EMPLOYMENT INVESTIGATIONS

EILEEN C. BEGLE
Assistant County Attorney
Office of Harris County Attorney
Vince Ryan
1019 Congress, 15th floor
Houston, Texas 77002
713-755-7159
Eileen.Begle@cao.hctx.net

State Bar of Texas
25TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 18-19, 2013
Austin

CHAPTER 8

The author would like to acknowledge Scott Brumley who wrote Section III. B. Ethical considerations in counsel serving as the investigator of this article.

EILEEN C. BEGLE
Office of Harris County Attorney Vince Ryan
1019 Congress, 15th floor
Houston, Texas 77002
713-755-7159
Eileen.Begle@cao.hctx.net

BIOGRAPHICAL INFORMATION

EDUCATION

B.S. with Honors, Saint Mary College, Leavenworth, Kansas
M.B.A., Corpus Christi State University
J.D., University of Houston Law Center

PROFESSIONAL ACTIVITIES

Board Certified in Labor and Employment Law since 2000
Member, Texas District and County Attorneys Association

LAW RELATED PUBLICATIONS

Author/Speaker for the State Bar of Texas PDP
- Suing and Defending Governmental Entities Boot Camp 2004
  - *Employment Law Issues Unique to the Governmental Employer*
- Suing and Defending Governmental Entities Boot Camp 2006
  - *The ABCs of the Family and Medical Leave Act*

Author/Speaker for the Texas District and County Attorneys Association
- Civil Law Seminar
  - *ADA and FMLA: The Basics* 2001
  - *HELP! Untangling the ADA-FMLA Web* 2002
  - *Military Leave* 2003
  - *Practical Tips for Handling EEOC Charges* 2003
  - *Timekeeping Issues Under the Fair Labor Standards Act* 2004
  - *The 2004 Amendments to the FLSA Regulations: What's New and What's Not* 2005
  - *Managing the Non-Working Worker* 2006
  - *Conducting Investigations: Law and Ethics* 2008
  - *FMLA Update* 2009
  - *Disaster Preparation* 2010

Author/Speaker for the South Texas College of Law
- Emergency and Disaster Preparedness and the Law Conference 2011
  - *When Disaster Strikes: Labor and Employment Issues*

Speaker for the State and Local Government Benefits Association
- National Conference Overland Park, Kansas 2001
  - *Employment Laws: Benefits and Risk Managers' Roles and Responsibilities*
- National Conference Seattle, Washington 2002
  - *The "Other" Employee Benefits*

Speaker for Texas Public Risk Management Association
- State Conference 2000, *FMLA, ADA, and Sexual Harassment*
- State Conference 2001, *Hot Buttons in Public Sector Benefits*

Speaker for Texas Association of County Auditors
- *Fair Labor Standards Act and Immigration Reform & Control Act* 2000
- *The Show That Never Ends: Recent Changes to FMLA* 2009

TABLE OF CONTENTS

I. INTRODUCTION 1

II. EMPLOYER'S LEGAL OBLIGATIONS TO INVESTIGATE 1
A. Harassment claims 1
B. Other discrimination claims 2
C. Special rules for certain fire fighters and peace officers 3

III. THE INVESTIGATOR 4
A. Qualities of a good investigator 4
B. Ethical considerations in counsel serving as the investigator 5
1. Lawyer as Witness 5
2. Inadvertent Formation of Attorney-Client Relationship 6
3. Lawyer as Intermediary 6
4. Contact with Represented Party 6

IV. TIMELINESS 7
A. Harassment claims 7
B. Other discrimination claims 8
C. Constructive discharge 8

V. FOLLOWING PROCEDURES 8

VI. THE INVESTIGATION REPORT 10

VII. CONCLUSION 10

APPENDIX 11

EMPLOYMENT INVESTIGATIONS

I. INTRODUCTION

The investigation an employer conducts into an allegation of workplace misconduct can make the difference between victory and defeat in a later lawsuit. Good investigations help defendants. Shoddy investigations help plaintiffs. This paper addresses several aspects of an investigation, including ethical issues, to watch for when handling an employment lawsuit.

II. EMPLOYER'S LEGAL OBLIGATIONS TO INVESTIGATE

A. Harassment claims

The employer's duty to investigate complaints of sexual harassment is well-settled. The Equal Employment Opportunity Commission (EEOC) first promulgated regulations on sexual harassment in the workplace in November 1980. 45 Fed. Reg. 74565-74677 (1980). Those regulations, later codified at 29 C.F.R. § 160.11(a)-(f), require employers, including governmental entities, to investigate sexual harassments by employees and to stop the harassment.

Very shortly thereafter the D.C. Circuit relied on the EEOC regulations in a case against a government employer, the District of Columbia. In *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981), the court held that employers "should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party, and should generally develop other means of preventing harassment within the agency."

When a plaintiff sues alleging to have been the victim of harassment based on behavior of a non-supervisor (based on any protected category), the plaintiff must prove that:

(1) he or she belongs to a protected group;
(2) was subject to unwelcome harassment;
(3) the harassment complained about was based on the protected category; and
(4) the employer knew or should have known of the harassment in question but failed to take prompt remedial action.

Hernandez v. Yellow Transp. Inc., 670 F.3d 644, 651 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 136 (2012) (race discrimination claim); *Harville v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 434 (5th Cir. 2005). (sexual harassment).

In 1998, the United States Supreme Court first ruled that employers are vicariously liable for hostile work environments created by a supervisor or someone with successively higher authority over the employee. At the same time, though, the Court created an affirmative defense for the employer. To succeed on the affirmative defense, the employer must prove by a preponderance of the evidence two elements:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and
(b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.

Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Thus, employers must have an appropriate policy in place for employees to make complaints of discrimination and harassment and must ensure that each complaint is investigated and appropriate disciplinary action taken for any substantiated complaints.

Employers today should not even consider proceeding without an investigation into such complaints. The more serious the allegations, the more serious the consequences for failing to conduct an investigation will be. *Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) is a pretty good example of what not to do. The facts were egregious. Waltman started working at an IPCO paper mill in 1982. Shortly after she began, an IPCO employee broadcast obscenities directed at her over the PA system in the mill. *Id.* at 470. Waltman complained and her supervisor promised to "take care of it." A foreman told the offending employee to stop, but did not punish him or document the incident in any way. *Id.* at 471.

Things got worse. She endured almost weekly sexual propositions. One man pinched her buttocks with a pair of pliers and tried to put his hands in her back pockets. Her co-workers put over thirty pornographic notes in her locker. Sexually explicit pictures and graffiti adorned the walls of the mill, in the restroom, and in an elevator. Some employees hung used tampons on their lockers. *Id.* That's enough detail for our purposes.

After enduring this environment for about a year, Waltman lodged a second complaint. This time, her supervisor told her she should expect this type of behavior working with men and that management could not determine who wrote the graffiti. Then they transferred Waltman to a different shift. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989).

A few months later, after a three month leave for depression, she lodged a third complaint. *Id.* at 472. Senior managers had a few meetings to discuss Waltman's complaint. They met with one of the

offenders, who denied her allegations. *Id.* A few weeks later, the plant manager sent Waltman a letter stating that IPCO could not investigate her complaint without revealing her identity and would not begin an investigation until she authorized it. *Id.*

Waltman then met with IPCO's human resources manager and the mill's personnel manager. They told Waltman that if they conducted an investigation into her allegations it would hurt her chances of promotion. *Id.* Then they wrote her another letter. In this one they wrote that IPCO would investigate her claim against *contractors* in the mill, but, at her request, they would not investigate the claims against IPCO employees. The last sentence read, "We will respect your wishes and would appreciate your confirming this by signing the attached copy of this letter." Waltman signed the letter, but later testified that she thought that IPCO was going to conduct an *informal* investigation into the allegations against the IPCO employees. *Id.* at 472.

The district court granted partial summary judgment to IPCO because, among other things, it found that IPCO did not know and should not have known of the alleged sexual harassment and because IPCO took prompt remedial action. *Id.* at 470. But the Fifth Circuit reversed and remanded, finding that Waltman had raised a genuine issue of material fact on whether IPCO had taken a prompt remedial action. *Id.* at 480. In the court's view, the evidence that IPCO management had warned Waltman that they could not conduct an investigation without revealing her identity and had told her an investigation would not be in her best interest, showed that IPCO "actively discouraged her from pursuing an investigation." *Id.* at 480.

From time to time, employers will receive a complaint from an employee who is reluctant to participate in an investigation. If that happens, the employer should thank the employee for following procedures and trusting the employer to do the right thing. Explain the serious legal obligation to conduct an investigation and let her know that you can't go forward if she doesn't answer at least a few questions related to her allegations. If she still refuses to participate, consider having her sign something that says she had the opportunity to file a formal complaint and the employer offered to conduct an investigation, promising to keep the investigation confidential to the extent permitted by law. The letter should inform the complainant that she can change her mind at any time and the employer will initiate an investigation. Even if the complainant signs such a letter, still investigate as much as you can based on the limited information you have and keep a record of the efforts.

B. Other discrimination claims

A solid investigation can provide a defense to other discrimination claims as well. In *Brauninger v. Motes*, 2007 U.S. App. LEXIS 29597, 260 Fed. Appx. 634 (5th Cir. 2007) (*cert. denied*, 2008 U.S. LEXIS 4495 (U.S., May 27, 2008), the investigation saved the day over the plaintiff's claims of race and age discrimination.

The plaintiff was a man who had been accused of sexual harassment. His accuser was his subordinate. She made an outcry in April 2004. *Id.* at *2. On May 4th the Human Resources manager interviewed seven employees, including the complainant and the accused, Brauninger. The HR manager heard first hand and second hand information from the witnesses. Recognizing the seriousness of the allegations, she recommended that Brauninger be fired. And he was, indeed, dismissed the very same day. *Id.* at *3.

Subsequently, the Human Resources manager compiled her report, summarizing the steps of her investigation, who she had interviewed, the statements the witnesses had made during the interviews, and the basis for the termination decision. The employer sent a termination letter on May 6th and notified Brauninger of his right to an internal administrative appeal. *Id.*

When he appealed, claiming a grand conspiracy among the witnesses, the original investigator's supervisor conducted a second investigation. She interviewed some of the original witnesses as well as some others. She also created a report and concluded that her investigation corroborated the first one. *Id.* *3-4.

Brauninger then sued the employer for race and age discrimination. The employer filed a motion for summary judgment based on affidavits by the Human Resources manager and her supervisor. Their respective investigation reports were attached to their affidavits. The district court granted the motion. Brauninger appealed. *Id.*

First, Brauninger argued that the affidavits were unreliably self-serving and inadmissible hearsay. The Fifth Circuit found that the lower court did not abuse its discretion in admitting all of the records. The affidavits were admissible, since they were based on personal knowledge. The investigators' reports were admissible, as well. The statements by the witnesses were not hearsay. Rather, they were offered to prove what the investigators heard about Brauninger and what they relied on in making the termination decision. *Id*. at *6-7. The court found the out of court statements by the investigators to be within the business records exception to the hearsay rule. *Id.* at *7-8. Rather than having prepared the investigation in anticipation of litigation, the employer showed that it prepared the investigation as the usual and customary response to a complaint. *Brauninger v. Motes*, 2007 U.S. App. LEXIS 29597, *8-9, 260 Fed. Appx. 634 (5th Cir. 2007) (*cert. denied*, 2008 U.S. LEXIS 4495 (U.S., May 27, 2008).

