INVESTIGATING EMPLOYEE COMPLAINTS

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BIOGRAPHICAL INFORMATION

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Leslie is an active member of the Austin community. She is currently President-Elect of the Austin Bar Association and a previous member of the board of directors of Leadership Austin. Ms. Dippel graduated *cum laude* from Southwest Texas State University in 1992 with a Bachelor of Arts in Political Science and from the University of Houston Law Center in 1996 with a Doctor of Jurisprudence. Leslie is a frequent speaker on employment law topics at seminars for county and district attorneys through the Texas District and County Attorney's Association and the labor and employment section of the Austin Bar Association. Ms. Dippel and her husband are native Austinites and live in south Austin with their three young children who are all three active in soccer and lacrosse. Any spare time away from the courtroom is spent on soccer and lacrosse fields across the great State of Texas.

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INVESTIGATING EMPLOYEE COMPLAINTS

I. INTRODUCTION

When an employer receives an employee complaint or has knowledge through other means of a potential violation of policy or law, it has a legal obligation to perform a prompt and thorough investigation. A well performed investigation can lead to a successful litigation outcome, while a poorly performed investigation can just as easily lead to liability. Often, the investigation is a necessary component of the employer's legal defense and "Exhibit A" to an investigating agency or jury. Even where no litigation or administrative claim is present, a prompt and thorough investigation is a good management tool to assist in managing employee complaints regarding various matters that impact employee performance and morale. The integrity of the investigation process and work product is therefore vital. This paper will outline some of the best practices from a litigation context to help provide the framework. This paper will further discuss the unique aspects of investigations for the public entity employer.

The most common form of investigations conducted includes a claim of some form of hostile work environment. The standard for employer liability for hostile work environment harassment depends in large part on whether or not the harasser is the victim's supervisor. In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), the Supreme Court rejected in part the EEOC's definition of "supervisor" holding an employee is a "supervisor" if the employer has empowered that employee "to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vance,* 133 S. Ct. at 2442.

Further, the *Vance* opinion noted an employer is liable for a hostile work environment harassment created by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." *Vance,* 133 S. Ct. at 2453. In making that determination, a court will consider, "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." *Vance,* 133 S. Ct. at 2451. Also relevant is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed." *Id.*

II. LEGAL OBLIGATION TO INVESTIGATE

A. When the Duty Arises

Because of the duty to monitor the workplace and respond to complaints of unlawful conduct, both state and federal law require an employer to promptly and thoroughly investigate employee claims of discrimination and harassment. The Equal Employment Opportunity Commission ("EEOC") also promulgated regulations on workplace sexual harassment. These regulations require employers, including public employers, to investigate claims of sexual harassment and to take corrective action necessary to end workplace sexual harassment. 20 C.F.R. §1604.11(a)-(g).

The duty to investigate arises even in the absence of a formal complaint. In its enforcement guidance on vicarious liability for unlawful harassment, the EEOC instructs, "[w]hen an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing." EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors Notice 915.002 (June 18, 1999).

The duty to investigate can arise even if the employee requests that the employer not investigate. *Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (even when a complainant does not request an investigation, an employer must still investigate and take steps to prevent unlawful conduct.)

B. The Scope of the Duty to Investigate

In 1998, the United States Supreme Court created an affirmative defense for employers in a lawsuit alleging harassment. In order to prove the affirmative defense, the employer must prove: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and. (2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).[1]

[1] The EEOC Enforcement Guidelines instruct that the rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment." EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors Notice 915.002 (June 18, 1999).

Therefore, employers must have policies in place that prohibit discrimination and harassment, describe for the employee where and how to file complaints of discrimination and harassment, and state the employer's intent to conduct prompt and thorough investigations. Policies must also list to whom such complaints should made and must have at least one alternative other than the employee's immediate supervisor, state the employer's intent to impose sufficient corrective action necessary to send unlawful conduct, and prohibit retaliation. *Casiano v. AT&T Corp.*, 213 F3d 278 (5th Cir. 2000). All of these components work together to provide the employer's defense against an employee's discrimination claim.

