SEXUAL HARASSMENT AND EMPLOYMENT INVESTIGATIONS IN THE #METOO ERA

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SEXUAL HARASSMENT AND EMPLOYMENT INVESTIGATIONS IN THE #METOO ERA

I. THE #METOO MOVEMENT'S EFFECT ON WORKPLACE HARASSMENT LAW

It is impossible to ignore the recent tidal wave of allegations of sexual harassment by celebrities and other high-powered public figures that have resulted in firings, resignations, and public outcry to change attitudes as to what is considered acceptable behavior in the workplace. The #MeToo internet phenomenon emerged in its wake, serving as a call-out to victims of sexual harassment to raise awareness by sharing their stories on social media using the viral hashtag. Employers are concerned and are asking what, if anything, they should do differently in the face of this movement.

Actually, the law itself hasn't changed much at all. To be actionable, generally, sexual harassment still must be sufficiently severe or pervasive to constitute a hostile work environment, must be claimed in a charge of discrimination within 300 days of the last illegal act, and the employer must be aware of, or should have known of, the harassment and not taken prompt remedial action. Employers are still required to perform full and fair investigations of complaints before taking action against any person accused of harassment. Employers should still have good policies that define and prohibit workplace harassment, provide a clear path for reporting outside the complainant's chain of command, and prohibit retaliation for complaining or participating in an investigation. The policies should be publicized and available to all employees, even those without computer access, and regular and quality training of all employees is necessary to reinforce the employer's position and procedures on workplace harassment.

So what has changed?

- **The speed of exposure** – Allegations made against an entity are immediately broadcast, often before the employer has a chance to investigate or formulate a response and sometimes before it learns of the complaint.
- **The age of the allegations** – Despite the statute of limitations barring legal claims made after 300 days, Twitter knows no such limits, and expired claims from years ago can wreak fresh havoc on an employer, often with no means to defend itself. Any chance to investigate the merits of the claim is often long gone, along with the witnesses, documents and facts surrounding the allegation.
- **Some loss of stigma** – The #MeToo movement is a call to action, demanding alleged victims to step up and be recognized, as an act of solidarity and bravery. Jumping in with one's own story, no matter how distant in time, is now viewed as a badge of honor.
- **Predicted increased claims** – In 1992, the year following the Clarence Thomas/Anita Hill televised confirmation hearing in October 1991, workplace sexual harassment charges filed with the EEOC skyrocketed 53 percent as compared to 1991. Claims in the last quarter of 1991 also increased dramatically. Everyone was talking about sexual harassment and discussing where the boundaries were. Now, with the intense publicity surrounding the #MeToo movement, and the valorization of women telling their stories (unlike the vilification of Anita Hill), it is expected that the statistics coming out of 2018 will also show dramatic increases in claims.
- **Employers may become aware of claims via #MeToo posts, and have an obligation to investigate** – Under the "knew or should have known" theory of employer liability, if the plaintiff can show the employer was aware of the employee's social media posts about workplace harassment, regularly monitors them, or otherwise should have been aware, then it is responsible for responding to them.
- **Using #MeToo references to influence settlements and juries** – we are seeing discussions of the movement in long preambles to demand letters, and references in arguments courts and juries. Moreover, the movement may be loosening evidentiary rulings on allowing "me too" evidence into trials.[1]
- **Increased workplace training** – The publicity of the allegations have led to a surge in requests for workplace harassment training. Management who a year ago did not want to spend the money on professional training, have suddenly gotten with the program and supported workplace-wide training. It is important for senior management to be seen by employees attending the training, to

[1] Generally, FRE 404(b) prohibits character evidence to prove that a person committed a bad act in accordance with that character. However, courts frequently allow in "me too" evidence about similarly-situated employees, especially when assessing punitive damages, to show the employer knew about the problem and failed to prevent or address it. Plaintiffs can also use me too evidence to avoid the affirmative defense that they didn't report, to show reporting would be futile because others who reported in the past received no relief or were retaliated against. Me too evidence can be used to impeach a defendant who claims it never happened before, or to show motive, intent, opportunity, or lack of mistake. The evidence may also be relevant to show discriminatory intent, based on the protected classification of other alleged victims.

send the message that the top brass supports the initiative.