Once the appellate court found that the investigation documents were properly admissible, it

went on to analyze the case under the burden-shifting scheme of *McDonnell Douglas Corp. v.* Green, 411 U.S. 792 (1973). Under that scheme, a plaintiff in an employment law suit must first make out a prima facie case. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001). A prima face case raises a presumption of discrimination, which the employer must rebut by establishing the legitimate, nondiscriminatory reason for the disciplinary action. *Id.* If the employer is successful, then the burden shifts to the plaintiff to show that the employer's offered reason(s) was either a pretext for discrimination or what mixed in with a discriminatory motive. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

Applying the burden-shifting scheme, the Fifth Circuit held that the employer's good faith reliance on the allegations of the plaintiff's misconduct satisfied its burden to provide a legitimate, nondiscriminatory reason for his termination. *Brauninger*, at *14. Thus, the investigation led to victory for the employer.

Even an imperfect investigation can protect an employer against a discrimination claim. In *Wal-Mart Stores v. Canchola*, 121 S.W.3d 735 (Tex. 2003), Wal-Mart fired Canchola after an investigation into sexual harassment charges lodged against him. Canchola claimed the investigation was a sham and that his disability, a heart condition, was a motivating factor in his termination. He alleged that a more thorough investigation would have uncovered exculpatory evidence, including that the complainant had refused an offer to work in another department, instead choosing to remain in the department where Canchola worked. Further, after a brief employment break, she even voluntarily returned to work with Canchola. *Id.* at 740.

Even though Canchola disputed the quality of Wal-Mart's investigation, the court held that the poor quality of the investigation, without more, did not prove that his disability was a motivating factor in his termination. *Id.*

C. Special rules for certain fire fighters and peace officers

Subchapter B of Texas Government Code Chapter 614 creates a legal obligation for certain governmental entities to conduct investigations before taking disciplinary action against certain fire fighters and peace officers. The chapter applies to the state, municipalities with a population greater than 50,000, and counties with a population greater than 190,000. Tex. Gov't Code Ann. § 614.002 (West 2012). The complaint requirement applies to:

> (1) a law enforcement officer of the State of Texas, including an officer of the Department of Public Safety or of the Texas Alcoholic Beverage Commission;
> (2) a fire fighter who is employed by this state or a political subdivision of this state;
> (3) a peace officer under Article 2.12, Code of Criminal Procedure, or other law who is appointed or employed by a political subdivision of this state; or
> (4) a detention officer or county jailer who is appointed or employed by a political subdivision of this state.

Tex. Gov't Code Ann. § 614.021(a) (West 2012). Fire fighters and peace officers who are covered by Chapter 174 or 143 of the Texas Local Government Code are excluded because they already have these protections. Tex. Gov't Code Ann. § 614.021(b) (West 2012).

Section 614.022 requires the head of the agency to get a complaint in writing and signed by the person making the complaint. Section 614.023 sets out the duty to investigate prior to indefinitely suspending or terminating the employee:

> (a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed.
> (b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee.
> (c) In addition to the requirement of Subsection (b), the officer or employee <u>may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:</u>
>
> > <u>(1) the complaint is investigated;</u> and
> > (2) there is evidence to prove the allegation of misconduct.

Tex. Gov't Code § 614.023 (West 2012) (emphasis added).

Based on these two provisions, a governmental entity can have a crystal clean investigation, but if the investigation doesn't have a signed, written complaint, any disciplinary action taken against the covered law enforcement officer or fire fighter is subject to being void with liability for full back pay and benefits. *Guthery v. Taylor*, 112 S.W.3d 715, 724 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Guthery was a Sugar Land police officer. He shut down a party on January 29, 2000. In doing so, he

allegedly damaged the front door of the house where the party was by knocking on it with his flashlight. A few days later, the homeowner called the police department to complain. *Id.* at 718.

The department conducted an investigation, including asking Guthery to answer questions in writing. "Guthery was told there was no complaint, but the questions needed to be answered for clarification purposes." *Id.* at 718, n.2. The investigation concluded that Guthery had struck the door with the flashlight several times, dented the wood, and broken a panel of glass. *Id.* at 718. The Police Chief proposed to suspend Guthery for three days. It was undisputed that Guthery received a copy of the Chief's proposal, which the Chief had signed. *Id.* at 718-19. The Chief approved the suspension. *Id.* at 719.

Guthery filed a petition for writ of mandamus asking the court to order the Chief to rescind the suspension because it was in violation of § 614.023(b) (no signed complaint). Guthery argued that the Chief could not discipline him without a complaint signed by the homeowner. *Id.* The mandamus action proceeded on cross motions for summary judgment. The trial court granted the defendants' motion. *Id.* at 717. Guthery appealed. *Id.*

Without going into the details of the appellate court's statutory construction analysis, the court concluded that the term "complaint" under § 614.023 must be signed and in writing by the victim of the misconduct, which in that case was the homeowner. *Id.* at 723. And since Sugar Land did not have that, the court reversed and rendered judgment in Guthery's favor, declaring the defendants' action violated the statute and ordering them to withdraw the disciplinary action and restore the lost wages and benefits. *Id.* at 724.