The *Waltman* case provides a graphic example of an employer who did not respond appropriately and exposed the company defendant to great liability. Shortly after Ms. Waltman was hired, a co-worker shouted obscene words about her over the company loud speaker. She complained to her supervisor who promised to address it. A supervisor told the co-worker to stop but did not do anything further and did not document the incident or corrective action. *Id.* 470-471. The conduct got increasingly worse, and she subject to almost weekly sexual propositions. One employee pinched her buttocks with a pair of pliers and others put over thirty pornographic notes in her locker. She made a second complaint. Her supervisor told her that was to be expected in the male dominated blue collar environment and transferred her to a different shift. Waltman complained a third time and was questioned about whether she really wanted to pursue her claim. International Paper asserted she withdrew her complaint, although the content of that conversation was factually disputed. She sued alleging harassment and the district court granted summary judgment to the employer on the basis that it took remedial action. The usually conservative Fifth Circuit reversed summary judgment holding that she raised a genuine issue of material fact as to whether the employer took prompt remedial action and stating that International Paper "actively discouraged her from pursuing an investigation." *Id.* at 480.

There are many lessons for the employer in this case. Other than the obvious, the largest one is perhaps the fact that an employer should not honor a request not to perform an investigation. Employers are often faced with an employee who although upset enough to come to human resources or a supervisor with a complaint are reluctant to request a investigation. This case, and there are recent others, stands for the proposition that employer has an obligation to investigate and correct unlawful conduct once it is aware of it, even if the complainant does not wish to pursue an investigation. Even if the complainant refuses to participate in an investigation, the employer should conduct one based upon the facts it is able to discover without the complainant's participation.[2]

Consider also, *Rhines v. Salinas Const. Technologies, Ltd.*, 574 F. App'x 362, 367 (5th Cir. 2014) where the employer asserted it took reasonable care when it investigated the plaintiff's complaints, and that the investigation must have been successful because the plaintiff did not make a further complaint. The Plaintiff was never told about the conclusion of the investigation and alleged that after making his complaint, the harassment got worse. The Court affirmed a jury verdict in favor of the Plaintiff.

In *Kramer v. Wasatch Cnty. Sheriff's Office*, 743 F.3d 726, 747 (10th Cir. 2014), reminds us that not all responses to sexual harassment establishes reasonable efforts to comply with Title VII. The evidence must show not only that the employer made "an attempt to promptly remediate the reported sexual harassment," it must also show that such attempts were "reasonably calculated to end the harassment" and deter future harassers. In the *Kramer* case there was evidence that:

- The Sheriff did not consult the County's human resources professional about the allegations;
- He assigned the investigation to a detective who had no investigation training, describing the man as being simply "the unfortunate guy that was on duty on that particular day"
- The investigator had been friends with the harasser for 10 years, and considered him a mentor
- The investigator did not interview the plaintiff or obtain statements from other witnesses
- Perhaps most shockingly, the investigator did not investigate the Title VII claim, his investigation focused on the plaintiff by asking her who was the father of her baby and then on uncovering the extent of her consensual affair with him

An investigation does not have to be without flaw in order to be "prompt and thorough" but it must

[2] If, after encouragement by the employer's representative, the complainant remains reluctant to pursue a complaint and participate in an investigation, the employer representative should document that decision, attach a copy of the employer's policy that prohibits harassment and retaliation and then investigate regardless, based on the information that is able to be gathered without the participation of the complainant.

be an objective investigation of the facts related to the complainant's allegation. An employer's failure to fully investigate a complaint will be used to support a finding that its response was inadequate.

C. The Complainant's Obligations

In *Ellerth*, and *Faragher*, the employer was not relieved of liability even though the plaintiff never complained. In *Faragher*, the Court held that the defendant's efforts to prevent sexual harassment were so deficient that it could not assert the affirmative defense, even though the plaintiff had never complained to management.

In *Swindle v. Jefferson County Comm'n*, No. 13-14050, 2014 WL 6678411 (11th Cir., 2014) the Court considered this fact pattern. "[A]n employer's showing that the plaintiff employee failed to follow its complaint procedures will often be sufficient [to] satisfy its burden." But, "in some cases the employee's noncompliance may be reasonable—such as where the employee did not receive the policy or was wrongfully told not to pursue her complaint." *See also Greene v. Dalton*, 164 F.3d 671, 674-75 (D.C. Cir.1999) (explaining that the district court invaded the province of the jury in awarding summary judgment to the defendant when the defendant had not demonstrated that the employee's delay in filing a complaint was unreasonable).

