and reviewing who makes decisions regarding critical aspects of the witness’s job situation, in order to determine if any of the parties or other witnesses are so involved);

2. Determining prior and current professional and personal relationships with the party and witnesses;

3. Determining whether the witness has anything to gain or lose depending on the outcome of the investigation;

4. Noting whether the witness’s credibility is inconsistent internally, and/or whether there are external inconsistencies between the witness’s account and other evidence (whether it be documentary or testimonial);

5. Refraining from relying upon unreliable bases for witness’s statements, such as third-hand knowledge;

6. Determining whether the witness has a motive to lie, including bias and interest;
(7) Determining whether a witness has acted in the same way on another occasion (Caution: undue reliance upon same may be a mistake, as guilt on one occasion does not always translate to guilt on another occasion, and such evidence most likely will be inadmissible at trial); 

(8) Determining whether the witness has any reputation for dishonesty (although, again, such reliance must be carefully placed); and

(9) Assessing the demeanor of the witness.

In sum, the proper conduct of interviews is a ripe area for attack, and the investigator must be experienced enough to handle all of the difficult interpersonal and legal skills required to adequately support this critical element of the investigatory process.

D. Failure To Review Relevant Documents And Properly Document Investigation

Obviously, it is critical to review all relevant documents, which may include company policies, handbooks, written complaints, personnel files, and the like. It also is critical to make sure that the conduct of the investigation is thoroughly documented, including all notes of all interviews, all records of communications and documents reviewed, and the like. Failure of the investigator to be able support his or her conclusions by explaining step by step what was done, and why, may result in critical defects which will subject the investigation to attack.

Regardless of the form of report or other reporting mechanism used, the conclusions reported, and each determination, must be supported with as much evidence as the investigator can garner. Ordinarily, the investigator makes objective findings of fact, not law, and should not be involved in the employer’s (or its counsel’s) decisions thereafter.

E. Failure To Remediate/Retaliation/Failure Appreciate The “Big Picture”

Ordinarily, the complainant should be notified about the conclusion of the investigation, although the form of that notification may vary. If alleged conduct is substantiated, obviously, disciplining the bad actor following the investigation is critical. The failure to do so will result in severe
attacks on the investigation. Equally, or perhaps even more importantly, retaliation (or the appearance thereof) must be carefully avoided. An investigation of the complainant’s work performance during the investigation, and/or adverse actions toward the plaintiff after the investigation, are dangerous. Even if such actions occur inadvertently, because persons involved in the plaintiff’s work environment are not aware of the investigation, and/or the complainant’s work environment is not monitored during and subsequent to the investigation, the appearance of retaliation alone will subject an employer to such dangerous claims. More times than can be counted, even where the underlying complaint is found to be unsubstantiated, or not to constitute a violation of law, by a jury, the company’s failure to remediate, or worse, its retaliation against plaintiff for bringing the complaint, results in liability. Retaliation is by far one of the most dangerous claims employers face, and must be studiously avoided in connection with investigations.

Finally, the failure to monitor the situation subsequent to the investigation, to ensure that the complainant, as well as all other employees, are not subjected to illegal conduct, including discrimination, harassment, or retaliation, will allow plaintiff’s counsel to argue that the employer does not take these matters seriously. Retraining employees, re-circulating anti-harassment policies and procedures, and if appropriate, announcements about the employer’s commitment to preventing and remedying workplace harassment, will go a long way to countering attacks that investigating and remedying these types of allegations is not a priority for the employer.

II. BAD INVESTIGATIONS CREATE NIGHTMARE CLAIMS FOR EMPLOYERS AND INVESTIGATORS

In addition to preventing the use of the investigation as an affirmative defense, and/or creating liability for the underlying claim, mishandled employment investigations can be used by employees as offensive weapons. Creative plaintiffs’ attorneys may assert – and have asserted -- claims ranging from
retaliation, to violation of public policy and privacy rights, to negligent or intentional misrepresentation, and last but not least, to RICO.

**A. Retaliation**

1. **Retaliation For Cooperating With An Investigation**

   In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ U.S. __, 129 S. Ct. 846, 172 L.Ed. 2nd 650 (Jan. 26, 2009), the United States Supreme Court held that an employee is protected from retaliation under Title VII of the Civil Rights Act of 1964 for answers she gave the defendant’s investigator’s questions about an alleged harasser, even where she did not initiate the complaint. The Sixth Circuit had held that she was not entitled to protection from retaliation because she had not engaged in “active, consistent” opposition to the harassment, but had merely answered questions during the investigation. However, the Supreme Court reversed, and in a (perhaps surprising) pro-employee opinion, noted that the plaintiff’s answers were criticisms of the person being investigated, and thus were identical in content to complaints that are undoubtedly protected by Title VII’s opposition clause. In other words, her comments were meant to be, and were perceived by the employer as, opposition to the discriminatory conduct. Therefore, her cooperation in the investigation was protected activity under Title VII’s opposition clause.