Since *Guthery*, the Austin court of appeals has ruled that § 614.023 applies even if the complaint is based on an internal policy violation (i.e., where the "victim" is the department itself). *Treadway v. Holder*, 309 S.W.3d 780 (Tex. App.- Austin 2010, pet. denied).

Treadway worked as an administrative sergeant for the Comal County Sheriff's Department. *Id.* at 781. One of her assignments in December 2005 was to meet with a trainee every week. A lieutenant "received a complaint"[1] from a shift sergeant that Treadway had only met with the trainee twice a month. Treadway provided copies of reports she had allegedly made when she observed the trainee. The lieutenant reviewed her reports, her time sheets, and videos from the jail. He concluded that she had not met with the trainee and that the observation reports were fabricated. *Id.*

The Sheriff fired Treadway without giving her a signed, written complaint about the allegations of falsifying the government record or untruthfulness during the investigation. *Id.* Treadway filed a declaratory judgment action against the County alleging that her termination violated chapter 614. The parties proceeded on cross-motions for summary judgment. Again, the county won at trial and the deputy appealed. *Id.* at 781-782.

On appeal, the Austin court applied rules of statutory construction and concluded that "complaint" under §§ 614.022 and .023 includes "any allegation of misconduct that could give rise to disciplinary action." *Id.* at 784. Therefore, if you represent a governmental entity that has peace officers or fire fighters, you need to be very well aware of these cases and what they mean.

Whether an investigation is required by common law to defend claims of discrimination or harassment or required by statute for certain peace officers and fire fighters, it is always the employer's responsibility to get it right. That means defense counsel must make sure the client understands the responsibility and trains and prepares the right people to conduct thorough, fair, and impartial investigations. The plaintiffs' bar should review any such investigations with a fine-toothed comb looking for improprieties or any other weaknesses in the investigation techniques or conclusions. The following sections discuss several aspects of the investigation that can make or break a case.

III. THE INVESTIGATOR

A. Qualities of a good investigator

Employers must choose the investigator wisely. The investigator will be a major witness if litigation develops. He or she must

- be credible and objective,
- know the employer's policies and procedures,
- know the law, and
- make a favorable impression on a witness stand.

The investigator must be both neutral and autonomous. She must be free of pressure (actual or perceived) to reach a pre-determined result. For instance, it is unreasonable to expect an employee of an elected official or department head to conduct an objective investigation into a complaint that targets the elected official or department head.

Sometimes it will be prudent to get an external investigator. Factors to consider in making that determination include:

- the complexity of the allegations;

[1] The opinion never identifies whether the sergeant's "complaint" was in writing or signed.

- whether the target is a high profile person;
- whether the investigation needs to be expedited;
- whether the investigation involves an entity other than the governmental entity; and
- price.

B. Ethical considerations in counsel serving as the investigator

Governmental entities fortunate enough to have a posse of lawyers at their disposal may consider asking counsel to conduct an internal investigation. An attorney may bring to an investigation a helpful measure of familiarity with the critical issues within the substantive and procedural law. Further, the attorney may be very familiar with the governmental entities policies and procedures. All of those factors seem to make the government attorney a prime consideration for the role of investigator. But let's look at some reasons that decision, which might appear to be very convenient when the complaint arises, might create a conflict down the road, particularly if the lawyer under consideration to be the investigator would also be a prime candidate to assume the role of defense counsel.

1. Lawyer as Witness

The most pressing concern would seem to be the rule regarding a lawyer who may also be a witness. Under the Disciplinary Rules, a lawyer may not accept or continue employment as an advocate in a contemplated or pending adjudicatory proceeding if (1) the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client; or (2) the lawyer believes that he or she will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure. *See* Tex. Disciplinary R. Prof'l Conduct 3.08(a), (b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9); *see also id.*, cmt. 9 (rule's two purposes are insuring that client's case is not compromised by representation by lawyer who could more effectively be witness for client and insuring that client is not burdened by counsel who may have to offer testimony substantially adverse to client's case).

Significantly, though, even if Rule 3.08(a) is violated, disqualification will not be appropriate unless the moving party presents evidence that the lawyer's testimony is "necessary" and goes to an "essential fact" of the nonmovant's case. *In re Hormachea*, No. 04-04-00581-CV, 2004 WL 2597447, at *2-3 (Tex. App.—San Antonio Nov. 17, 2004, orig. proceeding). Likewise, under Rule 3.08(b), disqualification is not appropriate unless the testimony of the lawyer is "required" for the movant's case and the testimony will be substantially adverse to the lawyer's client. *Id*.

In general, there is a perception that Rule 3.08 may be used as a tactical device to deprive a party of the counsel of its choice. *See In re Sanders*, 153 S.W.3d 54, 58 (Tex. 2004). To avoid that prospect, the Texas Supreme Court has engrafted an additional requirement before disqualification under Rule 3.08 is appropriate. A party requesting disqualification under the rule must show not only a violation, but also that the opposing lawyer's dual roles as attorney and witness will cause the party actual prejudice. *Id*. at 57. While the issue should be resolved as early as possible in the litigation, and is not prevented by the fact that some speculation may be involved, the speculation cannot be unsupported or dubious if disqualification is to be upheld. *In re Guerra*, 235 S.W.3d 392, 432 (Tex. App.—Corpus Christi 2007, orig. proceeding [mand. denied]).