As discussed above, in the *Kramer* case, the Court held the employee's failure to formally complain to the Sheriff is not dispositive of the affirmative defense's under *Ellerth* and *Faragher*. The duty placed upon plaintiffs is to act reasonably and what is "reasonable" must be analyzed given the totality of the circumstances. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 (2d Cir.2010). Accordingly, it was not enough for the County to show that Ms. Kramer did not complain; it must also show that her failure to do so was unreasonable under the circumstances—a rather high burden.

D. The "Prompt" Investigation

An employer's investigation must be prompt, but how "prompt" is "prompt"? "When a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability." *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 329 (5th Cir. 2004) (citing *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 402 (5th Cir. 1993)). "'Prompt remedial action' must be 'reasonably calculated' to end the harassment. *Id.* (quoting *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 615 (5th Cir. 1999)). Whether the employer has taken prompt remedial action depends on the facts of the case: "[n]ot every response by an employer will be sufficient to discharge its legal duty." *Skidmore*, 188 F.3d at 615 "Rather, the employer may be liable despite having taken remedial steps if the plaintiff can establish that the employer's response was not 'reasonably calculated' to halt the harassment." *Id.* at 615-16 (quoting *Waltman*, 875 F.2d at 479).

While an instant response is not required, courts have determined that an employer's delay in investigating weighs against the adequacy of the investigation and, as a result, the employer's affirmative defense. *See Nash*, 9 F.3d at 404 (holding that management's prompt investigation and transfer of complainant to department away from harasser was sufficient remedial response); *Pfau*, 125 F.3d at 940-41 (5th Cir. 1997) (concluding that management's reminder of sexual harassment policy and admonishment not to engage in sexually harassing conduct was sufficient remedial response); *Colbert*, 995 F. Supp. at 703 (holding that management's suspension of harasser the day after complaint was made, and terminating him following investigation**,** constituted prompt remedial action).

How long the investigation may take does not necessarily determine its "promptness." Courts have held that an employer's timely action to initiate an investigation and to separate the complainant and the object of the complaint weighed in the employer's favor in terms of conducting a "prompt" investigation even though the actual investigation took longer. There are certainly cases that span the spectrum of what is considered "prompt" under the circumstances, which may be an avenue to create a fact issue defeating summary judgment.

E. Complaints against Peace Officers

Unique rules may apply when a complaint is made against a fire fighter or peace officer. This is well known when it involves citizen complaints, but has equal application when it is a complaint of discrimination or harassment. Texas Government Code Chapter 614 creates a legal obligation for certain governmental entities to conduct investigations after receiving a signed complaint before taking disciplinary action. 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. The "signed 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 § 614.021(a).[3]

Generally speaking, §614.022 requires the head of the law enforcement agency to receive 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 may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:
>
> > (1) the complaint is investigated; and
> >
> > (2) there is evidence to prove the allegation of misconduct.

Tex. Gov't Code § 614.023.

Based on this statute, even with a thorough investigation, if it was not preceded by a signed, written complaint, 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.

Who is the "complainant?" One Court looked to the Local Government Code §143.123(a)(1) governing municipal peace officers and defined, "complainant" as "a person claiming to be a victim of misconduct by a fire fighter or police officer". At least one court has held that a complaint signed by the internal affairs investigator, rather than the victim, satisfied the requirements of the predecessor chapter to §614. *Fudge v. Haggar*, 621 S.W. 2d 196, 198 (Tex. App. – Texarkana 1981, writ ref'd n.r.e). In that case, a Dallas County Sheriff's Deputy contacted a Dallas Police Department Internal Affairs Investigator, to report improper conduct by a police department officer, Robert Fudge, regarding the release of a prisoner. *Id*, at 197. The IA investigator investigated the matter and provided Fudge with a letter of complaint signed by the IA investigator. Fudge's employment was terminated based upon that and Fudge then sued under Tex. Gov't Code §614 arguing the complaint was invalid because it was internally generated and signed by the IA investigator, and not the actual complaining person. The Court of Appeals disagreed with Fudge holding that even though the initial complaint was received from outside the police department, the entire investigation began inside the police department and Fudge understood and responded to each of the charges of misconduct against him. *Id.*

