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**SOMETHING FOR EVERYONE:
HOW TO ADDRESS THE INTERESTS OF THE EMPLOYER,
THE COMPLAINANT AND THE ACCUSED IN AN INVESTIGATION
OF SEXUAL HARASSMENT ALLEGATIONS**

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I. **INTRODUCTION**

Employers must investigate promptly when information surfaces which raises the possibility of sexual harassment in the workplace. Employers must also investigate allegations of misconduct before terminating an employee who has contractual good cause rights. Rising legal standards applicable to such investigations have imposed greater and greater obligations upon employers. In addition to simply meeting their legal duty, most employers now have other goals as well when conducting an investigation, including to gather sufficient facts upon which to base employment decisions, to minimize the possibility of litigation from either the accuser or the accused, and to minimize disruption to the workplace. To meet its own goals, an employer embarking on an investigation must be mindful of the interests of the complaining party and the accused party.¹

An employee who comes forward with a complaint of harassment has multiple objectives such as wanting to be taken seriously, to obtain a prompt resolution of the dispute without suffering retaliation, and often to avoid being pushed into litigation by a spouse, family member, or co-workers.² An accused individual, also a potential plaintiff, has similar desires, as well as concerns about safeguarding his/her reputation, career or marriage, and a desire for exoneration. From our perspective as attorneys regularly engaged to conduct independent factfinding investigations, we suggest that while the parties may not ultimately agree with some or all of the factual conclusions drawn from the evidence gathered, a good investigative process can and should address these underlying needs. It is our experience that the parties can still feel heard and satisfied by the investigative process, even if their individual legal positions are not specifically vindicated.

There is no road map to a perfect investigation, but an investigation serving as the basis for an employment decision which can withstand scrutiny at trial should be undertaken with an open mind and a commitment to neutrality. This paper provides practical guidance, based on court decisions and our personal experience as a neutral factfinders in dozens of cases, which may help to avoid some of the legal nightmares caused by a faulty, haphazard investigation.

¹ This article was first presented at the California Employment Lawyers Association, 1999 Annual Employment Law Conference, September 24 and 25, 1999 in San Francisco, California, and again in 2004 at the Annual Labor & Employment Law Symposium of the Los Angeles County Bar Association.

² It should be noted that an employer's duty to investigate is a legal one, and cannot be relieved by a complainant's lack of consent or cooperation. See Hollis v. Fleetguard, 668 F.Supp. 631, 632, (M.D. Tenn. 1987), aff'd, 848 F.2d 191 (6th Cir. 1988). See contra, Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997)[holding that the question of whether a supervisor breached his/her duty to remedy harassment by honoring an employee's request to maintain the information in confidence will vary from case to case].

II. THE EMPLOYER'S OBLIGATIONS

Under both federal and state law employers have long been under a legal duty to respond in a timely and thorough manner to information which raises the issue of sexual harassment;³ however, they usually responded by choosing an investigator from a personnel or human resources department. Where sexual harassment was found, the accused individuals were terminated, with little concern that they might sue.

If an accused individual did sue, employers usually defended such termination decisions by arguing that the employee was at-will and/or that there was sufficient and good cause for termination. With the erosion of the at-will doctrine and the steady increase in the number of individuals challenging adverse employment actions, employers have been forced to prove it engaged in a fair and adequate investigation to defend its employment decisions. Even though an investigation does not have to be perfect to be legally adequate, employers would do well to re-examine and refine the manner in which an investigation is conducted.⁴

In Cotran v. Rollins Hudig Hall, Int'l, 17 Cal.4th 93 (1998), the California Supreme Court rejected the argument that an employer had to prove sexual harassment had actually occurred to justify termination, requiring the employer to have had only a good faith belief that the harassment had occurred. More precisely, the Court said the inquiry should be whether termination was the result of : “a reasoned conclusion, . . . supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.” Cotran, 17 Cal.4th at 108.

³ California Government Code §12940(h)(1) provides in relevant part “harassment of an employee or applicant by an employee, other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring.”

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. similarly provides for liability where an employer fails to conduct a good faith investigation. Although the court declined to outline a bright line rule of employer liability in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), subsequent cases have imposed an affirmative duty on employers to conduct a reasonable investigation and take effective remedial action. *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991)(quoting *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984)). *Barrett* held that an employer properly remedied a hostile work environment by fully investigating and taking proper remedial action, *Id.* at 427.