So, how do these principles find their way into practice? One common example is fairly easy to understand. If a lawyer who represents a party is an affiant in support of a motion for summary judgment, he or she is a witness such that serving as an advocate in the case will violate Rule 3.08. *Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 544 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Aghili v. Banks*, 63 S.W.3d 812, 817-18 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). But exceptions may apply here. Specifically and relevantly, a lawyer's role as a witness does not hinder his or her ability to serve as an advocate if the subject of the lawyer's proposed testimony relates to (1) an uncontested issue; (2) a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the nature and value of legal services rendered in the case or (4) a matter on which the lawyer expects to testify if the lawyer has promptly notified opposing counsel and disqualification of the lawyer would work substantial hardship on the client. Tex. Disciplinary R. Prof'l Conduct 3.08(a)(1)-(3), (4).

Conversely, a lawyer's testimony generally will not implicate Rule 3.08 — at least to the extent disqualification may result — unless the lawyer's testimony will go to an "essential element" of the case. *See In re Bennett*, No. 14-06-00537-CV, 2006 WL 2403319, at 3 (Tex. App.—Houston [14th Dist.] Aug. 22, 2006, orig. proceeding) (mem. op.) (where lawyer's testimony did not go to essential element of divorce action, disqualification was improper); *compare Aghili*, 63 S.W.3d at 818 ("the practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence … nothing short of actual corruption can more surely discredit the profession.") (quoting *Warrilow v. Norrell*, 791

S.W.2d 515, 523 (Tex. App.—Corpus Christi 1989, writ denied)).

What may be gleaned from these authorities is the idea that some thought must be given in advance to whether the product of the investigation, including the impressions of the investigator, will be necessary to support the governmental entity's defense in any potential litigation. If so, it would seem prudent to secure the services of an investigator separate and apart from the lawyer who may defend the ensuing lawsuit. But if the investigating lawyer is a particularly adept writer, his or her services may not be entirely foreclosed. The prohibition of Rule 3.08 applies only to in-court functions; the rule is not violated if the lawyer-witness drafts pleadings, engages in settlement negotiations, or assists with trial strategy, even after learning that he or she will probably be called as a witness at trial on behalf of the client. *Anderson Producing Inc. v. Koch Oil Co*., 929 S.W.2d 416, 422-23 (Tex. 1996).

2. Inadvertent Formation of Attorney-Client Relationship

If a lawyer conducts the investigation, another potential trap lies in what he or she tells the witnesses in the case. This may be painfully true with regard to the target or the complainant. To set the stage, it should initially be acknowledged that lawyers shoulder obligations to preserve the confidences of their clients and avoid conflicts of interest as between the clients they represent. *See* Tex. Disciplinary R. Prof'l Conduct 1.05(b), 1.06(b). These rules can become pertinent if representations about what an investigation witness should do are made. For instance, where the subject of a municipal workplace investigation was asked to answer a series of questions under oath and the city attorney allegedly told the witness that he didn't need to hire a personal attorney because the city attorney would advise him regarding the investigation, the court found that a fact issue had been raised regarding whether an attorney-client relationship existed between the witness and the city attorney. *See Welch v. Milton*, 185 S.W.3d 586, 590-91, 600-01 (Tex. App.—Dallas 2006, pet. denied).

Perhaps the simplest and most poignant lesson for government lawyers to take from the *Welch* case, then, is if a witness asks whether he or she needs a personal attorney, the answer should be "get one if you want one; I'm not your lawyer." On the flipside, plaintiff's counsel should question their clients in detail about how the investigation happened, who was present when he or she gave a statement, and what any of those present may have said.

3. Lawyer as Intermediary

An investigation also may cause an attorney-investigator into the uncomfortable role of a "go-between" in the dispute between involved parties and the governing body of the governmental entity. A classic "red flag" should be seen if those facts play out. The Disciplinary Rules expressly caution that:

A lawyer shall not act as an intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;
(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

Tex. Disciplinary R. Prof'l Conduct 1.07(a).

In such a tenuous situation, it is critical that the lawyer's interests be factored out of the equation. *See id*., cmt. 2 ("a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed."). If any of the conditions described by paragraph (a) of the rule is no longer satisfied, withdrawal from all representation in the matter is required. *Id*. at (c). If the lawyer is precluded from acting as an intermediary under Rule 1.07, the lawyer's entire office is similarly barred from doing so. *Id*. at (e).

4. Contact with Represented Party

Finally, it should be noted that if any of the involved parties, the complainant, the accused, or any of the witnesses, is already represented by counsel regarding the subject of the investigation, contact with that person about the investigation may only proceed with the consent of the person's lawyer unless the contact is otherwise authorized by law. Tex. Disciplinary R. Prof'l Conduct 4.02(a). The same rule applies to indirect contact with a represented party. *See id.* at (b). Likewise, bluffing by coloring the truth also is frowned upon by the rules. See Tex. Disciplinary R. Prof'l Conduct 4.01 (in course of representing client, lawyer shall not make false

statement of material fact or law to third person or fail to disclose material fact to third person when disclosure is necessary to avoid making lawyer party to criminal act or knowingly assisting in fraudulent act perpetrated by client). Thus, the best practice here for a lawyer-investigator is to be straightforward about the subject matter and purpose of the investigation and how its results may be used.

In summary, there may be a rare case when an attorney for the governmental entity is the right person to conduct the investigation. But do not make that determination lightly. And certainly don't make it without considering the Disciplinary Rules.