- **Employers are developing crisis management plans** – The speed at which allegations can transverse social media and create a full-fledged public relations nightmare is astounding. That should not be the time that employers are first developing a response and mitigation plan. A plan of action, developed in advance, could save precious hours or days of the allegations going viral and beyond repair.
- **Backlash against women based on fear? – Unintended consequences –** We are starting to hear anecdotal reports of executives and businesses promulgating rules and/or personal conduct decisions for men to avoid being alone with women in business-related social or travel situations. The dialog began with the "Pence Rule" where Vice President Mike Pence was quoted in 2017 as stating that he refuses to dine alone with a woman not his wife, so as to avoid both temptation and misunderstandings. This "prophylactic gender separation" can have a devastating effect on women in business who may be unable to network effectively. And a female executive would have trouble staying in power abiding by the same rule. It also means that someone like Pence could not hire a woman as a personal assistant if late nights or travel were involved. In Silicon Valley, some male investors have declined one-on-one meetings with women. In Austin, a city official was reprimanded in 2017 for refusing to take meetings with women, stating "I've been told it is not appropriate for a married man to have lunch with a single lady." www.nytimes.com/ 2017/09/15/us/austin-william-manno-sxsw. This type of conduct could certainly translate into a claim of sex discrimination, especially if it can be shown to have an effect on women's careers.
- **Focus now on more than legal limits** – Employers are more concerned than ever about publicity and economic damage surrounding claims that might not otherwise have a legal basis. Behavior that may be legal, such as harassing men and women equally, can still cause significant problems for employers when it becomes fodder for social media discussions. Employers are adding bullying and respectful behavior policies to their handbooks, and training not only on the law, but also what is right and what can have a financial or public relations impact. For example, some employers are prohibiting high-ranking executives from off-duty or business development behavior that could reflect back badly if a photo is captured and posted on Facebook, such as attending strip clubs or engaging in other public sexually-oriented behavior that could be seen as disrespectful to women. Employers are refocusing on preventing excessive drinking or misbehavior at holiday parties and out-of-town events. Now, more than ever, senior management is being watched carefully, and must "walk the walk."

II. A BRIEF HISTORICAL TIMELINE OF THE LAW OF SEXUAL HARASSMENT

Sexual harassment has been illegal in American workplaces for a relatively short period of time. Despite the passing of Title VII of the Civil Rights Act of 1964, it was legal to fire an employee for refusing to have sex with the boss (*quid pro quo* harassment) until 1977. And in many parts of the country, including here in Texas,[2] it was legal to grope, make vulgar sexual comments to, and continually and graphically proposition an employee – so long as she kept her job – until 1986. The following are some important events in the evolution of sexual harassment law:

- **1964** – Title VII of the federal Civil Rights Act prohibits workplace discrimination because of sex.
- **1974** – *Barnes v. Train*, No. 1828-73, 1974 WL 10628 (D.D.C. Aug. 9, 1974). Paulette Barnes sued the Environmental Protection Agency, alleging the Director made repeated sexual propositions and remarks to her. After she consistently said no, and insisted on a professional relationship, she alleged he "began a conscious campaign to belittle her, harass her, strip her of her job duties, all culminating in the decision to abolish her job" in retaliation for refusing the sexual advances. The D.C. District Court granted the employer summary judgment, stating that because the claim was "that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor," it was not encompassed by Title VII.
- **1977 –** *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). Barnes appealed the 1974 ruling to the D.C. Circuit, which heard arguments in 1975, but did not issue an opinion until July 1977. The appeals court **reversed** the district court's ruling, and for the first time, recognized what we now call a "*quid pro quo*" form of sexual harassment. The court refused to accept the district court's analysis, stating that "but for her womanhood . . . her participation in sexual activity would never have been solicited." "She became a target of her supervisor's sexual

[2] Although the Fifth Circuit Court of Appeals was the first to recognize an actionable "discriminatory work environment" for minority employees. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

desires because she was a woman." Thus, the court held, she has stated a prima facie case of sex discrimination within the purview of Title VII.