⁴ In Cotran v. Rollins Hudig Hall, Int'l, 17 Cal.4th 93 (1998), a high ranking executive was accused of sexual harassment by two female employees; he denied the charges. An in-depth investigation ensued, conducted by the company's Manager for EEO compliance, during which over twenty witnesses were interviewed, including those Cotran asked to be interviewed. Both complainants signed affidavits, telephone records were reviewed to test the allegations, and at least one witness stated that Cotran had harassed her as well. The EEO Manager concluded that Cotran had most likely sexually harassed the women and, in reliance thereon, Cotran was terminated. He sued for breach of implied contract and, finding that he had not actually engaged in sexual harassment, the jury awarded him nearly \$1.8 million.

Although there are no hard and fast rules⁵, several court decisions assist in determining the makings of a good and fair investigation.⁶ The Cotran decision was presaged by the New Mexico Supreme Court which required an employer's good faith belief (that termination was appropriate) to be objectively reasonable. In Kestenbaum v. Pennzoil Co., 766 P.2d 280 (N.M. 1988), cert. denied, 490 U.S. 1109 (1989), the Court found that the company's discharge of an alleged harasser was unreasonable. The evidence at trial revealed that the decision makers relied solely on an investigative report, a report which the investigator admitted was not intended to be the sole source of factual findings, which it failed to distinguish between first hand knowledge, hearsay, and rumors, and which failed to make witness credibility evaluations.

In Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995), the Ninth Circuit examined an employer's investigation and found it inadequate. In Fuller, the City first became aware of the accused's behavior in October and attempted to close the investigative file in late December, even though the accused and numerous percipient witnesses had not been interviewed. The file was not closed but the accused, Romero, was not interviewed until February, after the City received notice that Fuller had filed a complaint with the EEOC. The City ultimately determined that the allegations were "unfounded".

The Court criticized the City for failing to promptly interview Romero, before he learned of the investigation and was warned of the claims against him and could prepare extensive documentation in his defense. Although some of Romero's statements could have easily been corroborated or refuted, such action was not taken by the City's investigator. For example, Romero denied calling Fuller but no review of his phone records was undertaken. Moreover, even though Romero admitted he lied about one alibi he gave to the investigators, his second purported alibi was not checked. The Court found that the City failed to give sufficient weight to evidence that contradicted Romero's statements.

The Ninth Circuit in Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) faulted the company not so much for an inadequate investigation, but for being slow in responding to Steiner's complaint. Although Steiner had complained internally, the company undertook a "serious" investigation only after she filed a subsequent complaint with the Nevada Equal Rights Commission.

On the other hand, employers are occasionally rewarded for good investigations. In Casenas v. Fujisawa USA, Inc., 58 Cal.App.4th 101 (1997), the plaintiff was unhappy with a

5 The Court in Cotran opined that it would be "imprudent to specify in detail the essentials of an adequate investigation" choosing instead to rely upon "common law's incremental, case by case jurisprudence, adjusting the standard as its sufficiency is tested in practice". Id.

6 The Court in Cotran, supra, cited with approval language in Pinsker v. Pacific Coast Society of Orthodontics, 12 Cal.3d 541 (1974) to the effect that fairness may be satisfied by any one of a variety of procedures which afford a fair opportunity for the accused to present his position and specifically refused to "fix a rigid procedure that must invariably be observed".

performance review and thereafter alleged that her district manager had sexually harassed her and then used the review to retaliate against her for refusing his advances. The Court noted that Casenas also had received the highest salary increase in her district and was promoted. In response to the allegations, Fujisawa contacted Casenas to arrange an interview and interviewed her as soon as she was available, interviewed Brown, and over the next week interviewed Brown's other current and former direct reports, as well as a management level person from a related corporate enterprise. After the interviews, and further review of Casenas' performance evaluation, Fujisawa informed her it had concluded her "highly commendable" rating was accurate and adequate and told her Brown was given a formal, written reprimand. Although they continued to respond to her communications, and met with her personally at length, she refused to accept the company's decision, quit and sued. In affirming summary judgment to the company, the Court described the company's actions vis-a-vis Casenas as "exemplary".

More recently, the California Court of Appeal, First District, in Silva v. Lucky Stores Inc., 65 Cal.App.4th 256, 76 Cal.Rptr.2d 382 (1998), again affirmed summary judgment in favor of the employer, finding that the employer acted with good faith in making a termination decision, following an investigation which was appropriate under the circumstances.⁷ The Court made an intensive review of the investigation that had been conducted by one of Lucky's human resources representatives and provided some excellent guidelines for future investigations:

Lucky's evidence demonstrates an appropriate investigation under the circumstances. Lucky utilized Szczesny, an uninvolved human resources representative, to investigate the charges. Szczesny had been trained by in-house counsel on how to conduct an investigation. Szczesny investigated the complaints promptly and memorialized his findings on Lucky's witness interview forms. He had important witnesses provide their own written statements regarding events at issue.