IV. TIMELINESS

A. Harassment claims

Timeliness is an important issue that will affect whether an investigation serves as a weapon for the plaintiff or a shield for the employer. The employer's actions do not have to be immediate to qualify as a prompt remedial measure. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987). As with so many things in the employment law arena, courts look at the totality of the circumstances, analyzing the employer's actions in light of its lines of command and organizational structure. *Id.*

In *Dornhecker*, the employer moved swiftly, literally overnight. Dornhecker worked four days for Malibu. She was, as the Fifth Circuit assumed for purposes of its opinion, the victim of unwelcome sexual harassment by a contract consultant for Malibu named Rockefeller. *Id.* at 308. Specifically, while on a business trip, Rockefeller put his hands on Dornhecker's hips while standing in line at the airport, dropped his pants in front of everyone while boarding the plane, touched her breasts, and later, while at a business dinner, put his stocking feet up on a table right in front of her and "playfully" choked her after she complained about it. Rockefeller also repeatedly said, "Let's get naked and go to my room." (Dornhecker admitted that the comment was not necessarily directed at her.) *Id.*

Dornhecker wound up in the ladies' room with "hysterical tears." Her immediate supervisor followed her into the restroom to find out what had happened. When she heard about the choking incident, she promised to tell the company president, Peabody. The next morning, Dornhecker told the company president herself. The president assured Dornhecker that she would not have to work with the consultant again after the business trip, which only had one-and-a-half days left. Though it was unclear why, it was undisputed that Rockefeller did not attend any of the remaining presentations on that trip. *Id.* Dornhecker, however, didn't know that because she left Florida right away leaving a short note for her supervisor at the hotel. *Id.* at 308-09.

Although the district court had awarded Dornhecker compensatory damages on her claim, the Fifth Circuit reversed the judgment, finding that the district court had erred in determining that Malibu had not promptly remedied the situation. *Id.* at 310.

While the speed with which the employer responded in *Dornhecker* was clearly set out in the opinion, the size of the organization was not. However, because a brand new employee like Dornhecker had immediate access to the president of the company, Peabody, it is probably safe to assume the organization was small with a very informal chain of command. In a case near and dear to my heart, where the organization involved several thousand employees and a very clear and long line in the chain of command, the Fifth Circuit held that even a remedial measure taken three months after the complaint was sufficiently prompt to warrant judgment in the employer's favor. *Waymire v. Harris County*, 86 F.3d 424 (5th Cir. 1996).

Jennifer Waymire was a young, attractive, female jailer. She believed she was a victim of a hostile work environment when another young deputy, Eric Smith, showed a drawing of her to several deputies during roll call. The picture was drawn on a handkerchief. An inmate drew it. It showed a naked female deputy on her hands and knees on a table. The deputy's uniform was on the floor. An inmate was standing behind the female with his jail jumpsuit down at his feet. His penis was erect. The caption above the inmate said, "Dam [sic] Baby, you have some good pussy." The caption above the female said, "Hurry up and get that Nut before the Sgt. come [sic]." *Waymire v. Harris County*, 86 F.3d 424, 426 (5th Cir. 1996).

Waymire heard from several deputies that Smith had shown the handkerchief at roll call. She asked Smith to show it to her. Reluctantly, he did - right in front of Waymire's and Smith's supervisor, Sgt. Mayberry. When Waymire saw the drawing, she thought the female deputy was her. She reached that opinion because the deputy's uniform in the drawing had a flashlight on the belt and, according to Waymire, she was the only female deputy who carried a flashlight. *Id.*

Sgt. Mayberry took the handkerchief from Smith and orally chastised him right then and there. Within a week, Sgt. Mayberry had produced a report of the incident, including interviewing Waymire, the inmate who had drawn the picture, and nine other deputies and jailers who knew about the drawing. *Id.* at 428. Mayberry forwarded the report to the Captain over the jail, who forwarded it to the Chief Deputy. Within one month, the Chief Deputy made a decision to fire Smith. But that decision was delayed while the County's equal employment opportunity compliance officer completed her investigation of the incident. The EEO officer determined that the one incident did not amount to

sexual harassment. Thus, the Chief Deputy chose not to fire Smith. Instead, he had the Captain issue a formal letter of reprimand. The written reprimand was issued three months after Mayberry discovered the drawing. *Id*.

Sgt. Mayberry discovered the drawing in February. Waymire filed an EEOC Charge in April. She resigned in August. After a week-long trial, the jury returned a judgment in Waymire's favor finding that she had been constructively discharged by the hostile working environment but that the County had not retaliated against her for filing the discrimination charge. *Id.* at 427. Harris County filed a motion for judgment as a matter of law based on the prompt remedial action. The district court granted the motion, finding that no rational juror could find that the County had failed to take prompt remedial action. Waymire appealed. On appeal, the Fifth Circuit affirmed. "Considering the Sheriff's Department's and county's lines of command and organization format, the county's response, even with the three month delay, was prompt." *Id.* at 429.

Even though both these cases resulted in victories for the defendant, plaintiffs should still look at the timing of the investigation. Look at the size and structure of the governmental entity defendant. Then consider whether to add an attack on timeliness into your arsenal.

B. Other discrimination claims

Beware, though, meting out discipline against the accused prior to finishing the investigation. The accused may argue that he was discriminated against because the disciplinary action was premature and, thus, evidence of pretext. In *Brauninger v. Motes*, 2007 U.S. App. LEXIS 29597, 260 Fed. Appx. 634 5th Cir. 2007) (*cert. denied*, 2008 U.S. LEXIS 4495 (U.S., May 27, 2008), recall that the plaintiff had been fired based on an investigation into allegations that he had sexually harassed his female subordinate. The HR manager interviewed seven employees and recommended that Bauninger be fired. The company fired him before the HR manager finished her investigation.