On the other hand, the Houston Court of Appeals considered the issue of signed complaint in *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 responded to a disturbance call arising out of a party and allegedly damaged the front door of the home with his flashlight. The homeowner complained to the police department. *Id.* at 718. The department conducted an investigation, including asking Guthery to answer questions in writing. Guthery received a copy of the Police Chief's proposal to suspend Guthery for three days for the damage. *Id.* at 718-19. Guthery filed a petition for sought a writ of mandamus ordering the Chief to rescind the suspension because it violated § 614.023(b) because the citizen's complaint was verbal. The court agreed and concluded 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. Guthery's suspension was withdrawn and the police department had to restore his lost wages and benefits. *Id.* at 723-724.

Following *Guthery*, the Austin Court of Appeals considered a similar issue and ruled that §614.023 applies even if the complaint is based on an internal policy violation (where the "victim" is the department). In *Treadway v. Holder*, 309 S.W.3d 780 (Tex. App.- Austin 2010, pet. denied), Treadway was a Sergeant in the Sheriff's Office. One of her duties was to meet with a trainee weekly. A lieutenant received a complaint 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

[3] Fire fighters and peace officers who are covered by Chapter 174 or 143 of the Texas Local Government Code are specifically excluded from coverage under Chapter 614 as they have extensive protections under those chapters that apply specifically to them. Tex. Gov't Code § 614.021(b).

complaint about the allegations of falsifying the government record or untruthfulness during the investigation arguing that it was a "complaint" under Chapter 614, but an enforcement of internal policy. *Id.* The Court of Appeals applied rules of statutory construction and concluded that "complaint" under §614.022 and §614.023 includes "any allegation of misconduct that could give rise to disciplinary action." *Id.* at 784. Therefore, Chapter 614 applied and the absence of a signed complaint was fatal to the attempt to uphold the termination.

This legislate session, Representative Allen Fletcher from Harris County and Chair of the Emerging Issues in Texas Law Enforcement Committee, introduced a bill that would have expanded Chapter 614 to, among other things, waive sovereign immunity and create a cause of action when the Chapter is violated. The proposed remedies included reinstatement, full back pay and benefits and attorney's fees and costs. That bill was set for public hearing and then pulled from the schedule, not progressing out of committee consideration. While it did not get signed into law, it is certainly an indicator that this Chapter is on the radar of law enforcement for expanding its coverage and protection—which may also have the support of the Chair of the legislative committee.

The law in this area continues to develop with these appellate courts in potential conflict. The Texas Supreme Court has not been presented the issue to issue an opinion. Therefore, if you represent a peace officers or fire fighters or the governmental entities that employ them, you need to be aware of these cases and watch for further case law development. Whether the duty to investigate arises by a common law affirmative defense or by statute for peace officers and fire fighters, it is the employer's responsibility to investigate thoroughly and accurately. Clearly, defense counsel must train employers on their obligations and the employers must train the appropriate personnel to recognize complaints and to respond appropriately. Those representing employees must be aware of the statutory obligations and the EEOC's guidance on what constitutes a prompt and thorough investigation. The Enforcement Guidance is very instructive to both sides of the bar.

III. CONDUCTING THE INVESTIGATION

A. Who Should Conduct the Investigation

There are several categories of people who would be appropriate to conduct an investigation. If a governmental entity is one with attorneys on staff, there are advantages to having an attorney conduct the 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 and with laws particular to governmental entities, such as the Public Information Act. Finally, if created for the purpose of providing legal advice, the final product may be considered attorney client privileged communication and work product—until the client wishes to use it as part of its affirmative defense in a later claim of discrimination or harassment.

There are also disadvantages that may pose a potential conflict if the lawyer may later defend the entity in a claim or litigation.

1. Ethical Considerations for the Lawyer Conducting an Investigation

Under the Texas Rules Disciplinary Rules of Professional Conduct, 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).