Szczesny asked relevant, open-ended, nonleading questions. He attempted to elicit facts as opposed to opinions or supposition. He maintained confidentiality by conducting a number of interviews off the store premises or by telephone. He encouraged those he interviewed to page him if they wanted to talk with him again. The record does not indicate how Szczesny determined which independent employees to interview. Apparently, various employee witnesses gave him additional names of persons who might provide pertinent information. Szczesny's notes indicate those interviewed were generally happy with their jobs, i.e. they were not disgruntled employees.

Szczesny notified Silva of the charges promptly and afforded him an opportunity to present his version of the incidents. He encouraged Silva to call him if he wanted to talk with him again and Silva called Szczesny the next day to provide more information.

⁷ The Silva court also reminded us that all the elements of the Cotran standard are triable to the jury.

Szczesny provided the critical witnesses with an opportunity to clarify, correct or challenge information provided by other witnesses which was contrary to their statements or which cast doubt on their credibility. After interviewing all the other witnesses, Szczesny gave Silva a final opportunity to comment on the information he had gathered. As such, Lucky's investigation of the sexual harassment allegations meets Cotran's fairness requirements. Lucky listened to both sides, advised Silva of the charges and provided him with ample opportunity to present his position and correct or contradict relevant statements prejudicial to his case. Silva, supra at 76 Cal.Rptr. at 392.

A. Fairness And Neutrality: The Benchmarks of Success

Once it is determined that an investigation is necessary, an employer's most important role is to ensure that the investigation is conducted in a neutral and objective manner. The employer should intentionally limit its involvement in the investigatory process to providing access to witnesses and documents, scheduling interviews, and other such administrative or clerical services. It must not dictate, or be seen as dictating, the results, tone or substance of the investigation. Nor should it seek to influence the results of the investigation upon which it wishes to rely. If this occurs, the employer increases the likelihood of a lawsuit by a disgruntled party and may lose the ability to present the investigators, and the investigative findings, as fair and objective at trial.

While an employer should be allowed some discretion in deciding the extent of an investigation, it is the investigator's responsibility to properly gauge and determine the scope of the investigation. While not allowing an employer to insert itself into the investigative process, an investigator need not shy away from logistical communications about the investigation. For example, an investigator may inform the employer as to how long the investigation might be expected to take, which witnesses need to be interviewed (including those identified by the complainant and alleged harasser), and what documents must be examined. A good investigation need not be unreasonably exhaustive and expensive, but it does need to be reasonably thorough.

B. Selecting the Appropriate Investigator

After the duty to investigate has been triggered, the employer must decide quickly who will conduct the investigation. The employer's decision should be driven by the goals of the investigation, i.e. to gather the facts in an efficient manner and to provide support to any remedial action taken by the employer as a result of the investigative findings. These goals are particularly important to remember in light of the jury's award in Cotran.

The employer must decide whether to use an attorney or a lay person, and whether the investigator should be one of its own employees, either a Human Resources employee or in-house counsel, or an outsider, either an attorney or professional investigator. An

informal survey of management professionals conducted by Masters & Ribakoff in 1999 revealed that employers typically consider the following factors when choosing an investigator:

- the seriousness and nature of the charges;
- the person(s) targeted in the complaint (the higher the rank of the employee, or if Human Resources, the legal department or a client is accused, the more likely an employer will hire an outsider);
- the time required for the investigation;
- the costs to, and resources of, the employer;
- the likelihood of litigation;
- the need for credibility determinations; and
- whether the complainant or the accused has retained counsel.

When listing the skills they thought a good investigator should possess, these same management professionals consistently listed the following skills as essential:

- the ability to be objective and neutral;
- good fact gathering/investigatory skills, including knowing who to interview and what to ask, as well as the ability to put the interviewees at ease;
- the ability to write and the potential to testify well and convey all the facts in a clear and thorough manner; and
- overall credibility and reputation in the community.

1. Inside versus outside investigators

In our survey, most employers reported that internal investigations were more cost efficient than utilization of an outsider; however it was universally noted that short term financial considerations were not always the most important. Management felt that hiring an independent/outside investigator, whether an attorney or not, provided the appearance of neutrality, both to the complainant and to the accused, and ultimately to a jury. Although an independent investigation was more costly than an internal investigation, they believed this strategy could save them money in the long run by avoiding litigation and/or helping them succeed on the merits.