Brauninger sued claiming that the real reason for his termination was race and age discrimination. The employer filed a motion for summary judgment claiming it had a legitimate, non-discriminatory reason to fire him; namely, that he had committed sexual harassment. Brauninger countered that the employer's offered reason was pretextual since he had been fired before the HR manager had even finished the investigation.

While Brauninger he did not prevail on his claim, it was a good argument and is certainly something for both sides of the bar to keep in mind.

C. Constructive discharge

An employee who quits without giving the employer a reasonable amount of time to investigate the complaint and fix the issue cannot later claim to have been constructively discharged. *Woolard v. Fluo Enters.*, 2013 U.S. Dist. LEXIS 21472 (S.D. Tex. 2013). Woolard accepted a position with Fluo in September 2007. She was promoted later that month and again in July 2008. Fluo had wonderful complaint procedures. The plaintiff received a copy of the employee handbook, which included the procedures for reporting problems. The employer had two vehicles for employees to make complaints. One way, the Open Door Policy, authorized employees to raise issues with a supervisor, the Safety Department, or Human Resources. If the employee wasn't satisfied with that result, she could go up the chain of command. The other vehicle for reporting was a Compliance Hotline. That route bypassed local company management completely. *Id.* at *2-3.

Woolard first reported any alleged sexual harassment via the Compliance Hotline on August 19th. *Woolard v. Fluo Enters.*, 2013 U.S. Dist. LEXIS 21472, *16 (S.D. Tex. 2013). The employer started an investigation into her concerns soon after it received the hotline complaint. *Id.* Woolard resigned eight days later on August 27th. *Id.* at *4. Then she sued making very specific allegations of harassment by seven of her male co-workers that had occurred throughout her employment with the company. She admittedly, though, never reported those incidents until she called the hotline. *Id.* at *4-9.

Defendant filed a motion for summary judgment. In analyzing her constructive discharge claim, the district court held that her resignation was not objectively reasonable as a matter of law. *Id.* at *16. *See also Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 301 (5th Cir. 2001) (for purposes of constructive discharge analysis, a reasonable employee would have reported the sexual harassment before resigning).

V. FOLLOWING PROCEDURES

We've seen so far that employers must have established policies and procedures for employees to lodge complaints. But that is only half the battle. Supervisors and anyone who is designated as a proper recipient of complaints of workplace misconduct must be trained in following those procedures. Neither judges nor juries have sympathy for employers who do not follow their own procedures. Plaintiffs should always find out what those procedures are and look to see whether the defendant employer followed them. Here is an example of what can happen when an employer does not follow its own policies.

Rodriguez v. City of Houston, 250 F.Supp.2d 691 (S.D. Tex 2003), arose out of the City of Houston

Police Department. Plaintiff Gloria Rodriguez graduated from the police academy in May 1996. She was assigned to a desk on the evening shift at the Kingwood Substation. Her immediate supervisor was Sergeant G.A. McAnulty. Sometimes, though, she reported to Sergeant R.D. Silva. Both sergeants reported to Lieutenant Frank Jackson. *Id.* at 695.

In early July 1997, Rodriguez told Sgt. Silva that Lt. Jackson had been "bothering her." She also told Sgt. Silva that she wanted Jackson "to leave her alone." *Id.* Sgt. Silva gave Rodriguez the phone number to the HPD Women's Issues Unit and recommended that she call. He also advised her to talk to Sgt. McAnulty about it. *Id.* On July 11, 1997, Rodriguez met with Sgt. McAnulty and told him, "Lieutenant Jackson is following me home and he's calling me all the time and I don't want him to." *Id.* But she also told him that she was not sure if she wanted to file a formal complaint against the lieutenant.

Sgt. McAnulty, who was also unsure about what to do, called the Internal Affairs Division (IAD) for advice. He reported a "sensitive situation that possibly involved sexual harassment" without identifying any of the parties involved. *Id.* The evidence was unclear on what IAD told Sgt. McAnulty. But it was undisputed that Sgt. McAnulty called Lt. Jackson at home and told him about Rodriguez's complaint. Sgt. McAnulty also told Lt. Jackson that he should stop. *Id.* at 795-96.

Lt. Jackson responded by apologizing to Rodriguez the next day. She told him she did not want to talk to him and complained again to Sgt. McAnulty. *Id.*at 696. Sgt. McAnulty set up a meeting with Lt. Jackson and Officer Rodriguez. The three of them met behind closed doors. Sgt. McAnulty told Lt. Jackson again to avoid Rodriguez. *Id.* The record showed that Lt. Jackson stayed away from Officer Rodriguez for some time. Unfortunately for all, he eventually started it back up again. *Id.*

According to Rodriguez, Lieutenant Jackson repeatedly made sexual comments to her and gave her gifts that were unrelated to work. *Id.* The evidence also showed that on October 20, 1998, Lt. Jackson sent Rodriguez a letter declaring, "I never knew love until you came into my life." The letter upset Rodriguez; so, Lt. Jackson wrote her another personal letter apologizing. *Id.* Rodriguez took both letters to Sgt. McAnulty on November 4, 1998. HPD transferred her two days later, at her request. Rodriguez filed an IAD complaint against Lt. Jackson the next week. *Id.*

Rodriguez sued in federal court under Title VII alleging that Lt. Jackson had sexually harassed her and that the City had done nothing to stop it when she had reported it to Sgt. McAnulty in July 1997. The City filed a motion for summary judgment arguing, among other things, that it was entitled to the *Faragher* affirmative defense.[2] *Id.*at 696-697. According to the City, Rodriguez failed to take advantage of the City's procedures for preventing or correcting bad behavior because she didn't report the alleged harassment to IAD or the Women's Issues Unit until November 1998. *Id.* at 702.