- **1980 –** The EEOC issues guidelines on sexual harassment, including a definition of "hostile work environment." (Also released in 1980 is the movie 9 to 5).
- **1981** – *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). The D.C. Circuit is the first appellate court to recognize the EEOC's position on hostile environment sexual harassment, and allowed a cause of action based on the psychological and emotional work environment without the need to show tangible adverse employment action. Sandra Bundy, a vocational rehabilitation specialist for the D.C. Department of Corrections, alleged that after her supervisor regularly questioned her about her sexual proclivities, and invited her to have sex with him, she complained up the chain to their boss, who responded, "any man in his right mind would want to rape you" and then proceeded to proposition her himself. Despite her continued refusals, she did not lose her job or other tangible job benefits.
- **1986** – *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The United States Supreme Court's first ruling on sexual harassment, holding that a hostile work environment claim of sexual harassment is actionable absent any economic injury. The Court flatly rejected the argument that Title VII only applied to sexual harassment that resulted in economic damages, and cited the EEOC's Guidelines in defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of s sexual nature . . . where such conduct has the purpose or effect in unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The Court held that, to be actionable, the sexual harassment "must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." The Court also determined that sexual activity that is "voluntary", *i.e.* not physically forced, is not necessarily "welcome" if participation is perceived as a condition of employment.
- **1993** – *Harris v. Forklift Systems*, 510 U.S. 17 (1993). The Court clarified that the plaintiff need not prove damage to her "psychological well-being" to maintain a sexual harassment claim, but advocated a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." The test combines an objective "reasonable person" standard with a subjective perception by the victim of abusiveness, in order to show the conduct has actually altered the conditions of employment.
- **1998** – *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). These companion cases discuss when an employer is liable for the workplace harassment of its supervisors. In a *quid pro quo* case, the employer is vicariously liable for the actions of its supervisors. In a hostile work environment claim, where the alleged harassment is committed by supervisors, the employer is vicariously liable, without additional proof of negligence, unless the employer can make out a two-part affirmative defense: that "a) 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise." The City of Boca Raton was determined, as a matter of law to have lost the opportunity to raise the affirmative defense or reasonable care, based on the isolation of the beach employees from upper management, the "virtually unchecked authority" of the supervisors, and a policy that gave no "assurance that the harassing supervisors could be bypassed in registering complaints."
- **1989** – *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Supreme Court recognized a cause of action for gender stereotyping, in holding that a female employee who was not promoted to partner had a cause of action even though other women had been promoted at the time. The reasons given to Hopkins for her not being promoted, that she was too aggressive, needed to be more feminine and wear more make-up, and needed to "go to charm school" were evidence of unlawful gender stereotyping, showing that women were being held to a different standard than men.
- **1998** – *Oncale v. Sundowner Offshore* Services, 523 U.S. 75 (1998). The Supreme Court held that a male employee could maintain a claim for sexual harassment based on a hostile work environment caused by other men, without having to prove that the harassers were homosexual or otherwise making sexual advances at the plaintiff. The plaintiff, an employee on an off-shore oil rig, complained of severe sexually harassing conduct against him that the Court found went beyond mere "male-on-male horseplay." The Court held that the conduct constituted "behavior so objectively offensive as to alter the conditions of the victim's employment."

- **2013** – *EEOC v. Boh Bros. Construction Co.*, 731 F.3d 444 (5th Cir. 2013). The Fifth Circuit Court of Appeals determined that a construction worker could maintain a claim that he was harassed by his male crew superintendent "because of sex" after he called the plaintiff names for being effeminate, and exposed himself to the plaintiff. Not only was some of the conduct sexual in nature, it was also based on a perceived failure to conform to a gender stereotype, as recognized in the 1989 *Price Waterhouse v. Hopkins* case.