2. Attorneys as investigators

Management personnel surveyed also expressed a preference that the outside investigator be an experienced employment attorney. This appeared to be primarily due to the attorney's knowledge of substantive law, as well as the perceived ability to invoke the attorney-client privilege. (See discussion of privileges hereinafter at page 8.) In light of the likelihood that the neutrality and fairness of the investigation will be questioned if litigation results,

employers must choose an investigator who will make a credible and knowledgeable expert witness, conveying an impartial demeanor.

Because outside investigators are initially unfamiliar with the particular employer and the personal dynamics of the individuals involved, they generally bring a fresh perspective to the matter and tend not to be burdened by premature conclusions. Outside investigators are also less likely to be intimidated by corporate politics, the nature of the complaint, or the respective status of the complainant and alleged harasser. Since they are not part of the working environment, outside investigators seem to provide a greater level of comfort to the parties and witnesses who may associate the human resources department with company management. This is important for the interviewing process, where comfort is essential to obtaining crucial information from witnesses who are often afraid of retaliation or who will remain in the work environment with the alleged harasser and/or complainant.

Those employers in our survey who favored non-attorneys as investigators believed that cross examination techniques instilled in attorneys can preclude an objective gathering of information and can tend to be perceived as demonstrating bias and an intent to reach a certain conclusion. It is therefore crucial for attorney investigators not to attack the complainant or the accused, or any one else involved, but rather to gather the facts of the dispute in an impartial manner using open-ended, non-judgmental questioning techniques. Nor should the attorney investigator typically make legal conclusions or provide legal advice. The role of the attorney investigator should be carefully spelled out in the retention agreement.

C. Maintaining Confidentiality

Confidentiality is a main concern to all those involved in a sexual harassment investigation. The employer does not want the work environment disrupted by gossip and rumors about the charges and is concerned about potential exposure for claims of invasion of privacy and defamation. Similarly, the complainant or the alleged harasser do not want the details of the complaint, or other parts of their private lives, broadcast throughout the office.

Recognizing that employees tend to want to discuss an ongoing investigation (or anything else in the workplace that is out of the ordinary) and speculate about the merits of the claims, there are several steps an employer can take in the attempt to maintain confidentiality. One is to distribute a memorandum from the head of the company at the outset of an investigation, advising witnesses that an important employment issue has surfaced, that an independent investigation is being conducted, that they are required to maintain confidentiality, and specifically directing them not to discuss the matter with anyone inside or outside the company.

In addition, at the beginning and conclusion of the interview, the investigator should admonish each witness about the need for confidentiality. The investigator, with the employer's consent, may also require each witness to sign a form acknowledging that they have been requested to maintain confidentiality and that they are aware that disciplinary action could

be imposed for violations of same. A typical acknowledgment form contains a request for the witness to cooperate fully with the investigators and to answer all questions truthfully and completely. It may also contain some or all of the following information:

- the company's responsibility to investigate charges and a description of the role of investigator(s);
- some background and credentials of the investigator(s), including experience and knowledge of substantive area of law;
- the purpose of the investigation is to gather information fairly and objectively and report the factual findings to the employer;
- the need for honesty;
- reiteration of the employer's policy against unlawful retaliation;
- the possibility of remedial action if the investigation discloses information which violates the employer's policies or procedures; and
- the name of a contact person in the event that the witness has questions or additional information.

D. Asserting Privileges

1. The attorney-client privilege

Communications between an attorney and a client are protected under both federal and state law.⁸ Employers argued, sometimes successfully, that their investigations were privileged whenever they included communications with counsel, but California law soon made clear that the attorney-client privilege protected only those communications to an attorney who was acting in a legal, not a factfinding capacity. Watt Industries Inc. v. Superior Court, 115 Cal.App.3d 802 (1981).

The attorney-client privilege will probably never protect the fact that an investigation was conducted. Nor will the attorney-client privilege attach where the attorney investigator is functioning solely as a factfinder. Where there is a clear understanding that an attorney/investigator's services were provided in anticipation of litigation and for the purpose of providing legal advice to the employer, the privilege may be asserted, but there may be negative consequences in doing so.⁹ As discussed more fully below, a conflict arises when attorney factfinders later serve as the employer's trial counsel; careful planning to avoid the problem inherent in this dual capacity must be made. While some employers and counsel fear that a jury will equate an attorney-client privileged investigation with a lack of neutrality and never attempt to create a privilege, it is our experience that most employers still wish to control the

⁸ Upjohn Co. v. United States, 449 U.S. 383, 390 (1981); D.I. Chadbourne v. Superior Court, 60 Cal.2d 723 (1964); see also California Evidence Code §950 et seq. and California Code of Civil Procedure §2018.

⁹ Roberts v. City of Palmdale, 5 Cal.4th 363 (1993); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

dissemination of the results of an investigation, and therefore seek to cloak the entire investigation as privileged from the outset.

