CONDUCTING SEXUAL HARASSMENT INVESTIGATIONS IN THE #METOO MOVEMENT

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OVERVIEW

- Purpose of harassment investigations?
- Why investigate sexual harassment claims?
- What triggers a harassment investigation?
- Pre-investigation procedures.
- Architecture and outline of the investigation.
- Finalizing the investigation findings.
- Other important considerations.
PURPOSE OF INVESTIGATIONS
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Federal Rule of Evidence 102: These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

“We as leaders have a legal and moral obligation to act respectfully to the complainant by being confidential and communicative during the investigation. We have a duty to ask questions until we know what did and did not happen. People’s lives and careers are at stake. It is our duty to uphold the law and to uphold integrity. No one should ever rig an investigation, hide facts or shy away from the truth.”

EEOC’S DEFINITION OF SEXUAL HARASSMENT

The EEOC qualifies sexual harassment as a form of sex discrimination, which employees are protected from under the Civil Rights Act of 1964. Sexual harassment is:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment."
10/10/2017 – The New Yorker publishes the Harvey Weinstein exposé and starts a revolution. Over 30 women spoke out about his harassment. No investigation was ever conducted. The Weinstein Company filed bankruptcy.
11/20/2017 – 60 Minutes Host **Charlie Rose** suspended, then terminated for sexual misconduct violations that had been repeatedly reported over a span of many years but not investigated.
4/2/2018 – Utah State University’s Piano Department received over 8 claims of discrimination and harassment over the past decade but failed to investigate or make any changes. Just recently hired outside counsel to investigate. No investigation for 10 years.
The EEOC’s enforcement guidelines advise employers to set up a “mechanism for a prompt, thorough, and impartial investigation in alleged harassment,” and that “as soon as management learns about the alleged harassment, it should determine whether a detailed fact finding investigation is necessary.”
Ellerth and Faragher Defense: the United States Supreme Court established an affirmative defense available to an employer accused of sexual harassment. The affirmative defense offers complete exoneration for employers who prove, by a preponderance of the evidence (more likely than not):

1. the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
2. the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
To invoke the *Ellerth and Faragher* defenses when faced with a sexual harassment lawsuit or claim, employers must:

1. Maintain sexual harassment policies, signed and acknowledged by all employees;
2. Policies must include multiple avenues for reporting the harassment;
3. At least annual training or review of sexual harassment policies;
4. **INVESTIGATE FORMAL AND INFORMAL SEXUAL HARASSMENT COMPLAINTS**;
5. Take remedial measures to ensure harassment does not repeat.
AFFIRMATIVE DEFENSES, CONT.

To invoke the affirmative defense, employers must conduct a credible and thorough investigation of the alleged sexual harassment.

When determining whether an employer qualifies for this defense, Courts will review:

1. Whether the company investigated the alleged claims of harassment, and
2. Will assess the quality and credibility of the workplace investigation.

See, e.g. Silver v. General Motors Corp., 225 F.3d 655 (4th Cir. 2000) (finding GM established first prong of Faragher affirmative defense because sexual harassment policy was “widely known” and GM promptly investigated the employee’s complaint and took remedial action against the harasser); Vincent v. Aztec Facility Services, Inc., 2007 U.S. Dist. LEXIS 67732 (N.D. Tex. Sept. 12, 2007) (barring employer from establishing affirmative defense because Company did not conduct a vigorous investigation and the investigator conceded she did not follow the Company’s standard procedures for investigating a harassment complaint.)
AFFIRMATIVE DEFENSE: INVESTIGATION POLICIES

• All sexual harassment complaints will be investigated by human resources, in-house legal, or outside counsel depending on the complaint. The company reserves the right to select the investigator(s).

• Failure to cooperate in sexual harassment investigations is not acceptable and will result in disciplinary action up to and including termination.

• Retaliation against any individual who reports harassment, participates in an investigation of such reports, or engages in other protected activity is prohibited.
PUNITIVE DAMAGES

Title VII allows for punitive damages in sexual harassment claims. Punitive damages are not covered by insurance and will be assessed when an employer engages in discriminatory practices with “malice or with reckless indifference to the federally protected rights of an aggrieved individual.” But, the Supreme Court has stated an employer cannot be liable for punitive damages if the manager's challenged actions “were contrary to the employer's good faith efforts to comply with Title VII.” Kolstad v. American Dental Ass'n, 527 U.S. 526, 546 (1999). In other words, an employer must “make a good faith effort to educate its employees about these policies and statutory prohibitions” and “make ‘good faith efforts to enforce an antidiscrimination policy.’” Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir.2000) (citing Kolstad, 527 U.S. at 546).
Threat of litigation triggers legal responsibility to preserve evidence.