III. TWO RECENT 2018 TEXAS SUPREME COURT AND FIFTH CIRCUIT CASES

- **2018 -** *Alamo Heights ISD v. Clark*, No. 16-0244, 2018 WL 1692367 (Tex. Apr. 6, 2018). The Texas Supreme Court recently weighed in on what constitutes harassment "because of sex" with a lengthy opinion addressing a female gym teacher, Clark's, claim based on a female coworker, Monterrubio's, conduct. The Court found that the conduct, although "rude, crass, and hostile," and "so offensive that it is easy to understand that a sense of decency initially inclines one to want to grant relief," was bullying that was not based on the victim's gender. Clark reported more than four dozen incidents where Monterrubio bullied and harassed her on a daily basis, a few of which referenced female body parts such as Clark's breasts being large and the "dimples" on her buttocks showing through her pants, and other, more vulgar comments about having sex with a candle, and jokes about the smell of her private parts. Monterrubio was also reported to be excessively vulgar and rude to other employees, both male and female, and spoke frequently about her own sex life. Monterrubio's conduct at the faculty holiday party was sexually inappropriate, such as "extremely dirty dancing" and "grabbing their private areas" for photos. The Court noted that "the multitude of other incidents Clark described are not remotely sexual in nature" and include rudeness, bumping, swearing, reading Clark's private papers, teasing her for getting a spray tan, and discussing atheism and abortion in a group. Clark never alleged the harassment was because she was a woman, and reported other motivations, such as jealousy for her financial situation, and for Monterrubio's dislike for her. The San Antonio appellate court held for the plaintiff, finding that some of the harassment was gender motivated, because "the bulk of Monterrubio's comments related to the fact that Clark is female [including] . . . comments about Clark's female anatomy." The Texas Supreme Court reversed, stating that in a same-sex harassment case, the plaintiff must show either that the conduct was motivated by sexual desire or a general hostility toward women. In this case, the harasser was not homosexual, and she was equally hostile and inappropriate toward her male and female coworkers. The Court further stated that comments about gender-specific anatomy do not alone raise an inference of gender-based harassment. Thus, the plaintiff had not met her burden that the harassment was because of sex.
- **2018 –** *Davenport v. Edward D. Jones & Co.*, No. 17-30388, 2018 WL 2251695 (5th Cir. May 16, 2018). The Fifth Circuit Court of Appeals held that a manager's request than an employee engage in sexual conduct with a customer can form the basis for a quid pro quo claim, although in this case, the court did not find sufficient adverse employment action to support the claim. The appellate court rejected the district court's reasoning that "this circuit does not recognize quid pro quo sexual harassment claims based on a supervisor's request that a subordinate date a third-party in exchange for monetary bonuses," and that the sexual advances must be from the supervisor. Rather, the Fifth Circuit opinion stated that "this circuit recognizes quid pro quo harassment claims akin to Davenport's bonus claim." The manager allegedly conditioned the receipt of "big bonuses" on the plaintiff's submission to his repeated requests that she date the wealthy client. He also told her she should send the client some "nudie pictures" to peak his interest. "Because [the manager] made the requests, *he* engaged in the sexual harassment," not the client. Thus, plaintiff's claim that she suffered a tangible employment action based on her rejection of her supervisor's sexual harassment can stand. However, in this case, the court found that Davenport failed to provide sufficient evidence that a bonus was available, that she was eligible for it, and she was denied the bonus for refusing to date the client, and thus could not survive summary judgment on her quid pro quo claim. The dissent opined that it is a jury question whether Davenport would have received a bonus but for refusing to date the client, based the managers repeated statements she would receive bonuses in exchange for dating the customer, and the fact that Davenport had received a $400 bonus the previous year.

IV. RETALIATION FOR COMPLAINING ABOUT HARASSMENT

According to recent polls, anywhere from 42 to 76 percent of women who say they have been sexually harassed at work did not report the harassment to someone in a supervisory position, citing as the most

common reason, fear of retaliation.[3] It is crucial to follow up with complainants after an investigation to ensure that no retaliation is taking place, and to document the complainant's response at that time.

Title VII prohibits employers from retaliating against employees, and even prospective or former employees who complain about workplace harassment or other protected discrimination. The employee doesn't need to be correct about the complaint, only that the complaint, if true, would have been a violation of the law. Actionable Title VII retaliation occurs when (1) the employee engages in protected conduct; (2) the employer takes an adverse employment action against the employee; and (3) a causal connection exists between the protected conduct and the adverse employment action. *EEOC v. Emcare, Inc.*, 857 F.2d 678 (5th Cir. 2017). Proving whether there is a causal connection may depend on the amount of time that has passed between the complaint and the adverse action, and whether the complainant was treated differently than others who are similarly situated. *Id.*