2. The work product privilege

Even if the facts of the investigation are not kept private by the attorney-client privilege, the work product privilege may still protect documents and other items prepared by an attorney in anticipation of litigation.¹⁰ However, a plaintiff may be able to obtain documents if s/he can prove substantial need and inability to obtain the information on his/her own without undue hardship. Federal Rules of Civil Procedure §23(b)(3) (codifying Hickman).

3. The self-critical analysis privilege

A third privilege that may attach to an investigation is the self-critical analysis privilege. Although the Supreme Court has never confirmed or denied the existence of such a privilege, some courts have relied on the flexibility of Rule 501 of the Federal Rules of Civil Procedure to "develop rules of privilege on a case by case basis." Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 425 (9th Cir. 1992). As developed, this privilege may prevent the discovery of a company's personnel review reports, internal investigation documents, and other materials prepared with an expectation of confidentiality.

In order to demonstrate that materials are protected, the party asserting the privilege must demonstrate that the information resulted from a critical self-analysis process and that there is be a strong public interest in preserving the free flow of the information in question. Dowling, Id. at 426. Courts have been reluctant to deny discovery of such information, doing so only when the rationale behind the exclusionary policy is great.

4. Waiving privileges

Even if initially privileged, if an employer should need to rely on the information gathered and/or the reasonableness of the investigation to defend itself, it will be required to waive the privileges. In other instances, reliance on the investigation can result in an inadvertent waiver.¹¹

The issue of waiver was addressed in Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal.App.4th 110 (1997). Wellpoint hired an attorney to investigate an

¹⁰ California Code of Civil Procedure §2018; Hickman v. Taylor, 329 U.S. 495 (1947). But see, United States v. Nobles, 422 U.S. 225, 238 n.11 (1975), where the Court held that by presenting the investigator as a witness, the employer waived the privilege with regard to matters covered in the investigator's testimony.

¹¹ See, e.g. Harding v. Dana Transport, Inc., 914 F.Supp. 1084 (D.N.J. 1996), wherein the court found attorney-client privilege and work product doctrine protections waived after the employer defended on the basis of an investigation by outside counsel.

employee's claims and sent a letter stating that each charge...made by the employee had...been fully investigated and taken seriously". The Court held that when an employer raises the defense of an adequate investigation, it cannot hide behind a privilege to keep the entire investigation secret:

...any defense by the employer based on the reasonableness of its attorney's investigation would place the adequacy of the investigation itself at issue, and the employer would then not be able to claim the attorney-client privilege or work product doctrine to protect the otherwise privileged communications generated by that investigation. Wellpoint, supra, at 128.

This holding was refined by the Court of Appeal, First District, in Kaiser Foundation Hospitals v. Superior Court of San Mateo County, 78 Cal.Rptr.2d 543 (1998). Kaiser assigned its human resources consultant to conduct an investigation of alleged inappropriate sexual conduct by one of its physicians-in-chief. The consultant periodically consulted with members of Kaiser's legal department to obtain advice about the process and progress of the investigation, which he intended to keep confidential. In response to a document request in the subsequent litigation, Kaiser agreed to provide the investigative report and notes and documents that did not refer or relate to communications with counsel, pursuant to a stipulation that it was not waiving any privilege; a motion to compel followed. The plaintiffs, citing Wellpoint, supra, asserted that as long as Kaiser was placing the scope and adequacy of its investigation and remedial action at issue, it could not selectively withhold documents pursuant to the attorney-client privilege or work product doctrine. The trial court granted plaintiff's motion. Kaiser immediately filed a writ of mandate seeking a stay and directing the Court to set aside and vacate the trial court's order.

The First District declined to interpret Wellpoint, supra, as requiring production of all communications involving an employer's investigation, noting that the Wellpoint Court had specifically rejected a blanket rule excluding attorney investigation of employer discrimination from attorney-client and work product protection. Rather, a document by document analysis is required to determine if the dominant purpose of the document was or was not the furtherance of the attorney-client relationship, notwithstanding the original purpose of employing the attorney. The trial court was found to have erred in giving plaintiffs carte blanche discovery of the investigative files, rather than basing its ruling on the subject matter of each document sought. The Court was also mindful that Kaiser had produced over 90 percent of its investigative file, withholding and/or redacting only a small part of the file, had provided a detailed privilege log, and that the production had been pursuant to a stipulation of non-waiver. The Court noted that Kaiser did not deny plaintiffs any discovery at all as did the employer in Wellpoint.