However, Rule 3.08(b) provides that 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.*

To avoid Rule 3.08 being used as a trial strategy, (s*ee, In re Sanders*, 153 S.W.3d 54, 58 (Tex. 2004), the Texas Supreme Court added an additional requirement. A party seeking disqualification must show a violation, and must also show that the opposing lawyer's dual roles as attorney and witness will cause the party actual prejudice. *Id*, at 57.

However, 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 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.) (lawyer's testimony did not go to essential element of divorce action, disqualification was improper). Consider also the admonition in *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)).

If a lawyer conducts the investigation, another potential concern is the appearance to the witnesses, particularly the complainant and the accused, that the lawyer is representing them. To avoid this perception and prevent an unintentional creation of an attorney client relationship, the lawyer should state clearly who he or she represents because the lawyer has a duty to preserve the confidences of their clients and avoid conflicts of interest between the clients they represent. *See*, Tex. Disciplinary R. Prof'l Conduct 1.05(b), 1.06(b). The lawyer/investigator should take care to answer a witness' question about whom the lawyer represents with an admonition that the lawyer does not represent them and cannot answer legal questions for them, including whether or not they need a lawyer. The witness should be told they are free to consult a personal attorney if they wish. Plaintiff's counsel should also discover this information as well to determine if an attorney client relationship was arguably created which could be used to attack the thoroughness of the investigation.

If after considering all of the above the employer determines it is not appropriate for the lawyer to conduct the investigation, there are many independent consultants well educated in conducting workplace investigations and have experience in providing testimony as well. Another choice is a human resources representative trained in conducting workplace investigations. What an employer should not do is to pick an employee that has no experience in this area or in investigations in general. In the event the lawyer is chosen to conduct the investigation he or she is not completely foreclosed from assisting in later defense.

These factors make it difficult for the lawyer to also function as the investigator but it does not prevent the lawyer from advising the investigator on the legal foundation of their investigation and final report.

B. Investigation Procedures

There are many different methods to perform an investigation and they can be documented in many different valid formats. Some may be more extensive than others and some are more formal than others. The common goal of any type of investigation is to determine the facts for substantiation of the complainant's allegations. It is not the investigator's role to make a determination of violation of law or to recommend particular forms of corrective action. The investigator's role is to determine which allegations can be substantiated and which cannot.

To investigate a claim of discrimination or harassment, the first thing an investigator should do is to review the employer's policy in those areas. The investigator should review what types of conduct are prohibited. Most policies contain a more onerous prohibition than the legal minimum. The investigator should review the complainant's written complaint if there is one. The investigator should review an organizational chart to obtain an understanding of the relevant reporting structure. Next, the investigator is ready to interview the complainant. In terms of the order of the witness interview, the usual practice is to interview the complainant first, then the accused, then other witnesses if necessary.

The investigator should take as much time as is necessary to conduct an interview, particularly with the complainant. If an investigator fails to give the complainant the time necessary to provide all of the facts, the investigation will be fatally flawed. *Ramirez v. City of Robstown*, 2006 WL 470601 (S.D. Tex. February 27, 2006) (finding employer liability for harassment when employer "simply went through the motions" in its investigation and the investigator only interviewed the complainant for approximately five minutes).

It goes without saying that the tone of the investigator should be empathetic and professional, yet objective. The complainant will remember this interview for a very long time and the investigator plays an important role in the employee's overall harassment and discrimination prevention program. The investigator should begin the interview by reassuring the complainant and reviewing the employer's policy reiterating that discrimination and harassment and retaliation are prohibited. The investigator should explain they are tasked with reviewing the complaint and investigating it and will need to ask some questions and potentially review documents in order to gather information.