Whether an adverse action is material enough to support a retaliation claim has been frequently litigated, and hinges on whether the action would dissuade a reasonable employee from engaging in protected activity. *See, e.g.*, *McCullough v. Kirkum*, 212 F. App'x 281 (5th Cir. Dec. 20, 2006) (holding relocation of plaintiff female employees' desks, vague comments by unnamed employees, and transfers to different divisions as requested by the female employees were not the sort of actions that would dissuade a reasonable person from reporting discrimination, and thus, no retaliation claim could be supported); *Eure v. Sage Corp.*, 61 F. Supp. 651 (W.D. Tex. 2014) (concluding a reduction in hours and consequently the associated income can be an adverse employment action to support a retaliation claim); *Lee v. City of Corpus Christi*, 749 F. Supp. 2d 521 (S.D. Tex. 2010) (holding plaintiff established a prima facie case of retaliation based on adverse action of destruction of plaintiff's computer files, which would be "extremely demoralizing because it would affect tremendously an employee's ability to be efficient and productive in the workplace.").

A termination or demotion is clearly enough, and not saying "good morning" is likely not. There is a lot of litigation over where the middle ground lies. A 2018 Texas opinion held that a lowered performance evaluation, which did not immediately result in a loss of employment, pay or promotion was still enough to maintain a claim, based on reduced prestige and likelihood of future advancement. *Metropolitan Transit Authority of Harris County v. Douglas,* No. 14-17-00176-CV, 2018 WL 1057629 (Tex. App.—Houston [14th Dist.] Feb. 27, 2018).

The recent Texas Supreme Court opinion of *Alamo Heights ISD v. Clark* (summarized above), may indicate that the Court has moved to a tougher standard for proving retaliation than the federal courts have promulgated. In *Clark*, the Court held that Clark did not engage in protected activity, because, although she complained of severe "harassment," she did not state that the harassment was "based on sex" and therefore was not a complaint, even if true, that is encompassed under Title VII.

V. BASIC GUIDANCE FOR PREVENTING AND RESPONDING TO WORKPLACE COMPLAINTS

A. Review anti-harassment policy to ensure it has a strong statement against workplace harassment and clear reporting procedures.

The organization should have an anti-harassment policy that includes a clear statement that sexual harassment is prohibited and that such conduct is unlawful. The statement should inform employees that if they engage in harassment, whether a manager, supervisor, or employee, they will be subject to disciplinary action, up to and including termination.

The policy should define sexual harassment as (i) unwelcome sexual advances; (ii) requests for sexual favors; and/or (iii) other verbal or physical conduct of a sexual nature when submission to the conduct is a term or condition of employment, is used as a basis for employment decisions, interferes with the employee's work performance, or creates an intimidating, hostile, or offensive work environment. The policy should provide examples of verbal, physical, and visual conduct that constitutes sexual harassment, while cautioning employees that the examples are not all inclusive. The policy must inform employees that they will not be retaliated against for complaining of harassment, reporting harassing behavior, or for participating in an investigation regarding a harassment claim.

In addition, the policy must include a procedure for employees to report harassment, including multiple avenues to report if reporting to a direct supervisor or manager is insufficient or the offender is the individual's direct supervisor or manager. The procedure should assure employees that reports will be investigated promptly and thoroughly, will be kept as confidential as possible, and that the organization will take swift action if it is determined that harassment occurred. A benefit of a reporting procedure is that an employer can assert a defense against liability if it can

[3] abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story; press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it; www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

show it had a policy against harassment with a reporting procedure but that the employee unreasonably failed to use the reporting procedure.

B. Remind employees of the anti-harassment policy and reporting procedures to reinforce that the workplace is one where employees should feel comfortable speaking out, and so any current issues can be addressed as soon as possible.

Regardless of whether the employer has a current problem with workplace harassment, now is a good time to remind employees of its anti-harassment policy and reporting procedures. The employer can send out an email with a copy of the policy and procedure and let employees know where the policy can be found in the handbook. The communication should assure employees that their complaints will be kept as confidential as possible and that the organization has an open-door policy, takes complaints seriously, and will address reports promptly and thoroughly. Learning about harassment complaints early, or while they are still minor, can allow resolution before things get out of control.

C. Train all employees, including supervisors and management, on the organization's anti-harassment policies and reporting procedures.