When you come across damaging or incriminating evidence your instinct might be to not preserve such evidence. But if you fail to do so, the company can be liable for spoliation of evidence and significant sanctions and damages.

Litigation Hold Letter.
The type of evidence you uncover and be required to preserve may include electronic and/or tangible data, information, documents, objects, text messages, social media postings, witness interviews, email messages, etc.
Some insurance policies condition claim coverage on appropriate investigations and reporting.
NON-LEGAL REASONS

• #MeToo Movement
• Employee Morale & Goodwill
• Safety of Employees
• Employee Trust
• Reputation in Community
WHEN TO INVESTIGATE

SOMETIMES THE NEED TO INVESTIGATE MISCONDUCT IS OBVIOUS!
SEXUAL HARASSMENT INVESTIGATION TRIGGERS

The circumstances that might lead to a sexual harassment investigation are enumerable, but some examples may include:

1. Formal written complaints of specific sexual harassment;
2. Informal verbal complaints that an employee was offended or feels uncomfortable about comments or touching of a sexual nature;
3. Observations of inappropriate sexual comments, touching, or behavior;
4. Inappropriate images or text messages of a sexual nature;
WHAT DO YOU DO?

One of the company’s all-stars is being hit on by her supervisor and she comes to you, a manager, only as a friend, and lets you know. She says it’s okay and she thinks the supervisor will stop and will let you know in the future if it does not. She just wants it to be on record that she told someone. She says she’s handling the situation and she asks you to promise complete confidentiality.
Sexual harassment claims of any nature must be investigated promptly, even when:

- The employee says: “I got this!”
- The employee demands complete confidentiality.
PRE-INVESTIGATION PROCEDURES

Create Investigation Policies and Procedures that determine:

1. When an investigation should be conducted;
2. Who should conduct the investigation;
3. How to conduct the investigation;
4. How and under what circumstances employees may report incidents or request an investigation;
5. Policies should include an electronic communications privacy standard that sets an employee’s privacy expectations for computer and device monitoring.
Determining who should conduct the investigation is an important part of the initial planning. The investigator should:

1. Know the basic techniques of investigation;
2. Have a thorough understanding of the company’s policies and procedures;
3. Have a solid grasp on the relevant law, with the assistance of counsel; and
4. **NOT** have close ties to either the complainant or the accused employee.
SELECTING THE INVESTIGATOR, CONT.

The investigator should also be able to:

- Develop a rapport with witnesses;
- Employ a variety of techniques to obtain information from witnesses who may be angry, embarrassed, defensive, or otherwise reluctant to cooperate;
- Effectively interview witnesses regarding uncomfortable or delicate subjects; and
- Ask appropriate follow-up questions on new information revealed during an interview.
SELECTING THE INVESTIGATOR, CONT.

• The investigator should be able to judge the credibility of witnesses.

• It is also important to consider the credibility of the investigator because if the matter results in legal action, the investigator could be required to testify on behalf of the employer.

• If the investigator chosen is not an attorney, it is helpful to have counsel available for the investigator to seek guidance and advice.
SELECTING THE INVESTIGATOR, CONT.

Human Resources Investigator.
In-House Counsel.
Outside Counsel.
Rule 3.7, Lawyer as Witness. Rule 3.7 addresses the lawyer-witness issue and provides: (a) a lawyer shall not act as advocate at a trial in which the lawyer is likely to be necessary as a witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client; (b) a lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. ¶ 5 Rule 3.7 does not automatically require withdrawal. Rather, Rule 3.7(a) provides that a lawyer may not act as an advocate at trial if she is likely to be a “necessary” witness. Whether or not this lawyer’s testimony is necessary is a fact-specific question the lawyer being summoned must resolve. If the testimony is duplicative and obtainable from other sources, her testimony may not be necessary, and the lawyer should not withdraw or should not be subject to disqualification. “The naming of a party’s attorney does not ipso facto render the named attorney a ‘necessary witness’ . . . nor does the availability of other competent witnesses for the same testimony automatically render the named attorney ‘unnecessary’.”
OUTSIDE COUNSEL

Sexual harassment claims involving executive level or high-profile employees may merit hiring a law firm that is not the company’s regularly retained counsel to ensure the investigation is independent and unbiased.
Temporary Remedial Measures. Once a workplace incident occurs that necessitates an investigation, management should immediately and proactively act to ensure that the conduct complained of does not continue to occur during the pendency of the investigation. For example, an employee accused of sexual harassment should be separated from the alleged victim. This might even include leave for the accused until the investigation is complete.
CONFIDENTIALITY CONSIDERATIONS

Attorney-client privilege should be protected if possible by:

1. Instructing witnesses not to discuss allegations and that information is being gathered for counsel to provide legal advice to company.