1. Interviewing the Witnesses

There is basic information an investigator needs to gather from every witness in every investigation. These include:

- Name and position of witness
- Name of the person who the allegations are against

- Details about what happened, including dates, times, locations, and observing witnesses
- How the complainant felt about the discrimination or harassment at the time, and if that has changed over time and how
- How the complainant responded to the alleged discrimination or harassment
- If the witness discussed the alleged discrimination or harassment with anyone else
- If the witness has discussed the investigation itself with anyone else
- If there are any documents (emails, posts, etc.) relating to the complaint
- If there are other individuals who may have relevant information
- What the complainant would like to have happen as a result

After receiving this information the investigator should reassure the witness again and inform him or her what will happen next. Typically, that will be interviewing the person against whom the allegations are made any other relevant witnesses. Assure the complainant and other witnesses that the investigation will be conducted as discretely as possible, but that certain information will have to be disclosed in order to conduct a thorough investigation. (*See discussion re: Confidentiality)*

2. The Non-Cooperative Complainant

Sometimes, a complainant may not want to cooperate in the investigation. This may be true when the complaint was made by someone on their behalf, or when, after being informed of the investigation process, the complainant is no longer interested in pursuing a complaint out of fear of retaliation or simply the formality of the process is more than what was expected. The investigator should reassure the complainant and let them know that discriminatory conduct is strictly prohibited and policy prohibits retaliation against them from coming forward. If the complainant still insists on not going forward, the investigator will have to investigate what is able to be ascertained without their further input. *See, discussion in Section II, Legal Obligation to Investigate.*

3. Interviewing the Accused

When interviewing the person against whom the complaint is made, in addition to the above questions, the investigator should ask if the accused has control over the complainant's compensation, schedule, or performance reviews and if the accused has taken any adverse action or any positive action involving the complainant. If the accused denies the complained of conduct, the investigator should ask what, in the accused's opinion would motivate the complainant for making the allegation. If the accused is also a supervisor of the complainant, the accused should be counseled about the appearance of retaliation and how actions may be perceived by the complainant. Of course, adverse personnel actions are risky at this point.

4. Interviewing Other Witnesses

When interviewing other witnesses, in addition to the above questions, the investigator should carefully craft their questions to initially give as little detail about the complaint as possible in order to obtain as objective information as possible. The investigator should inquire of each witness what conduct they witnessed, what they observe about the accused and the complainant's relationship, and if the witness has observed any objectionable or offensive conduct of the person accused.

The investigator may need to meet again with the complainant or the accused to follow up on any matters raised by the other witnesses.

Once each interview is completed, the investigator should prepare notes of each interview, send them to the witness for review and correction, have the witness sign them, and file them for use in preparing the final report.

5. Weighing the Evidence

The investigator will have to weigh the information presented and determine whether each allegation can be substantiated or not. In doing so, the investigator will to consider the credibility of the witnesses. What does either party have to gain or lose? Are there previous complaints about the accused? Has the complainant been recently advised of poor performance for which disciplinary action may be considered? Do the witnesses express fear of speaking out? Was any witnesses' account of the issue consistent with another? What might be either party's underlying motivation? What documents can substantiate the allegation? What reputation does either party have? The investigator should take into account these factors in weighing all of the gathered evidence.

6. Closing Procedures

There are different schools of thought on how to document the investigation. Generally, the investigator is tasked with determining whether the allegation can be substantiated or not. The main components of the written report are:

- Statement of the allegation(s)
- Applicable employer policies under review
- Identity of the witnesses interviewed
- Identity of document reviewed
- Analysis of substantiation or non-substantiation
- Conclusion

The written report should avoid adjectives and superlatives, and merely state the allegation, the information gathered to support it, and whether that information substantiates the allegation or not. An investigator should also conclude whether or not the conduct violated the employer's policy which may prohibit a broader range of conduct than the law prohibits. If the investigator is unable to conclude the information substantiates the allegation, the report should state that the information gathered did not substantiate the complaint. If the complaint is substantiated, the investigator should report that finding to the decision maker for further action. While the investigator may be consulted about appropriate corrective training (disciplinary action, training, professional development, transfers, demotions, terminations, etc.), employer's counsel will prefer not to have those recommendations contained in the written report because if the recommendation is not accepted by the decision maker, the employer will have to explain why they were not followed in later litigation. Further, the investigator may not other information relevant to appropriate corrective action (past disciplinary history of the accused or of similar violations of other employees) If these recommendations are included in the investigator's report, Plaintiff's counsel will want to inquire as to whether each recommendation was followed and if not, why not. Plaintiff's counsel may also wish to inquire if corrective action recommendations were provided through a mean other than the formal report.