The district court rule against the City on all of its arguments. On the affirmative defense, the court noted that HPD policy instructed employees to report sexual harassment to one of the following:

(1) the victim's immediate supervisor,
(2) Internal Affairs Division, or
(3) Women's Issues Unit.

Rodriguez v. City of Houston, 250 F.Supp.2d 691, 703 (S.D. Tex 2003). And that's precisely what Officer Rodriguez had done. She reported it to both of her immediate supervisors, Sergeants Silva and McAnulty.

In denying the City's motion, the district court quoted extensively from an earlier HPD case:

> When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to accept notice of harassment problems … To allow employers to escape liability when … the complainant has followed the employer's policy for reporting harassment would undermine [the] goals [of Title VII, as detailed in *Faragher* and *Ellerth*]. *** [I]f the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.

Id., (quoting *Williamson v. City of Houston*, 148 F.3d 462, 466-67 (5th Cir. 1998)). Finally, "if the employer provides alternate procedures for reporting harassment, then an employee is deemed to have acted reasonably if she takes advantage of any one of them." *Id.*

Although the ruling on the second prong of the affirmative defense was dispositive, the district court went on to analyze the other prong – that is whether the City had provided a prompt remedial measure. The City argued that as soon as Sgt. McAnulty learned of the problem, he called IAD and then called Lt. Jackson and told him he should stop. *Id. at 703-04*. The court pointed out that the employer's response has to be "reasonably calculated" to end the harassment.

[2] The disposition of the case on Lexis identifies it as a motion for *partial* summary judgment. However, Judge Milloy's opinion indicates otherwise.

First, the court noted those cases that have held that a measure could be "remedial" if it actually stopped the bad behavior from re-occurring. *Id.* But the undisputed facts in *Rodriguez* were that Sgt. McAnulty's actions did not stop the problem. *Id.* Moreover, Sgt. McAnulty really had no authority to address the problem. While it was true that Sgt. McAnulty was someone designated under the HPD policy to receive complaints, he certainly had no authority to transfer the alleged harasser, who was his immediate supervisor, let alone to reprimand or terminate him if he continued the bad behavior. *Id.*

The bigger the governmental entity, the harder it is to make sure that everyone who needs to know actually does know what the policies and procedures are. Training is crucial.

VI. THE INVESTIGATION REPORT

The final investigation report, whether formal or informal, should be fair and impartial. Investigators must be well-trained to reach factual conclusions based upon the evidence obtained in the investigation. While they get to use their common sense to make credibility determinations of what happened or did not happen, investigators should not include legal determinations in the investigation report. That is true even if the investigator is a well-seasoned employment law expert. Further, investigators must be well-disciplined to refrain from editorializing or offering their opinions about the complainant, the accused, or any of the witnesses. Here are a few hypothetical findings, some good, some extremely problematic.

Appropriate Fact Findings	Inappropriate Legal Conclusions	Inappropriate Opinions
Joe told Sarah three jokes with sexual undertones between January and May 2013.	Joe created a sexually hostile work environment.	Joe is a pervert.
Joe told Sarah three jokes, but they did not contain sexual innuendo.	Joe is innocent.	Sarah falsified the complaint because Joe got a promotion she wanted.

Plaintiff's counsel should mine the investigation report for golden nuggets left by an unwary investigator to put to use during the investigator's deposition, in defense of a motion for summary judgment, and throughout trial. For instance, in *Waymire v. Harris County*, 86 F.3d 424 (5th Cir. 1996), Sgt. Mayberry, who conducted the investigation into the inmate's drawing on the handkerchief, wrote in the report his conclusion that Waymire's complaint was "totally unfounded and without substance, retaliatory, fabricated and vindictive in nature." *Waymire*, 86 F.3d at 428.

Needless to say, that phrase really haunted us throughout the trial from opening statement, through Sgt. Mayberry's testimony, to closing argument. I am convinced that it was a significant part in the jury's finding in Waymire's favor on the hostile environment claim.

Sgt. Joe Friday from the TV series *Dragnet* was right. "All we want are the facts, ma'am."

VII. CONCLUSION

No matter which side of the bar they are on, employment lawyers will serve their clients well to learn what makes a good investigation and what doesn't. These were just a few of the bigger considerations.

Appendix 1

Anonymous Complaint
On which the Video is based

COMPLAINT

I am writing this anonymous complaint because me and my wife Betsy Jo Williams cannot take it no more. The Public Works Director has continued to put pressure on me and the other engineering techs, Julio, Jeff, and Ray to join in his wife swapping parties. He has threatened us with termination if we do not join his swinger parties. I am in fear for my job if he finds out I complained so I cannot tell you who I am.

I do not want to get involved in any of this but I thought you ought to know what is going on in your Public Works Department. I may have to take a new job with my mother-in-law who owns the Who Wants A Donut Store here in town. Please look into this but don't even try to figure out who I am because my son Jimmy Williams Jr. goes to that fancy private school and I need the tuition money.

I also overheard the Director telling sex jokes to Mindy our receptionist on several occasions. I think she was crying when he left. Please help us out of this jam.

If you need any further information you can call me at (713) 545-5555 but don't even try asking me who I am because I am too scared to get involved.

Anonymous