2. Interview only necessary witnesses that might have first hand knowledge of claims.

3. Limit individuals involved in investigation on a “need to know” basis.

4. Assume all communications and notes will be made public.
   a. Only record verified factual details; and
   b. Avoid assumptions, mental impressions, speculation and conclusions.
Not every investigation needs to rise to the level of the Spanish Inquisition. Leading up to the investigation, the investigator should identify the scope and parameters of the investigation, keeping in mind that while the investigation should be thorough, the disruption to the Company’s business should be balanced with the gravity of the claim.
SCOPE OF INVESTIGATION, CONT.

The investigator should consider and determine:

1. What is the subject matter of the investigation?
2. What issues must be covered?
3. What issues should not be addressed?
4. Have the employment policy and procedures at issue been reviewed thoroughly?
5. Are there any potential obstacles to proceeding with the investigation?
The investigator should consider and determine:

1. What documents should be reviewed and gathered prior to the investigation?
2. What electronic information should be included and gathered in the investigation?
3. What witnesses should be interviewed?
4. When should the investigation be completed?
5. Who should be put on leave, if anyone?
The investigator should consider and determine:

1. What employees’ emails, text messages, or electronic media should be reviewed prior to the investigation?

2. Does the Company’s electronic communications policy allow a company investigator to review employee emails, text messages, and other electronic media?
COLLECTING AND REVIEWING EVIDENCE

Pursuant to company policy (including electronic communications policies), the investigator should obtain and review evidence that is related to the investigation prior to witness interviews. This evidence may include:

1. Documents;
2. Personnel files;
3. Written formal and informal complaints;
4. Surveillance video, voice mail recordings;
5. Text messages;
6. Emails;
7. Public social media postings; and
8. Any other electronic or tangible documents related to the incident.
GENERAL CONSIDERATIONS FOR ALL INTERVIEWS

In conducting the interviews:

- Have an additional assistant taking copious notes and serving as a witness.
- Inform witness of importance to tell the truth.
- Cover no-retaliation policy.
- Explain general purpose of investigation and the specific allegations.
- Inform witness that the interview is confidential.
GENERAL CONSIDERATIONS FOR ALL INTERVIEWS, CONT.

• Ask broad, open-ended questions to begin the interview, and narrow the questions as you go.
• Appear impartial and do not take sides during an interview.
• Don’t be afraid of silence after you ask a question.
• Follow-up with detailed questions on the source of information provided.
GENERAL CONSIDERATIONS FOR ALL INTERVIEWS, CONT.

• Avoid disclosing the information you received from other witness interviews. The investigator’s job is to gather information, not disseminate it – unless to confront conflicting versions.

• Do not finish the employee’s sentences or interrupt the employee’s responses.

• Save tough or confrontational questions until the end, but be sure to ask the tough questions to ensure you have all the information the witness has.

• In the event the employee refuses to talk or provide answers to specific questions, the investigator should document the insubordination.
TYPES OF QUESTIONS FOR ALL INTERVIEWS

- Who?
- What?
- When?
- Where?
- How?
- Why did this happen?
- What other employees or individuals might have relevant information?
- What could have been done to avoid the incident?
- What evidence do you have concerning the incident (notes, emails, text messages, recordings)?
- Who have you told about the incident?
CONFIDENTIALITY OF INTERVIEWS

The investigator should make clear to all interviewees that allegations and information will be kept confidential to the extent possible. However complete confidentiality cannot be guaranteed because certain information must be used to confront the accused and to make employment decisions or to defend the company. Information and evidence about the alleged sexual harassment should be shared only with those who need to know about it.
INTERVIEWING THE COMPLAINANT

• Typically, the complainant is the first to be interviewed.
• The investigator should explain his or her investigatory role to the complainant and acknowledge that the employer takes the complaint seriously and is appreciative of the complainant’s willingness to come forward with the complaint.
• It is best if the complaint is received officially in writing.
• Interviewing the complainant alone is preferred, but often a complainant wishes to speak to the investigator with a companion or confidante in the room. If the employee is non-union, the general rule is to not allow representation or an additional third-party to attend the interview.
SAMPLE QUESTIONS

1. Who committed the alleged harassment or misconduct?
2. What exactly occurred or was said?
3. Where did it occur?
4. When did it occur and how often?
5. Did the complainant tell the offender that the conduct was offensive and that it must stop?
6. What else did the complainant do to discourage the conduct?
7. Is the offensive conduct still occurring?
8. Did the complainant report the incident to his or her supervisor or anyone else in management?
9. Did the complainant mention the incident to a co-worker or anyone else?
SAMPLE QUESTIONS, CONT.