Following the completion of the report the person who received the initial complaint should reach out to the complainant and let him or her know that the investigation has been completed, that it either or was or was not substantiated, appropriate corrective action, if any, has been taken, thank them for coming forward, and inform the complainant that retaliation is prohibited. It is also a good practice to include a copy of the employer's policy against discrimination and harassment including complaint procedures. It is also advised the investigator to email the complainant a couple of weeks following the investigation to ask how things are going. The investigator should document the complainant's response. Assuming there are no new allegations, the investigator should close their interaction by letting the complainant know the employer prohibits discrimination and making sure the complainant is aware of the complaint procedures should they need to bring a claim forward in the future.

C. Confidentiality

It is important not to assure any witness their statements or allegations will remain confidential. First, an investigator cannot perform a thorough investigation without revealing some facts and the identity of some witnesses. Second, in the public employer context, that may not be possible in considering the Public Information Act. Third, the National Labor Relations Board has issued recent opinions that requiring confidentiality of witnesses may violate the prohibition of employees being able to discuss terms and conditions of employment.

In *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), the NLRB held that an employer's policy instituting a blanket prohibition on an employee discussing an ongoing investigation violated the National Labor Relations Act. While the National Labor Relations Act does not apply to public employers, it is an interesting expansion of their opinion in the area of employee investigations.

This concept was adopted by at least one EEOC regional office making some employers reconsider their confidentiality policies and practices. Within the same week as the *Banner* opinion, an EEOC Office in New York notified an employer in a pre-determination letter that the EEOC was expanding its investigation of a discrimination charge because the employer's policy mandated that employees keep the investigation confidential while it was ongoing. According to the EEOC, the employer had "a written policy that warns all employees who participate in one of [the employer's] internal investigations of harassment that they could be subject to discipline or discharge for discussing 'the matter,' apparently with anyone." The EEOC further stated in relevant excerpts from the letter it sent to the employer:

> ". . . EEOC guidance states that complaining to anyone, including high management, union officials, other employees, newspapers, etc. about discrimination is protected opposition. It also states that the most flagrant infringement of the rights that are conferred on an individual by Title VII's retaliation provisions is the denial of the right to oppose discrimination. So, discussing one's complaints of sexual harassment with others is protected opposition. **An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is "flagrant" not trivial**. In this case, telling the ___women who complained of harassment that they were not to tell others about the alleged harassment is enough to constitute a harm under Title VII. There does not have to be a separate adverse action. In addition, your written policy is so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated internally by your organization…."

(Emphasis added). Although this letter is not law or even a statement of the EEOC's overarching opinion, the analysis gives insight into how an EEOC investigator may view policies that require confidentiality during an investigation. Obviously, this position makes conducting an investigation particularly thorny. Confidentiality is important in conducting a thorough internal investigation, because where confidentiality is not maintained, employees may discuss the allegations and their responses to questions, which could have effects ranging from disruptive gossip and rumors of unsubstantiated (and perhaps unfounded) allegations to having employees coordinate stories, making it more difficult to identify inconsistencies, thereby harming the overall integrity and effectiveness of the report.

While this is the opinion of only one regional EEOC office, it certainly provides guidance that the issue confidentiality has the attention of both the EEOC and the NLRB. Blanket prohibitions of discussing the process are problematic but a witness could be advised that his or her discussing the matter, although not prohibited, could be disruptive to relationships and that decision of with whom to discuss the matter should be made carefully. Of course, this is another area where Plaintiff's counsel will want to probe for exactly what admonitions were given by the investigator. To avoid misunderstandings and faulty memories, the investigator may consider providing written admonishments, reviewed by counsel, that are provided to all witnesses prior to being interviewed.