2. **Employer Reliance Upon Investigator Determinations**

   In *Gilooly v. Missouri Department of Human and Senior Services*, 421 F.3d 734 (8th Cir. 2005), the Eighth Circuit Court of Appeals held that there was an issue of material fact suitable for determination by a jury in a case where a male employee had made a sexual harassment complaint against two female employees. In the ensuing investigation, the investigator found that there was no sexual harassment, and that the plaintiff had filed a false claim and lied during the investigation. In reliance upon that determination, the employer fired the plaintiff. The plaintiff that his termination constituted retaliation.
The Court held that summary judgment on that claim was improper, as the termination letter stated that his termination was based on conduct and deception during the sexual harassment investigation, and that that statement gave rise to a necessary inference of retaliatory motive. This conclusion was drawn because the belief that the employee was lying was founded solely upon the statements of other employees and witnesses, which the investigator credited, but for which there was no independently verifiable evidence that contradicted the plaintiff’s allegations. Clearly, investigators should guard against recommending punishment for persons who make protected complaints, resulting in investigations, where there is little evidence, if any, that the complaining employee is lying or acting in bad faith.

**B. Investigator Misconduct: When Is It Actionable?**

1. **Negligent Misrepresentation**

In *Peterson v. Ballard*, 292 N.J. Super. 575 (App. Div. 1996), an interviewee brought an action against the employer and employer’s attorney for the attorney’s actions during an investigation of a co-employee’s sexual harassment suit against the employer. (Note that New Jersey imposed a duty to investigate sexual harassment claims long before *Farragher/Ellerth*, and this case arose in that context). The plaintiff alleged that the employer’s attorney had so abused and demeaned her in an interview that his conduct created claims under the New Jersey Law Against Discrimination (LAD) for retaliation and under the common law regarding intentional infliction of emotional distress. In that case, the appellate court decided that the attorney could not be held liable because of the litigation privilege. The Court did not rule, however, on whether such actions could render the company liable under the LAD.

Thus, in *Peterson*, the individual investigator -- although not the employer for whom he was acting as agent -- avoided liability. However, more recently, in *Spagnola v. Town of Morristown*, 2006 U. S. Dist. LEXIS 88431 (D. N.J.), the District Court for the District of New Jersey held that an
attorney/investigator hired by the Town of Morristown to conduct an investigation of an internal sexual harassment complaint could be held liable to the complainant for negligent misrepresentation. The plaintiff’s attorney creatively pleaded, and argued persuasively on the attorney’s motion to dismiss, that the investigator had deliberately mislead her as to the legal significance of her complaints. The attorney argued that he owed no duty to her because there was no attorney/client relationship between them. The Court determined that dismissal at the motion to dismiss stage was inappropriate. It further determined that, if the allegations made by plaintiff about his conduct proved to be true, she could state a claim for negligent misrepresentation.

The attorney had informed the plaintiff that, since she was not spoken to or touched in a sexual way, she did not have a claim for sexual harassment, which clearly was incorrect legal advice. The investigator allegedly also advised her to seek a new job “off the record” and instead of helping to investigate her complaints, served the harasser’s and employer’s interests over hers by continually giving her knowingly false information and trying to intimidate her. Furthermore, the investigator allegedly told her that the employer had no policy that was violated by the supervisor’s conduct and that the employer had no duty to protect her from the misconduct. The plaintiff alleged that it was thus foreseeable that she would remain in her job and be further exposed to sexual harassment.

The Court found that a jury could reasonably find that plaintiff relied on this information and that she was harmed by it, including continued exposure to sexual materials, thus causing emotional distress. In other words, the three elements of a negligent misrepresentation claim could be shown: (1) negligent misstatements of a past or existing fact; (2) justifiable reliance on the misrepresentation; and (3) reliance caused a loss or injury. Thus, this novel theory was utilized to potentially hold an attorney/investigator personally responsible for his conduct during the investigatory process.
2. “Bad Faith” Investigations

In a different vein, in *Grasser v. United Health Corporation* (unpublished opinion) (N.J. Law Div. 2002), the trial court recognized another novel claim arising out of an employer’s abuse of the obligation imposed upon employers to investigate sexual harassment complaints. In *Grasser*, the male plaintiff was terminated for allegedly sexually harassing a female employee. The female employee, who quit voluntarily, made it clear that her relationship with plaintiff was completely consensual. In fact, she stated that she was quitting because her boyfriend had discovered the affair. Despite the fact that there was no complaint of sexual harassment—indeed, the “victim” made it clear that no such harassment was involved—the employer conducted an “investigation” of the plaintiff/supervisor, purportedly under the case law requiring such investigations of sexual harassment complaints. They then fired the plaintiff for sexual harassment.