1. Did the complainant make a complaint under the EEOC policy?
2. Are there witnesses, documents, or other evidence that corroborates the complainant’s allegations?
3. How did the harassment or misconduct affect the complainant (psychologically, physiologically, and economically)?
4. Why does the complainant think this happened?
5. Who does the complainant think is to blame?
6. What was your working relationship with the accused?
7. Does the complainant think this could have been avoided and how?
8. Does the complainant know if the person who harassed him or her harassed anyone else?
9. Does the complainant know if anyone has ever complained about harassment by that person?
10. How would the complainant like the situation resolved?
11. The investigator should not promise anonymity.
Typically it is appropriate to interview additional witnesses that might have information about the complaint or incident. This should happen before the accused is interviewed, generally.
INTERVIEWING THE ACCUSED

• After interviewing the complainant, and additional witnesses, as well as reviewing all available documented evidence, the accused should be interviewed.

• The investigator should explain that a claim of inappropriate conduct has been made, and that the employer is attempting to determine whether the allegations have merit before making any personnel decisions. The investigator is simply asking to hear the employee’s side of the story with a fair and open mind.

• The accused should be told that all information from the investigation will be handled as discreetly as possible.

• It needs to be clear to the accused that there are policies against any form of retaliation and that it will not be tolerated. Retaliation could result in discipline or even termination, if necessary.
With respect to specific questions for the accused, there is important ground to cover:

- An effective starting point is to ask the accused if he or she is aware of any personnel issues in the workplace. If the employee denies any such knowledge, the investigator should then give the accused a brief description of the allegations against him or her.
- The accused should then be given time to respond to each of the allegations, and the investigator should explain to the accused that he or she is expected to cooperate in the investigation and that there will be negative consequences for being untruthful or uncooperative.
- If the accused claims that the allegations are false, ask why the complainant might lie or might have a motive to make false claims.
- If there is a specific policy violated in the complaint, the accused should be asked if he or she is familiar with the policy and if he or she ever received any training about that policy.
- Ask the accused if there are any persons that the investigator should speak to or any relevant evidence or documents that support the accused’s position.
CONCLUDING ALL INTERVIEWS

• Is there anything else you would like to tell us?
• Recount significant points and testimony.
• Keep interview confidential.
• Review no-retaliation policy.
• Re-interviews are common and indicate you may re-interview the employee.
• Contact investigator if anything else arises.
FINALIZING INVESTIGATION

• Factual notes, not conclusions or assumptions.
• Notes about demeanor and credibility may be included.
• No recording of interviews, generally.
• Signed witness statements may be appropriate.
• Written objective summary of factual findings made by interviewer. Summarize facts not opinions.
• Legal or HR leaders, not interviewer, will make decisions and conclusions based on factual summary.
In the event the investigative report leads management to conclude the accused is guilty of the allegations, or has violated Company policies and procedures, management should take prompt remedial action. The disciplinary action must be reasonably calculated to end the harassment or conduct.
OTHER CONSIDERATIONS

• **Weingarten Rights.** In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the U.S. Supreme Court held that unionized employees have the right to request that a union representative be present in an interview that the employee reasonably believes will result in disciplinary action. An employer’s failure to honor a protected employee’s *Weingarten* rights can be found to have interfered with the exercise of the employee’s Section 7 rights under the National Labor Relations Act. *Weingarten* does not currently apply to non-union employees, see *Praxair Distrib., Inc.*, 358 N.L.R.B. No. 7 (Feb. 21, 2012), though it has in the past, see *Epilepsy Found. of N.E. Ohio*, 331 N.L.R.B. 92 (2000), and may again in the future.

• Employer’s mere suggestion to employees that they not speak with others regarding an internal investigation could reasonably be considered to discourage employees from discussing the terms and conditions of their employment and from engaging in protected concerted activity – a violation of the NLRA.
THANK YOU

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