D. Texas Public Information Act

Public employers have the added issue of complying with the Texas Public Information Act ("PIA"). The PIA was adopted in 1973 in reaction to the 1969 Sharpstown scandal.[4] The scandal involved governmental officials at the highest levels and Houston banker and insurance company manager Frank Sharp and his companies, the Sharpstown State Bank and the National Bankers Life Insurance Corporation. Sharp granted loans from his bank to state officials who would, in turn, purchase stock in National Bankers Life, to be resold later at a profit, after Sharp artificially inflated the company's value. The scheme generated a quarter of a million dollars in profits for the investors until the Securities and Exchange Commission filed criminal and civil charges against former state attorney general Waggoner Carr, former state insurance commissioner John Osorio, Frank Sharp, and others in early 1971. Politically, there were allegations of legislators pushing bills through the legislature that would be favorable towards Sharp and his companies.

The political fallout from the scandal was extensive. 1972 was an election year, and the scandal effectively ended the political careers of several officials up to then Governor Preston Smith. Governor Smith was defeated in the primaries that year by businessman Dolph Briscoe of Uvalde. The legislative reaction to the scandal occurred in 1973 and was expansive. The legislators, led by new House Speaker Marion Price Daniel, Jr., passed a series of reform laws. Among other areas, the legislation required state officials to disclose their sources of income, required candidates to disclose more details about their campaign finances, opened up most governmental records to citizen review, expanded the requirement for open meetings, and imposed new disclosure regulations on paid lobbyists.

Codified in the Texas Government Code, the PIA is intended to guarantee public access to governmental information in the interest of providing transparency in government. There are exceptions, however, to what is public information subject to disclosure. Relevant to employment investigations, §552.305 relieves the governmental body of its duty to state which exceptions apply to the information and why they apply when (1) a third party's privacy or property interests may be implicated, (2) the governmental body has requested a ruling from the attorney general, and (3) the third party or any other party has submitted reasons for withholding or releasing the information. Section 552.305 does not relieve a governmental body of its duty to request a ruling within ten business days of receiving a request for information, to notify the requestor in accordance with section §552.301(d), or to provide the attorney general's office with the information required in section §552.301(e).175

In *Morales v. Ellen*, 840 S.W.2d 514 (Tex. App.—El Paso 1992, writ denied), the court of appeals considered whether the statements and names of witnesses to and victims of sexual harassment in an employment context were public information under the Act. In Open Records Decision No. 579 (1990), the attorney general concluded that an investigative file concerning a sexual harassment complaint was not protected by common-law privacy. The decision in *Ellen* modified that interpretation. The *Ellen* court found that the names of witnesses and their detailed affidavits were "highly intimate or embarrassing." *Ellen,* 840 S.W.2d at 524. Furthermore, the court found that, because information pertinent to the sexual harassment charges and investigation already had been released to the public in summary form, the legitimate public interest in the matter was satisfied. Therefore, the court determined that, in this instance, the public did not possess a legitimate interest in the names of witnesses to or victims of the sexual harassment, in their statements, or in any other information that would tend to identify them. The *Ellen* court did not protect the identity of the alleged perpetrator of the sexual harassment from public disclosure.

[4] https://tshaonline.org/handbook/online/articles/mqs01

Of course, in the employment investigation context, the report may be used as a part of the employer's defense and would likely be disclosed during the investigation. With this in mind, and even with the exceptions tf the PIA, it is advisable to draft investigation reports with the assumption that will be produced, and choose words carefully.

IV. CONCLUSION

The employer may do all of the above steps correctly and still be in position answering a charge of discrimination or defending a lawsuit. The investigator should be aware they are a vital component in the employer's defense to those claims. The investigator may be called as a witness and the report will be a very significant piece of evidence, for both sides. It will be scrutinized for thoroughness.[5] Handling these sensitive matters is not easy, especially when the allegation is made against a high-ranking employee or official. However, the very worst thing an employer can do is to ignore a complaint or to perform a thin investigation that is clearly not designed to identify and correct discriminatory and harassing conduct. Cases have held that even an investigation that is proven incorrect does not lead to liability as long as it was conducted fairly. Supervisors, department heads, elected officials, and human resources representatives must work hand in hand in order to limit liability exposure to the employer.

[5] For this reason, although not legal advice, care should be taken that the report is written with proper grammar and contains no typographical errors. The report will be copied many times, attached to many documents as an exhibit, and will be blown up to large proportion as a trial exhibit. While it may be unfair, these types of errors are impactful and may harm the credibility of the report and the investigator. For example, spell "harassment" correctly!