Training is a valuable tool for preventing harassment from occurring in the workplace, and to increase the likelihood that any harassing behavior will be reported so it can be addressed before the situation escalates. The training should provide management and employees with a clear and uniform understanding of what type of behavior is prohibited, how to report harassing conduct, how the organization will investigate complaints, and that retaliation is forbidden. Managers and supervisors should also be trained on how to respond to complaints from employees, no matter how minor, to foster a workplace environment that is professional and respectful, and guidelines for discipline of harassers. Managers should also be reminded that any romantic or sexual advances toward subordinate employees violate the anti-harassment policy and place them and the organization at legal and reputational risk.

Training must occur periodically and not just one time. How often may depend on the rate of turnover and the rate of promotion to supervisor and manager positions. Employers with seasonal employees might have to train much more frequently, as all employees, not just those who are regular, full-time, must be aware of the workplace harassment and discrimination policies.

Top management should reinforce the importance of the training by their attendance. Some go so far as to introduce each session and stress its importance.

In 2016, the EEOC completed and reported on its Select Task Force's findings on preventing workplace harassment, and created checklists for employers. Regarding training, the EEOC expects employers to provide "repeated and reinforced training on a regular basis" that is "supported at the highest levels" to "all employees at every level of the organization." The training should be **live whenever feasible** and conducted by qualified, interactive trainers. www.eeoc.gov/eeoc/task_force/harassment/checklist4.cfm.

D. Respond to complaints by investigating seriously, thoroughly, and promptly.

Upon receipt of a complaint, respond immediately to address the situation not only to reduce the organization's legal liability but also to show employees that their employer does not just pay lip service to its anti-harassment policy and reporting procedures, and that it takes harassment complaints seriously. Investigations should be conducted by a neutral party, whether that is HR, management, or outside consultants and/or legal counsel. The complainant should be interviewed and the discussion documented with details as to who engaged in the conduct, how the accuser has been affected, what the conduct consisted of, when the conduct occurred, and where it occurred. It should be determined whether anyone else has information that can assist in the investigation, and if so, those individuals should be interviewed as well. The person accused should be interviewed with a full opportunity to respond to the charges and provide other witnesses. Any written evidence, such as phone records, texts and posts, should be gathered and preserved. Based on the information gathered, each party's credibility should be weighed along with the facts presented to determine whether the conduct complained of occurred. The standard is not so high that it must be determined beyond a reasonable doubt that the conduct occurred, only that the employer has a reasonable belief, based on the information presented, that the harassing conduct occurred. If the results are inconclusive, the complainant should be informed of the results and the situation should continue to be monitored.

VI. FOCUS ON CONDUCTING WORKPLACE INVESTIGATIONS

A. Select the Right Investigator

The first decision an employer needs to make when embarking on an internal investigation is who should be the investigator. If litigation follows an investigated complaint, you can count on your investigator being the star witness at trial. An employer should consider that the person it selects as investigator in a sense "becomes" the employer in the eyes of a jury. The employer must decide, is this person professional and fair sounding? Does the individual's training and background show that

the employer made a reasoned and caring decision in its choice of investigator? Does the investigator articulate his or her views in an effective manner? In other words, is this person a good witness?

Also important to consider is whether the investigator has the skills necessary to conduct a good investigation. These skills include good interviewing techniques, the ability to take good notes, a thorough understanding of the legal issues and pitfalls involved, and familiarity with not only the general guidelines for conducting good investigations, but also the employer's internal policies and procedures regarding the investigation and the underlying alleged conduct.

Be sure that the investigator is not personally involved in the situation to be investigated or might not otherwise become a possible fact witness. Look into whether the investigator, or the investigator's family, has any personal history with either the accused or the accuser. In some cases, the work place has become so divided into "camps" with regard to the issue at hand that it is impossible to be sure that any employee at that location could be neutral. In those cases, it may be advisable to bring in an investigator from another site or even to hire an outside investigator whose neutrality can be less likely impugned. It is also helpful to get on record at the beginning of the investigation a statement from both the accused and the accuser that each is satisfied with the choice of the investigator.

The right investigator must also be impartial and credible—if the investigator has a criminal record, has been involved in prior accusations of dishonesty or misconduct, has had a personal relationship with a party to the inquiry, or has been disciplined in the workplace himself, a jury may feel the investigator cannot adequately assess the behavior complained about. The right investigator may ultimately be an in-house human resources professional, your organization's attorney, or an outside investigator.