The lesson is clear: if an employer's defense hinges on the investigation it conducted, the factual portions of that investigation will be discoverable, whether or not the

investigator is also an attorney.¹²

Steps can be taken to reduce the likelihood of unintended waivers and other undesirable consequences, although perhaps at the risk of decreasing the appearance of true neutrality. Labeling documents "attorney-client privileged" or "confidential" and careful selection and preparation of the investigator will be required if the employer hopes to maintain a privilege, at least until such time as it is determined that the investigation results should be disclosed. A non-attorney investigator may be selected and directed to report to the employer's counsel, as in Kaiser. If an attorney is selected, care should be taken to draft a retainer letter which explicitly states the investigator will be functioning under the auspices of the company's legal counsel. The retainer letter could also include a statement that the investigator will be acting in a dual role of legal advisor and factfinder, if appropriate. Such steps will help insure that the employer, the holder of the privileges, makes an informed choice about whether and when to waive the privileges. One should consider, however, that such designations may be used to impugn the investigator's neutrality.

Alternatively, a factfinding investigation may be undertaken with the express understanding at the outset that its substance will be discoverable, and that only information, conversations, and/or documents which are truly attorney-client or work product privileged will be protected. Increasingly employers, at the suggestion of defense counsel, voluntarily disclose to the parties some or all of the investigative findings in an effort to informally resolve the situation, often in a pre-suit mediation proceeding.

III. MEETING THE NEEDS OF THE COMPLAINANT

As discussed above, there is no question that an individual complaining of unwanted sexual attention is owed a legal duty of a prompt, thorough and objective investigation.¹³ Having represented hundreds of individuals over our careers, we are of the opinion the majority of individuals faced with a problem at work find it extremely difficult to come forward, especially with allegations of sexual harassment, notwithstanding the plethora of laws and personnel policies that offer protection to a sincere complainant. The fear of embarrassment, disbelief, and retaliation can be paralyzing, making action difficult and at times seemingly impossible. An employee contemplating a complaint has myriad questions, inter alia, how seriously will the complaint be taken; whether there will be an investigation; whether

12 It may be possible to prevent disclosure of confidential work product communications to employer's counsel during the course of the investigation. However, it may still be argued that the opposing party is entitled to discover the substance of any alleged attorney-client communications to determine whether the same influenced the factfinding process.

13 See, Steiner v. Showboat Operating Co., 25 F.3d 1459 (6th Cir. 1994); Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995); and Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

the investigation will be fair and objective; how quickly the alleged inappropriate behavior cease; will personal matters be kept confidential and private; will adverse action be taken by the employer; how will the accused react; and will the witnesses and records substantiate the complaint.

While an employee is not currently required to complain under state law, s/he may be under federal law.¹⁴ An employer may defeat a federal sexual harassment, hostile work environment claim by showing that the employee unreasonably failed to take advantage of its complaint procedure or otherwise failed to exercise reasonable care to avoid harm.

Mindful of its own needs to resolve the dispute and to avoid litigation, the prudent employer will want to be sensitive to the complainant's needs in setting out to investigate and in devising the investigative process. The employer should keep in mind that the complainant must feel comfortable with the investigator and feel that he/she is being kept up to date and given sufficient access to information about the investigation, or he/she may begin to question the employer's good faith. At a minimum, the employer should discuss with the complainant the decision to investigate the background of the investigator(s), who to contact about the investigation and its results, how long the investigation is expected to take, and efforts which will be taken to maintain confidentiality.

A. Involve Complainant's Counsel

If the complainant has counsel, there are other factors to consider. There is a tendency on the employer's part not to want to allow the complainant's attorney in the process. If that happens, chances are the complainant's attorney may not allow the complainant to be interviewed. Even if the complainant will not be interviewed, the employer must still proceed with the investigation and make decisions based upon the information it can gather.¹⁵

In deciding whether to cooperate in an investigation, the complainant's attorney must weigh the best interests of his/her client in light of the evidence already obtained and in light of the strategic goals to be obtained for the client: does the client wish to maintain

14 The U. S. Supreme Court in Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), crafted an affirmative defense to allegations of a hostile environment created by a supervisor when no tangible employment action is taken. For the defense to succeed, an employer must prove that it exercised reasonable care to prevent and correct any sexually harassing behavior and that the employee unreasonably failed to take advantage of such opportunities. Ellerth testified that she never complained about the accused's behavior to her direct supervisor during her employment because, pursuant to Burlington's policy, it would have been her supervisor's duty to report it. The Court gave Burlington a chance to prove the new affirmative defense. Not so in Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), where the Court found the City from had failed to disseminate its sexual harassment policy which did not contain a provision to bypass harassing supervisors when registering complaints and had made no attempt to track the conduct of Faragher's supervisors. As such, the Court found that the City did not exercise reasonable care to prevent harassment. No California case has yet adopted the Burlington/ Ellerth analysis.

employment, seek to have corrective action imposed on the harasser, and/or obtain a monetary resolution/buyout of employment. The attorney must also consider the emotional condition of his/her client. If the client is an emotional wreck, it may be wise to limit the client's involvement in an investigation, or at least seek to secure an agreement to have counsel and/or a psychotherapist present during the complainant's interview or to have the interview take place at the attorney's office.