Grasser sued, alleging claims under the common law for wrongful discharge in violation of public policy. The Court held that since employers are required to investigate complaints of sexual harassment to avoid liability, they also are required to ensure that the investigation is fair to everyone involved, including the accused. The employer there allegedly conducted a bad faith investigation which it used as a pretest to fire the plaintiff. While the Court did not go so far as to state that mere negligence in conducting an investigation could give rise to a claim, it made it clear that misusing the law which requires such investigations to be conducted may result in liability. Thus, a wrongfully accused harasser may have a legal remedy if the investigation is conducted in bad faith or in a manner that is antithetical to a full, fair and impartial review of the alleged complaints. Although this rationale was applied to a state law claim, this case may be utilized for similar arguments under *Farragher/Ellerth*. 
C. Violation Of Privacy Rights

Although outside of the investigation context, a recent decision by the New Jersey Appellate Division, Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390 (June 26, 2009), demonstrates the dangers of overstepping with respect to employees’ privacy rights. In Stengart, the Court considered the issue whether emails exchanged by an employee and her attorney through her personal, password-protected, web-based email account, even though sent via the employer’s computer, and the employer’s handbook purported to transform private emails into company property, were protected by the attorney/client privilege.

The Court cited with approval a recent decision of the New York Court of Appeals, Thyroff v. Nationwide Mutual Insurance Co., 8 N.Y.2d 283, 832 N.Y.S.2d 873, 864 N.E. 2d 1272 (2007), holding that property rights are no less offended when an employer examines documents stored on a computer as when as employer rifles through a folder containing an employee’s private papers, or reaches in and examines the contents of an employee’s pockets. Thus, the Stengart Court held that a breach of the company policy with regard to the use of its computers does not justify the company’s claim of ownership to personal communications and information accessible therefrom or contained therein. Stengart, supra, 973 A.2d at 399. The Court found it significant that the electronic age -- and the speed and ease with which many communications may now be made -- has created numerous difficulties in segregating personal business from company business, resulting in many highly personal and confidential transactions commonly conducted by the Internet within moments. Id., at 400.

The Court thus concluded that it “suffices for present purposes to say that past willingness of our courts to enforce regulations unilaterally imposed upon employees is not limitless; the moral force of a company regulation loses impetus when based on no good reason other than the employer’s desire to rummage among information having no bearing upon its legitimate business interests.” Id., at 401. The
Court continued: “We thus reject the philosophy buttressing the trial judge’s ruling that, because the employer buys the employee’s energies and talents during a certain portion of each work day, anything the employee does during those hours becomes company property.” Id. The Court concluded that the attorney/client privilege remained in effect with respect to those communications, and the employer was forced to return them. More significantly, the Court held that the employer’s outside counsel, who had received and reviewed such information, was subject to possible disqualification from the case and other sanctions, to be determined by the trial court, for its conduct in failing to alert the plaintiff that it was in possession of these emails and giving plaintiff the right to seek a ruling from a judge about them. Id. at 403-04.

It easily can be seen how the Stengart case may be utilized by employees’ attorneys in the future when employers overreach with respect to their intrusions into an employee’s personal life and communications, albeit at work, including in conducting investigations.

**D. Last, But Not Least, Rico (and Other Claims)**

The worst nightmare involving an investigation gone wild to date is described in the recent case of Vierriea v. California Highway Patrol, 644 F. Supp. 2d 1219 (E.D. Cal. June 24, 2009). In that case, plaintiff was an employee of the California Highway Patrol. She asserted numerous claims, including under the Racketeer Influence and Corrupt Organization Act (“RICO”), violation of the right to equal protection under Section 1983, violation of the right of privacy under Section 1983, discrimination, harassment and retaliation under the California Code, and intentional infliction of emotional distress.

The case arose out of an increased number of disability claims associated with retiring California Highway Patrol (“CHP”) assistant and deputy chiefs. Plaintiff worked for CHP as an analyst in the disability and retirement section. Employees apparently became concerned about the fraudulent theft of state funds through such claims. A newspaper, the Sacramento Bee, dubbed these “large and unjustified
payouts” the “Chief’s Disease”. A grand jury investigation subsequently began, but, according to plaintiff’s complaint, instead of investigating the accuracy of the allegations about “Chief’s Disease, CHP began a “witch hunt” to determine which, if any, of its employees had leaked the information to the Sacramento Bee. Id. at 1229. It was alleged that various high-level employees engaged in this fraud; a criminal investigation and state audit to address concerns of favoritism and conflicts of interest was begun. Id.