B. Should an Attorney Conduct the Investigation?

It may be beneficial for an organization to hire an experienced employment law attorney to conduct the investigation, so long as the attorney is not the regular representative of the employer. Often, an attorney brings litigation and conflict resolution experience to the investigation which may assist with decisions about whom to interview, what to document, when to finish, and how to write a useful report. Also, an attorney can often use privilege to protect the confidentiality of the investigation until it is decided that the employer wishes to waive privileges to use the investigation as a defense should there be a charge or lawsuit. The attorney should begin the engagement with a statement that he or she is gathering facts for the purpose of rendering legal advice, to allow for confidentiality unless and until the employer wishes to waive it.

Remember that the investigator is often the star witness in litigation, and the neutrality and skill of the investigator becomes an issue. Obviously, the attorney who may be litigating the complaint or provides regular, confidential advice to the client on other matters could face conflicts if that same attorney performs the investigation that is intended to show appropriate employer response.

C. Gather Supporting Documentation

To conduct an investigation, the investigator should review the relevant documents before interviewing witnesses. Such documents will likely include the employer's policies and guidelines, the complainant's personnel file, and comparative documents (e.g., charts showing complainant's performance rating compared to other employees). The investigator may also need to contact your attorney, your human resources department, or accounting, environmental or safety experts to fully understand the underlying issues.

D. Conduct Effective Witness Interviews

An investigation should begin by providing appropriate and honest disclosures of what the investigation is about, and include any important acknowledgments in the witness's statement. Don't misrepresent the purpose of the investigation, as this may later taint your findings. Be sure that your notes reflect the witness's words, and that your own style or vocabulary does not make your notes less credible by using phrasing that the witness would never use.

The investigation must then focus on developing the facts. If the investigation is regarding specific events, inquire about all events which occurred during the relevant time frame, in chronological blocks of time. Ask the 5 "W's" (who, what, when, where, why) for each time block. Be sure to separate opinions from facts in notes, and also identify additional witnesses you may need to interview for the investigation. Get as many details as possible for later comparisons when judging which witnesses were more credible.

E. Government Employers Must Use the *Garrity* Warning when Questioning Witnesses about their Own Potentially Criminal Acts

Public sector employees have the right to remain silent under the Fifth Amendment when questioned about acts that could self-incriminate them, unless they are told that their statements will be used only for administrative (personnel) purposes, and cannot be used against them in a criminal proceeding. The document such witnesses sign assuring them of their rights is called a *Garrity* Warning, named after a U.S. Supreme Court case from the 1960s. *Garrity v. New Jersey*, 385 U.S. 493 (1967). Once signed, criminal judges will exclude such statements from evidence if introduced by

the prosecution. If an employee continues to remain silent after being offered the notice, he or she can be disciplined or terminated for failure to cooperate in an investigation, or the investigator may decide to issue a finding without the benefit of the employee's input.

F. Prepare a Final Investigative Report

A written report is the most effective way to organize the investigator's conclusions and allow for a determination of appropriate remedial action. A thorough, non-privileged report should contain (1) a description of the alleged wrongdoing; (2) a description of the documents, manuals, and witnesses examined; (3) witness statements; (4) a summary of the information elicited; (5) determination as to credibility where there are fact conflicts; and (6) findings of fact based on the credible evidence. The report should also document unsuccessful attempts to gain information, to explain any gaps in the evidence. Finally, be sure to proofread the report to avoid potential allegations that the investigation was not done carefully; remember, the report may be the main exhibit in any future litigation.

G. Confidential Investigations under Title VII

The EEOC encourages employers to assure employees that their complaints will be investigated in as confidential a manner as possible. However, in 2012, the Buffalo, New York office of the EEOC sent a letter to an employer warning that the employer's policy violated Title VII because it prohibited employees who participate in an internal investigation from discussing the matter with others. 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 went on to state that:

> 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.

Although the law is not settled in this area, it is important that confidentiality requirements for witnesses in internal investigations, and especially concerning the complainant, are not overly-broad. Any confidentiality requirement should not imply that a complainant cannot contact an outside agency like the EEOC, or that he or she cannot discuss the allegations with an attorney, spouse, or other supporting person.