By refusing to participate in an investigation, counsel for complainant may miss an opportunity to learn more about the facts and the client and to learn how the employer sees the situation and possibly what defenses should be anticipated. We have found that more experienced counsel will generally be able to work out an arrangement with which they are both comfortable, and which provides that information will be shared.

Once an investigation is completed, employer's counsel will typically convey the investigative findings to the employee's counsel in some fashion. Counsel for the employer and counsel for the complainant should discuss whether the employer will share the details of the investigator's findings or possibly the actual investigative report, if one is prepared. The decision of whether or not to have the investigator prepare a written report is entirely at the employer's discretion, but this is a fruitful area for creative negotiations. We have participated in investigations where counsel agreed that the entire written investigative report be delivered simultaneously to both the employer and the complainant and her counsel. We have also be involved in situations where the complainant's attorney was given only a summary of the investigation, including partial witness information, as part of settlement negotiations. Recently we have been asked to transition from the role of independent fact finder to that of mediator, assisting the parties in reaching resolution while sharing the results of the independent investigation.

Some plaintiff's lawyers believe that an investigation conducted by someone who's paid by the employer will always be biased and therefore there is no reason to cooperate. That cynical approach does not serve the client's interests well as it denies counsel the opportunity to obtain all available information before committing a client to the litigation process, including investigative information relied on by the employer. Indeed, it is our experience that employers typically express a genuine desire to uncover the "truth" objectively and impartially, whatever it is and rarely lobby the investigators for a particular result.

B. Employment Actions Pending Investigation

Once information surfaces which raises the issue of unwanted sexual attention, it is crucial to the employer, the complainant, and the accused that there be no continuing harassment and/or retaliation.¹⁶ The employer may therefore be faced with the dilemma of

¹⁵ Title VII of the 1964 Civil Rights Act, §2000e-3, §704(a), prohibits retaliation against an employee who has "opposed any practice made an unlawful employment practice by this title, . . . or participated in any matter in an investigation, proceeding or hearing under this title." Section 12940 (f) of the Fair Employment and Housing Act provides substantially similar protection.

having to take some action pending the completion of the investigation.

While many employers tend to want to remove the complainant from the alleged hostile environment, this action creates potential liability.¹⁷ In the most conservative view, whether or not to remove the complainant, rather than the alleged harasser, from the work environment pending the investigation should be left to the complainant. The complainant may want to remain at his/her job, or s/he may welcome some time off, paid or unpaid, to deal with the emotional and physical stress caused by the alleged harassment. Whether to place the complainant or accused on leave is a topic which should be covered with the complainant or complainant's counsel.

If the complainant does wish to remain in her current position, the employer should strongly consider temporarily reassigning the alleged harasser until the investigation is completed or placing him/her on an administrative leave. If moving the accused is not possible, the employer should determine whether the complainant feels s/he can remain working with the alleged harasser in place or whether s/he is willing to temporarily take another position, out of the vicinity of the alleged harasser. The important thing is for the employer to work with the complainant and/or his/her counsel to devise an appropriate solution, rather than automatically transferring the complainant away from the problem.

While the employer owes a duty not to retaliate against a complainant because of the charges brought forth, in some circumstances, a complainant can lose this protection, such as where charges are knowingly false and malicious or where the complainant's position has become antagonistic to the employer.¹⁸ Nothing in Title VII compels an employer to absolve and rehire an employee who engaged in deliberate, unlawful activity against it.¹⁹

17 In Steiner, *supra*, the Court criticized the casino's act of moving the complainant's shift rather than the alleged harasser's, and imposed liability on the employer. Steiner at 1464. Similarly, in Intelkofer v. Turnage, 973 F.2d 773, 780 (9th Cir. 1992), the Court sternly stated that a victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan.