Plaintiff alleged that there was a conspiracy to “harass, humiliate, and bring false or exaggerated disciplinary charges against any CHP employee who protested the fraudulent practice.” Id at 1230. In addition, she alleged that her employer and an individual defendant, Castle, attempted to force non-compliant employees into the worker’s compensation system, in order to expose them to an investigation by another defendant, SCIF, which ran that program. Once in that system, she alleged that SCIF subjected these employees to excessive and prolonged investigations, and depositions into private matters unrelated to the disability claims. Id.

After a coworker filed a complaint against plaintiff alleging that she was planning to leak information to the Sacramento Bee about some workers compensation claims, the CHP Office of Internal Affairs began an investigation into whether plaintiff was “thinking about” leaking information to the Sacramento Bee. Id. Plaintiff was subjected to a 4 1/2 hour interrogation, during which she alleged that she was repeatedly threatened with disciplinary action, including dismissal, and was “grilled” relentlessly about whether she leaked information. She alleged that the investigators “also interrogated her about unrelated personal matters, including her religious practices, in order to force her to confess to betraying CHP”. Id. In addition to that interrogation, CHP interrogated her coworkers, managers and husband. CHP inquired about personal matters, including sexual relationships and religious practices. It was alleged, obviously, that these inquiries were unrelated to whether she was
“thinking about” leaking information to the Sacramento Bee. Plaintiff alleged that the interrogation and scrutiny she was enforced to endure were intended to “scare” her and other employees from reporting specific cases of “Chief’s Disease” misconduct. Id.

Although Internal Affairs issued a report concluding that plaintiff did not release confidential information to the Sacramento Bee, it did include four unrelated allegations of improper action, and recommended adverse action against plaintiff. She then filed a worker’s compensation claim for post-traumatic stress disorder and “compassion fatigue”. Id. Although four physicians agreed that plaintiff’s physical and emotional symptoms were caused by work-related stressors and approved three-months’ leave, she claimed that she was then subjected to a second phase of what she claimed to be a “sham investigation,” to force her into confessing to be the Sacramento Bee informant. She was subjected to six days of “relentless” depositions. Defendants attempted to coerce her into “admitting she had worked with another person to leak information” by “grilling” her about a personal relationship with a former CHP captain. Id. at 1231-32.

In addition, two investigative services investigated her workplace injury claim. She alleged that those investigators asked questions of witnesses that went to the “sham investigation”, including about her sexual and family relationships, friendships, religion, California property ownership, bankruptcies, liens and judgments, and pending divorce. Id. at 1231. She then was suspended for ten days and transferred.

Plaintiff alleged not only that that suspension and transfer were retaliatory, but that defendants poisoned her new work environment by continuing the ongoing stigma of her as a “traitor”, and thus further intimidated and humiliated her. Even though the decision to transfer and suspend her was overturned, plaintiff resigned in the wake of the “never-ending investigation and harassment, alleging a constructive termination.” Id.
Although in the context of a public employee, and thus involving claims that would not be available to a private employee, this case is particularly instructive as to the types of claims that could be asserted by a creative plaintiff, which claims in large part withstood defendants’ motion to dismiss. Perhaps most significantly, the motion to dismiss plaintiff’s RICO claim was denied, including her retaliation claim under RICO. The Court rejected all of defendant’s arguments under this draconian statute, which provides for treble damages, among other relief. Id. at 1232-38. In addition, plaintiff’s free-speech claim against the individual defendants, survived the motion to dismiss. Id. at 1240-41. Although plaintiff’s right to privacy claim under Section 1983 was dismissed, she was granted leave to amend such claim to plead a violation of the United States Constitution. Id. at 1243. Finally, with respect to plaintiff’s intentional infliction of emotional distress claim, the Court not only rejected defendants’ contention that the conduct did not rise to the level of being extreme and outrageous enough to meet the criteria for such a claim, it denied dismissal on the basis of worker’s compensation preemption because the conduct allegedly contravened a “fundamental public policy”. Id. at 1247-48. The individual investigator defendant faced personal liability on virtually all such claims.

Thus, the Vierriea case (while occurring in California and unlikely to produce the same result in many other states) stands as the best example of a “California nightmare” for employers. The far-reaching claims brought by employees subjected to investigations (and investigators) that abuse what should be a fair and impartial process serve as a warning that plaintiffs’ attorneys will turn these abuses into offensive weapons.

IV. CONCLUSION

As the importance and frequency of workplace investigations increases, the potential for disasters flowing from the improper conduct of such investigations is magnified. Employment counsel must be vigilant in ensuring that all workplace investigations are conducted impartially, fairly, and thoroughly. They must utilize investigators who are fully conversant with the law, and have the ability
to deal with the myriad of credibility and interpersonal issues which arise during the course of their work. Finally, they must be fully cognizant not only of the effect of a mishandled investigation on the strength of the underlying complaint when it results in litigation, but of the potential liability for serious claims, not only against the employer, but against the investigator personally, for improper investigatory practices.