18 In Smith v. Singer, 650 F.2d 214, 217 (9th Cir. 1981), Smith, Singer's Director of EEO Programs, filed a complaint with two outside agencies alleging widespread discriminatory practices at Singer, but denied he knew the identity of the charging party. Smith then worked on the investigation of the complaints and solicited other employees to allege discrimination. When Singer discovered that Smith was the complainant it relieved him of his duties and asked him to detail its alleged EEO deficiencies in a memorandum. After Singer received the memorandum from Smith, it terminated his employment and he sued for retaliation. The court found that Singer was not fired in retaliation for performing an activity protected under Title VII, but due to his failure and inability to perform certain tasks fundamental to his position. The Court observed that "by filing complaints against Singer . . . , appellant placed himself in a position squarely adverse to his company." Thus, since his legal position had become inimical to the employer, he could no longer perform the duties required of him as the company's EEO Officer.

19 EEOC v. Kallir, Philips, Ross, Inc., 401 F.Supp. 66 (S.D.N.Y. 1975), relief determined, 420 F.Supp. 919 (1976), aff'd. based on Dist. Ct. opinion, 559 F.2d 1203 (2d Cir. 1976), cert. denied, 434 U.S. 920 (1977), in which the Supreme Court concluded that "under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charges may be so excessive and so deliberately calculated to inflict needless conomic hardship on the employer that the employee loses the protection of section 704(a)."

IV.
MEETING THE NEEDS OF THE ALLEGED HARASSER

Individuals accused of sexual harassment are increasingly seen as viable plaintiffs. Just as a legal duty is owed to an individual complaining of unwanted sexual attention to conduct a careful, objective and timely investigation, a similar duty is also owed to the accused harasser. Like the accuser, an accused harasser is apprehensive about the good faith and fairness of the investigation. Although most of the alleged harasser's investigatory concerns mirror those of the complainant, procedural due process and fairness are of the utmost importance to the alleged harasser, whose reputation and job security often depend upon the investigative findings.

Among the questions foremost in the mind of a individual accused of misconduct are the following: have I already been found guilty; will I be treated fairly; what exactly is the complaint; what rights exist under the employer's policies and/or the collective bargaining agreement (if applicable); will there be an adequate opportunity to respond to each allegation of the complaint; will there be an opportunity to provide witnesses and relevant information; will a lawyer be necessary and will one provided by the employer; and will there be an opportunity to participate in the resolution of the complaint.

A. Fair Treatment

Fair treatment is of particular concern to the alleged harasser, since some employers are apt to terminate the alleged harasser in the hopes of quickly remedying the problem and avoiding litigation by the complainant. Eliminating sexual harassment can mean discharging the harasser or taking other drastic or punitive actions against him. Employer's main goal used to be avoiding liability to the alleged victim. However, with wrongful termination claims by employees fired or mistreated by their employers after being accused of sexual harassment on the rise, employer goals must now include avoiding liability to the alleged harasser as well. Although the alleged harasser is not always legally entitled to due process prior to remedial action, juries seem quite willing to impose liability on employers who terminate employees who are not found to have actually committed sexual harassment. See e.g. Cotran, supra.

B. Reputation Rights

Personal rights claims such as defamation and invasion of privacy are emerging as a frontrunner claims in suits by accused harassers against employers. In investigating complaints of sexual harassment and other unlawful conduct, the employer therefore must take steps to safekeep the reputation of the alleged harasser, or run the risk of litigation. Although truth is a complete defense and a qualified privilege exists for communications made without malice to a

recipient who shares a common interest with the communicator²⁰, an employer's best defense is to be vigilant in limiting the dissemination of information only to those who need to know.

In an effort to maintain confidentiality, as discussed above, witnesses should be asked to acknowledge in writing that they have been informed of the importance of confidentiality and admonished not to discuss the matter with anyone. Investigators should also be careful in giving witnesses only those details necessary to the interview. The reality is that the witnesses usually already know who is involved, as well as the general allegations, by the time the investigation starts.

V. CONCLUSION

Contrary to the opinion held by some, it is our experience that most investigations conducted by employers into allegations of sexual harassment are not predetermined attacks on the complainant or the accused. Rather, such investigations provide invaluable information to the employer and the involved individuals, as well as an opportunity to reach an informal resolution without the agony and expense of litigation. To that end, employers should always consider the option of sharing investigative results with the parties in the context of mediation. This will help maintain the attorney-client privilege, until the employer chooses to make a conscious disclosure.

A good investigation requires careful planning and preparation. Since a properly conducted investigation can save an employer many, many thousands of dollars in litigation costs, it is worth the time and money to ensure the investigation is conducted correctly and, wherever possible, to obtain the cooperation of both the complainant and the accused.

19 See, e.g., Cuenca v. Safeway San Francisco Employees' Federal Credit Union, 180 Cal.App.3d 985 (1986); Cruey v. Gannett Company, Inc., 64 Cal.App.4th 356 (1998); California Civil Code §47(3).